JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 September 1999 *

In Case T-127/98,

UPS Europe SA, a company incorporated under Belgian law, established in Brussels, represented by Tom R. Ottervanger, of the Rotterdam Bar, and Dirk Arts, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Loeff Claeys and Verbeke, 5 Rue Charles Martel,

applicant,

v

Commission of the European Communities, represented by Barry Doherty and Klaus Wiedner, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for a declaration under Article 175 of the EC Treaty (now Article 232 EC) that the Commission has failed to act by not having delivered a decision on the applicant's complaint lodged under Article 3(2) of Regulation No 17 of the Council of 6 February 1962 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87) objecting to certain anti-competitive practices on the part of Deutsche Post AG,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 1999,

gives the following

Judgment

Facts

1 The applicant is one of the companies in the United Parcel Service group (hereinafter 'UPS') which distributes parcels throughout the world. It has offices in all the Member States of the European Community, including Germany.

2 By letter of 7 July 1994 the applicant sent a complaint to the Commission asking it to initiate a procedure to establish *inter alia* that abusive conduct by the Deutsche Bundespost, now Deutsche Post AG (hereinafter 'Deutsche Post'), on the postal service market and the cross-subsidisation of that postal service were contrary to Article 86 of the EC Treaty (now Article 82 EC), Article 90 of the EC Treaty (now Article 86 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC).

3 Following a meeting between the applicant and the Commission in August 1994 the Commission, on 11 August 1994, forwarded the complaint and a first letter under Article 11 of Regulation No 17 of the Council of 6 February 1962 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17') to Deutsche Post, which replied on 24 November 1994. The non-confidential version of that reply was sent to the applicant on 28 November 1994 by the Commission. It was also the subject of discussions between the applicant and the Commission.

4 By letter of 21 March 1995 the Commission indicated to the applicant that the complaint would be examined only in relation to Article 86 of the Treaty and that, if it so wished, a separate complaint 'substantially reinforced by further evidence' could be lodged on the basis of Article 92 of the Treaty.

5 On 3 April 1995 the applicant submitted its comments on Deutsche Post's reply of 24 November 1994.

6 On 10 July 1995 the Commission sent a second letter under Article 11 of Regulation No 17 to Deutsche Post. The latter replied by letter of 2 October 1995.

7 On 13 December 1995 the applicant sought information from the Commission as to the progress being made regarding its complaint in so far as Article 86 of the Treaty was concerned.

8 On 30 April 1996 the Commission sent a third letter under Article 11 of Regulation No 17 to Deutsche Post. Deutsche Post replied by letters of 31 May, 27 June and 12 September 1996.

9 On 19 November 1996 counsel for the applicant sent a letter to the Commission calling on it to act and expressly referring to Article 175 of the EC Treaty (now Article 232 EC).

10 Following that letter, Mr Temple Lang, Director of the Commission Directorate-General for Competition (DG IV), sent to Deutsche Post on 24 January 1997 a communication in which he stated:

'The Directorate-General for Competition hereby informs you that, drawing on the data available, it intends to take a negative position with regard to the behaviour against which UPS has complained and to make a Statement of Objections with a view to proposing that the Commission consider adopting a negative decision. The Commission's objections to the above behaviour will be submitted to you in a fully developed statement of objections, according to the normal procedures.'

He added:

'The provisional timetable for the further procedure in this case will be the following, taking into consideration the Commission's current priorities and workload:

— statement of objections in April 1997;

— parties' written observations in June 1997;

— hearing in July 1997;

— Advisory Committee in September 1997; and

— final decision in the Fall of 1997.'

11 On 28 February 1997 Deutsche Post replied to that letter.

12 On 3 July 1997 the Commission responded to a further request from the applicant for information concerning progress with the case, stating that, following the complaint lodged on 23 January 1997 by another competitor of Deutsche Post, examination of the case would take longer.

13 On 3 July 1997 the Commission also instructed a firm of outside consultants to draw up a report on the studies produced by Deutsche Post. It received the report on 11 September 1997.

14 By letter of 25 August 1997 Mr Temple Lang indicated to the applicant that the Commission was suspending its investigation as regards Article 86 of the Treaty and was proceeding with it as regards Article 92 of the Treaty.

15 On 22 October 1997 the applicant, referring expressly to Article 175 of the Treaty, made an official request to the Commission to take a position on its complaint lodged on 7 July 1994 and to reconsider its position as expressed in its letter of 25 August 1997 regarding the procedure against Deutsche Post under Article 86 of the Treaty.

16 On 19 December 1997 the Director General of DG IV sent the applicant a letter referring to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition, 1963-64, p. 47, hereinafter 'Regulation No 99/63'). In that letter he stated:

'As indicated above, the Commission is therefore of the opinion that for the time being your complaint should only be examined in so far as it alleges infringements of the State aid rules. The Commission will open the procedure provided for in Article 93(2) of the EC Treaty at the beginning of next year... In view of the foregoing, the Commission's services have come to the conclusion that there are no grounds for granting your application in so far as Article 86 of the EC Treaty is concerned.'

He also invited the applicant to submit its observations. He did not however exclude the possibility of the investigation being reopened in relation to Article 86 of the Treaty.

17 In a letter of 2 February 1998 the applicant submitted its observations on the letter of 19 December 1997. In its letter it objected to the Commission's intention not to pursue the investigation in relation to Article 86 of the EC Treaty. It asked the Commission to reject its complaint, if it still wished to do so, by formal decision within a reasonable time.

18 On 2 June 1998 the applicant sent the Commission a formal letter of request expressly referring to Article 175 of the EC Treaty and calling on it to take a definitive decision in relation to the procedure against Deutsche Post under Article 86 of the EC Treaty.

Procedure and forms of order sought

19 By application lodged at the Registry of the Court of First Instance on 7 August 1998 the applicant initiated the present proceedings.

20 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, by way of a measure of organisation of procedure as provided for in Article 64 of the Rules of Procedure, the Court asked the applicant to reply in writing to a question put to it.

21 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 9 March 1999.

22 The applicant claims that the Court of First Instance should:

— declare in accordance with Article 175 of the EC Treaty that the Commission has failed to act by not having delivered a decision on the applicant's complaint lodged with the Commission on 7 July 1994;

— order the defendant to pay the costs;

— take such further action as the Court might deem appropriate.

At the hearing the applicant also requested the Court to set a time-limit of one month for the Commission to take the necessary measures following delivery of the judgment in accordance with the first paragraph of Article 176 of the EC Treaty (now Article 233 EC).

23 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

The claim for a declaration of failure to act

Arguments of the parties

24 The applicant, referring to the judgment of the Court of Justice in Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 36, submits that it is settled case-law that the Commission is required either to initiate a procedure against the person to whom the complaint relates or to take a definitive decision rejecting the complaint where the complainant has submitted his observations on the letter sent under Article 6 of Commission Regulation No 99/63.

25 It adds that, in accordance with the principles of good administration, the Commission's decision must be adopted within a reasonable time after receipt of the complainant's observations (*Guérin Automobiles*, cited above, paragraph 37). When the present action was commenced, six months after the applicant had submitted its observations, the Commission had still not given its decision.

26 The applicant points out moreover that the complaint was initially lodged in July 1994 and that the Commission has thus had more than four years to examine it.

27 At the hearing it also submitted that Articles 86 and 92 of the Treaty are not mutually exclusive. Thus, the Commission is under an obligation to conduct the investigation under those two provisions in the same way and at the same time.

28 The defendant contends that the complaint criticises in particular the use by Deutsche Post of income from its monopoly in the letter market in order to cross-subsidise its parcel services. The complaint raises complex questions of economic analysis, in particular the prices charged by Deutsche Post and the cost structure of that undertaking. The complaint also requires the Commission to analyse the scope of the public service obligations imposed on Deutsche Post. Furthermore, it must also consider a parallel complaint against Deutsche Post.

29 The Commission adds that it reconsidered its position after receiving the applicant's letter of 2 February 1998 and that it decided to reopen the investigation in relation to Article 86 of the Treaty, whilst at the same time suspending its investigations under Article 92 of the Treaty. However, that new approach required an in-depth examination which could not be completed in a matter of weeks.

30 The Commission contends that in those circumstances it cannot reasonably be expected to have terminated its analysis at this stage and for this reason is not guilty of any failure to act.

31 At the hearing the Commission stated that it is probably guilty of a technical infringement of Article 175 of the Treaty but that there was no other course it could have taken in this case. It added that the applicant is entitled to a decision as to the existence or otherwise of an infringement of Article 86 of the Treaty, but in view of the circumstances it did not wish to reject the complaint, which might be well founded.

32 The Commission also conceded that Articles 86 and 92 of the Treaty are not mutually exclusive but it added that it would be wasteful of resources to investigate infringement of those two articles simultaneously.

Findings of the Court

33 It is appropriate to clarify at the outset the purpose of the claim for a declaration of failure to act. That claim seeks a declaration of failure on the part of the Commission to act in relation to the complaint lodged by the applicant on 7 July 1994 on the ground that six months had elapsed since the applicant submitted, on 2 February 1998, its observations on the Commission's letter of 19 December 1997 under Article 6 of Regulation No 99/63. At the hearing, the defendant, conceding that it was probably guilty of a technical infringement of Article 175 of the Treaty, did not dispute the fact that the purpose of the claim was as described above. Moreover, in response to a written question from the Court, the applicant confirmed that its application is concerned solely with failure by the Commission to act in relation to examination of its complaint from the point of view of Article 86 of the Treaty.

34 In order to adjudicate on the merits of the claim for a declaration of failure to act, it is necessary to verify whether, when the Commission was served with a formal request under Article 175 of the Treaty, it was under an obligation to act (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 71).

35 According to case-law, a letter addressed to a complainant which is in conformity with the requirements of Article 6 of Regulation No 99/63 constitutes a definition of position within the meaning of the second paragraph of Article 175 of the Treaty (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 21). Such a definition of position terminates the Commission's failure to act (*Guérin Automobiles* v *Commission*, cited above, paragraphs 30 and 31).

36 It is also settled case-law that, when a complainant has submitted his observations on the notification under Article 6 of Regulation No 99/63, the Commission is required either to initiate a procedure against the person who is the subject of the complaint or to adopt a definitive decision rejecting the complaint, which may be the subject of an action for annulment before the Community judicature (*Guérin Automobiles* v *Commission*, paragraph 36).

37 According to the same case-law, the Commission's definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after receipt by the Commission of the complainant's observations (*Guérin Automobiles* v *Commission*, paragraph 37).

38 The question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages to be followed by the Commission, the conduct of the parties in the course of the procedure, the

complexity of the case and its importance for the various parties involved (Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 45, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57).

39 In this case the applicant's complaint was lodged on 7 July 1994. The applicant submitted on 2 February 1998 its observations on the notification of 19 December 1997 sent to it pursuant to Article 6 of Regulation No 99/63. The formal request for the Commission to act was made on 2 June 1998 and the application was lodged at the Court of First Instance on 7 August 1998. It follows that when the Commission was requested to act under Article 175 of the Treaty and when the application was lodged, periods of four and six months respectively had elapsed as from receipt of the applicant's observations.

40 In order to decide whether those periods were sufficient, it is necessary to consider what the Commission should have done during that time. As the Court of First Instance observed in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 45 to 47, the procedure for examining a complaint comprises three successive stages. During the first stage, following the submission of the complaint, the Commission collects the information which it needs to enable it to decide how it will deal with the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations, as the case may be in the light of any initial reaction from the Commission. In the second stage, in the notification prescribed by Article 6 of Regulation No 99/63, the Commission informs the complainant of the reasons for which it considers that there are insufficient grounds for upholding the complaint and invites it to submit any comments it may have within a time-limit which it fixes for that purpose. In the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant. Although Article 6 of Regulation No 99/63 does not expressly so provide, at the end of that stage the Commission is required either to initiate a procedure against the subject of the complaint or to

adopt a definitive decision rejecting the complaint, against which proceedings for annulment may be brought before the Community judicature (*Guérin*, cited above, paragraph 36).

41 In the present case, when on 2 June 1998 the applicant sent to the Commission a formal request to act within the meaning of Article 175 of the Treaty, requesting it to take a position on its complaint, the procedure for examination of the complaint was in its third and final stage. The Commission had received the complaint alleging infringement of Article 86 of the Treaty 47 months earlier and had already undertaken an investigation of the case. Consequently, in considering whether the period between the lodgment of the applicant's observations following the notification under Article 6 of Regulation No 99/63 and the sending of the formal request to the Commission is acceptable, it is appropriate to take account of the years already spent on the investigation, the present state of the investigation of the case and the attitudes of the parties considered as a whole.

42 It follows that, when served with the formal request, the Commission was required either to initiate a procedure against the person who was the subject of the complaint or to adopt a definitive decision rejecting the complaint. It should not have resumed its examination of the complaint. Therefore, the Commission's defence to the effect that reconsideration of the situation was embarked upon only after it received the applicant's observations following the notification under Article 6 of Regulation No 99/63 and that it could not be reasonably expected to have completed its analysis by that stage, shortly after having decided to focus on infringement of Article 86 of the Treaty, cannot be accepted.

43 On the contrary, the Commission should, on a reasonable view, have been in a position either to initiate a procedure against the person who was the subject of the complaint or to adopt a definitive decision rejecting the complaint, unless there were exceptional circumstances, demonstrated by it, justifying the lapse of the periods of time mentioned above (*Gestevisión Telecinco*, cited above, paragraph 81).

44 However, none of the arguments put forward by the Commission can justify its failure to take action within the periods concerned.

45 Moreover, the Commission does not deny its obligation to act. Similarly, in response to a question put to it by the Court, the Commission confirmed that by the time of the hearing no specific measure had been taken following the applicant's observations on the letter of 19 December 1997 with respect to its complaint in relation to Article 86 of the Treaty. Thus, it conceded that it has still not initiated a procedure against the person who is the subject of the complaint or adopted a definitive decision rejecting the complaint. At the hearing it even admitted that it has not acted 'in an impressive manner' in this case and that, manifestly, there has been an infringement of Article 175 of the Treaty.

46 It follows from the foregoing considerations that on 2 August 1998, upon the expiry of the period of two months following its receipt, on 2 June 1998, of the request for it to act, the Commission was in a position of having failed to act as a result of its failure to initiate a procedure against the person who was the subject of the applicant's complaint, which was lodged on 7 July 1994, or to adopt a definitive decision rejecting that complaint.

47 Consequently, the claim for a declaration of failure to act in relation to Article 86 of the Treaty must be held to be well founded.

The request that a time-limit of one month be imposed for the Commission to take action under Article 176 of the Treaty

Arguments of the parties

48 At the hearing the applicant asked the Court to impose on the Commission a time-limit of one month to take the measures required following the judgment in accordance with the first paragraph of Article 176 of the Treaty. Otherwise, the applicant submits, a further action under Article 175 of the Treaty would be necessary. The applicant submits that its request is admissible having regard to the general nature of the third head of claim in its application.

49 The Commission contends that the Court of First Instance has no jurisdiction to impose such an obligation.

Findings of the Court

50 This request must be rejected as inadmissible. The Court of First Instance has no jurisdiction to issue directions to the Community institutions (order of the Court of First Instance in Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraph 45). Consequently, pursuant to Article 175 of the Treaty, the Court may only declare that there has been an unlawful failure to act. It is then incumbent on the institution concerned, under Article 176 of the Treaty, to take the measures necessary to comply with the judgment of the Court.

Costs

51 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

52 Since the Commission has been unsuccessful, it must be ordered to pay the costs incurred by the applicant, as applied for by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Declares that the Commission has failed to fulfil its obligations under the EC Treaty by failing either to initiate a procedure against the person who is the subject of the complaint lodged by the applicant on 7 July 1994 or to adopt a**

definitive decision rejecting that complaint following the observations of 2 February 1998 on the notification to the applicant under Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17;

2. For the rest, dismisses the application;

3. Orders the Commission to pay the costs.

Moura Ramos Tiili Mengozzi

Delivered in open court in Luxembourg on 9 September 1999.

H. Jung R.M. Moura Ramos

Registrar President