Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

29 January 2025 *

(Action for annulment – State aid – Postal sector – Capital contribution in favour of Post Danmark – Decision finding no State aid – Capital contribution in favour of PostNord – Decision declaring the aid incompatible with the internal market – Lack of individual concern – No substantial effect on the competitive position – Inadmissibility)

In Case T-334/22,

Danske Fragtmænd A/S, established in Åbyhøj (Denmark), represented by L. Sandberg-Mørch, lawyer,

applicant,

supported by

UPS Europe NV/SA, established in Brussels (Belgium),

and

Dansk Avis Omdeling A/S, established in Vejle (Denmark),

represented by L. Sandberg-Mørch,

interveners,

v

European Commission, represented by J. Carpi Badía and L. Nicolae, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented by C. Maertens, acting as Agent, and by R. Holdgaard, lawyer,

and by

Kingdom of Sweden, represented by C. Meyer-Seitz, F.-L. Göransson, H. Eklinder and R. Shahsavan Eriksson, acting as Agents,

* Language of the case: English.

and by

Post Danmark A/S, established in Copenhagen (Denmark),

PostNord Group AB, established in Solna (Sweden),

represented by O. Koktvedgaard, lawyer,

interveners,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of S. Papasavvas, President, R. da Silva Passos (Rapporteur), N. Półtorak, I. Reine and T. Pynnä, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the written part of the procedure,

further to the hearing on 20 September 2024,

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Danske Fragtmænd A/S, seeks annulment of Commission Decision (EU) 2022/459 of 10 September 2021 on the State aid SA.49668 (2019/C) (ex 2017/FC) and SA.53403 (2019/C) (ex 2017/FC) implemented by Denmark and Sweden for PostNord AB and Post Danmark A/S (OJ 2022 L 93, p. 146) ('the contested decision').

Background to the dispute

2 The applicant is a company incorporated under Danish law which is active, inter alia, on the Danish market for road transport of goods and parcel distribution services.

3 PostNord AB is a company whose main activity is the distribution of mail. It is mainly active on the Swedish, Danish, Norwegian and Finnish markets for postal services. The Kingdom of Denmark owns 40% of the share capital of PostNord and the Kingdom of Sweden owns the remaining 60%. Each of the two shareholder States have 50% of the voting rights. PostNord Group AB is wholly owned by PostNord.

4 Post Danmark A/S is a wholly owned subsidiary of PostNord Group which operates on the Danish and overseas postal services market. Since the liberalisation of the Danish postal market in 2011, Post Danmark has operated in full competition with the other postal operators.

5 On account in particular of digitalisation trends in correspondence, Post Danmark's revenue decreased by 55% between 2009 and 2019. As from 2012, the company has recorded losses.

6 On 20 October 2017, the Kingdom of Denmark and the Kingdom of Sweden concluded a bilateral agreement entitled 'Agreement between the Kingdom of Sweden and the Kingdom of Denmark regarding [PostNord]' ('the October 2017 Agreement'). That agreement describes several measures in favour of PostNord and Post Danmark in order to respond to the challenges of digitalisation in Denmark and to implement a new production model developed by the Board of Directors of PostNord. According to that agreement, the new production model was to be financed by, inter alia, two capital injections in favour of PostNord, granted by the Kingdom of Denmark and the Kingdom of Sweden, and an internal contribution made by PostNord Group to Post Danmark.

7 The Kingdom of Denmark and the Kingdom of Sweden each injected, separately, capital into PostNord in an amount of 267 million Swedish kronor (SEK) (approximately EUR 23.1 million) and SEK 400 million (approximately EUR 34.6 million), respectively; PostNord Group injected capital into Post Danmark in an amount of 2.339 billion Danish kroner (DKK) (approximately EUR 313.6 million) (together, 'the capital injections referred to in the October 2017 Agreement').

8 On 27 November 2017, a trade association representing companies incorporated under Danish law which are active in the road transport and logistics sector in Denmark (Brancheorganisation for den danske vejgodstransport – ITD) lodged a complaint with the European Commission alleging that, by means of a number of past or future measures, the Danish and Swedish authorities had granted or would grant unlawful State aid to Post Danmark. Those measures included the capital injections referred to in the October 2017 Agreement.

9 On 14 June 2019, the Commission decided to initiate the formal investigation procedure provided for in Article 108(2) TFEU in respect of the capital injections referred to in the October 2017 Agreement.

10 On 10 September 2021, following the formal investigation procedure, the Commission adopted the contested decision. In that decision, the Commission concluded that the capital injections referred to in the October 2017 Agreement constituted three separate measures, which were to be assessed separately. The Commission took the view that the capital injection from PostNord Group into Post Danmark did not entail the grant of an advantage and that, therefore, that measure did not constitute State aid. By contrast, it held that the capital injections from the Kingdom of Denmark and the Kingdom of Sweden into PostNord constituted unlawful State aid incompatible with the internal market and ordered its recovery from PostNord.

Forms of order sought

11 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission, the Kingdom of Sweden and the Kingdom of Denmark to pay the costs.

12 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

13 The Kingdom of Denmark and the Kingdom of Sweden contend that the Court should dismiss the action.

14 Post Danmark and PostNord Group contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

15 UPS Europe NV/SA contends that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

16 Dansk Avis Omdeling A/S did not lodge a statement in intervention.

Law

17 The Commission, supported by the Kingdom of Denmark, the Kingdom of Sweden, Post Danmark and PostNord Group, submits that the action is inadmissible on the ground that the applicant does not have standing to bring proceedings. In particular, the applicant did not demonstrate that its position on the market had been substantially affected by the capital injections referred to in the October 2017 Agreement.

18 The applicant submits that it has standing to bring proceedings. The capital injections referred to in the October 2017 Agreement substantially affected its competitive position on the postal services market in Denmark and the Nordic countries. They thus enabled Post Danmark to 'dump its prices below any competitive level'. The applicant claims that those capital injections made it lose a significant number of customers and, consequently, led to a 30% reduction in its market share, which it claims to have proved.

19 In that regard, it should be recalled that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

20 In the present case, first, as is apparent from Article 7 of the contested decision, that decision is addressed solely to the Kingdom of Denmark and the Kingdom of Sweden, and not to the applicant. Therefore, the present action cannot be declared admissible under the first limb of the fourth paragraph of Article 263 TFEU.

21 Second, the capital injections referred to in the October 2017 Agreement are individual in nature. Thus, the contested decision cannot be classified as a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU (see, to that effect, order of 10 October 2017, *Greenpeace Energy* v *Commission*, C-640/16 P, not published, EU:C:2017:752,

paragraph 26, and judgment of 3 December 2014, *Castelnou Energía* v *Commission*, T-57/11, EU:T:2014:1021, paragraph 23). The present action cannot therefore be declared admissible on that basis.

22 Accordingly, the present action for annulment is admissible only if the applicant is, in accordance with the second limb of the fourth paragraph of Article 263 TFEU, directly and individually concerned by the contested decision, those two conditions being cumulative.

23 In the present case, the Court considers that it is appropriate to begin by examining the condition of individual concern.

24 According to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed by such a decision (see judgment of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 53 and the case-law cited).

25 As regards more specifically the field of State aid, an applicant challenging the merits of a decision appraising the aid taken at the end of the formal investigation procedure must demonstrate that it has a particular status, within the meaning of the case-law referred to in paragraph 24 above. That applies in particular where the applicant's position on the market concerned is substantially affected by the aid to which the decision at issue relates (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 37 and the case-law cited).

26 The substantial adverse effect on the applicant's competitive position on the market in question results not from a detailed analysis of the various competitive relationships on that market, allowing the extent of the adverse effect on its competitive position to be established specifically, but, in principle, from a prima facie finding that the grant of the measure covered by the Commission's decision leads to a substantial adverse effect on that position (judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 58).

27 It follows that that condition may be satisfied where the applicant adduces evidence to show that the measure at issue is liable to have a substantial adverse effect on its position on the market concerned (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 59 and the case-law cited).

28 With regard to the determination of a significant effect on the position on the market in question, it must be borne in mind, first, that the mere fact that an act may influence the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the beneficiary of that act cannot in any event suffice for that undertaking to be regarded as being individually concerned by that act. Therefore, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 60 and the case-law cited).

29 Second, it must be borne in mind that demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in the applicant's commercial or financial performance, such as a significant decline in

turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid in question. The grant of State aid can also have an adverse effect on the competitive situation of an operator in other ways, in particular by causing the loss of an opportunity to make a profit or a less favourable development than would have been the case without such aid (see judgment of 15 July 2021, *Deutsche Lufthansa* v *Commission*, C-453/19 P, EU:C:2021:608, paragraph 61 and the case-law cited).

30 It is in the light of those principles that it must be examined whether the applicant, which bears the burden of proof as recalled in paragraph 27 above, has demonstrated that it is individually concerned by the contested decision.

31 For the purposes of examining whether the applicant has demonstrated that it is individually concerned by the contested decision, it must be noted that, according to the applicant, first, the capital injections referred to in the October 2017 Agreement were all granted on 20 October 2017 to Post Danmark and, second, it is in a competitive relationship with the latter.

32 That being so, in the first place, as regards the applicant's role in the administrative procedure before the Commission, the applicant rightly submits that it played an active role. The applicant submitted observations in the context of the formal investigation procedure as an interested party. Nonetheless, in any event, it cannot be inferred from the mere participation of the applicant in the administrative procedure that it is individually concerned by the contested decision, even if it played an important role in that administrative procedure (see, to that effect, judgment of 12 April 2019, *Deutsche Lufthansa* v *Commission*, T-492/15, EU:T:2019:252, paragraph 143 and the case-law cited).

33 In the second place, as regards the substantial effect on its market position, as stated in paragraph 18 above, the applicant claims to have lost a significant number of customers and approximately 30% of its market share due to Post Danmark '[dumping] its prices below any competitive level' thanks to the capital injections referred to in the October 2017 Agreement. At the reply stage, the applicant also maintained that the grant of the capital injections at issue had led to a change in the behaviour of customers, who decided no longer to use its services. Thus, the applicant claims that, before those capital injections were granted, it lost customers to various competitors, whereas, after those injections were granted, it lost customers almost exclusively to Post Danmark.

34 In support of its argument, the applicant produced three lists of customers who allegedly left it for PostNord between January 2016 and November 2021. In its view, by switching to PostNord, those customers made use in particular of the services offered by Post Danmark. More specifically, the first list covers the period from January 2016 to October 2018. The second list, which partly overlaps with the first, covers the period from January 2018 to June 2019. Last, the third list covers the period from October 2019 to November 2021 ('the lists of customers allegedly lost to PostNord').

35 In that regard, first, it should be noted that the applicant's claim that it lost approximately 30% of its market share must be rejected, since it is not supported by prima facie evidence.

36 Second, as regards the applicant's line of argument, developed at the stage of the reply, relating to the alleged change in the behaviour of customers who decided no longer to use its services, it should be noted that the applicant refers to the lists of customers allegedly lost to PostNord. The

first of those lists, which partly covers the period prior to the grant of the measures at issue, identifies several undertakings the applicant's former customers allegedly made use of, unlike the other two lists, which identify only PostNord.

37 In response to a measure of organisation of procedure and at the hearing, the applicant acknowledged that all the customers identified in the first list had also been lost to PostNord, including those linked to the names of other competing undertakings, since those other undertakings were in fact PostNord's subcontractors.

38 Therefore, in the light of the applicant's line of argument, the lists of customers allegedly lost to PostNord must all be understood as identifying the customers who left the applicant to switch exclusively to PostNord or its subcontractors. In the light of that line of argument, they cannot therefore be interpreted as demonstrating a change in the behaviour of those customers following the grant of the measures at issue.

39 It follows that, in the absence of other evidence in support of the applicant's argument that, before the measures at issue were granted, it lost customers to several competitors whereas, after the grant of those measures, it lost customers exclusively to PostNord and more specifically to Post Danmark, the alleged beneficiary of those measures, that argument must be rejected, without there being any need to rule on its admissibility, which is disputed by the Commission.

40 Third, as regards the applicant's argument that it had lost a significant number of customers to PostNord owing to the grant of the capital injections referred to in the October 2017 Agreement, the following should be noted.

41 Assuming that the lists of customers allegedly lost to PostNord are sufficient to establish the plausibility, prima facie, of a substantial effect on the applicant's competitive position within the meaning of the case-law referred to in paragraph 26 above, it is necessary to assess whether the applicant has succeeded in establishing that that substantial effect on its competitive position was likely to stem from the capital injections referred to in the October 2017 Agreement, in accordance with the burden of proof borne by it.

42 Even if it were accepted that, in the lists of customers allegedly lost to PostNord, the applicant, first, correctly identified the customers who left it to switch to PostNord and, second, correctly considered that those customers used, in particular, the services offered by Post Danmark, the alleged beneficiary of the measures at issue, it does not demonstrate, to the requisite legal standard, that there is a likely correlation between the alleged loss of customers to PostNord and the capital injections referred to in the October 2017 Agreement.

43 First of all, it is apparent from the data produced by the applicant that it lost, to PostNord, 22 customers in 2016, 26 customers in 2017, 19 customers in 2018, 21 customers in 2019, 13 customers in 2020 and 14 customers in 2021. It may therefore be observed that the applicant's alleged loss of customers was relatively steady between 2016 and 2019, despite the grant of the measures at issue. As from 2018 onwards, the applicant's alleged loss of customers to PostNord is even smaller than that recorded in 2016. In the absence of other explanations making it possible, in particular, to contextualise the figures provided, the applicant has failed to demonstrate that they establish a plausible causal link between the alleged loss of customers and the measures at issue.

44 Next, it must be noted that the applicant has not adduced prima facie evidence in support of its argument that the alleged loss of customers resulted more specifically from Post Danmark's alleged practice of dumping prices or of setting prices lower than its competitors thanks to the capital injections referred to in the October 2017 Agreement.

45 First, while the applicant stated at the hearing that it had complained to the Danish Government about Post Danmark's prices, it did not, however, adduce any evidence to show that such a complaint had been lodged. Nor did it produce a decision finding that Post Danmark was dumping its prices or even a document to show the existence of such a practice.

46 Second, as regards the applicant's argument that the fact that PostNord acquired the customers it lost demonstrates in itself the existence of dumped prices or the practice of setting prices lower than competitors' prices, it is sufficient to recall that, as has been observed in paragraph 43 above, the applicant's alleged loss of customers to PostNord was relatively steady before and after the grant of the capital injections referred to in the October 2017 Agreement.

47 Furthermore, it is also necessary to reject the applicant's argument that the loss of a large number of customers to PostNord is sufficient to establish the causal link between that loss of customers and the capital injections referred to in the October 2017 Agreement. In support of that argument, the applicant relies on the judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* (T-146/03, not published, EU:T:2006:386). Admittedly, in that judgment, the Court found that the competitive position of the applicants' members had been affected by the mere fact that one of them had put forward a loss of customers in respect of 52 of its petrol stations, which – since the contested measures came into force – were supplied by the beneficiaries of those measures. However, first, it is not apparent from that judgment that, as is the case here, the number of customers lost to the beneficiaries of the measures at issue was relatively similar before and after those measures were granted. Second, in more recent decisions, where the applicant relied on a loss of customers to the beneficiary of the measure at issue, the Court found that the applicant had not provided any information to support the conclusion that that loss resulted from that measure (judgment of 12 June 2014, *Sarc* v *Commission*, T-488/11, not published, EU:T:2014:497, paragraph 54; orders of 11 April 2018, *ABES* v *Commission*, T-813/16, not published, EU:T:2018:189, paragraph 59, and of 17 May 2019, *Deutsche Lufthansa* v *Commission*, T-764/15, not published, EU:T:2019:349, paragraph 134). Therefore, in the light of those more recent decisions, it must be held that the mere existence of a loss of customers to PostNord cannot suffice to establish that a correlation is likely to exist between that loss and the capital injections referred to in the October 2017 Agreement.

48 In addition, it should be noted that the alleged loss of customers could be attributed to other factors which occurred in 2018. It is indeed apparent from the applicant's internal document entitled 'Management Report/Annual Report 2019', produced by Post Danmark and PostNord Group, that the loss of customers suffered by the applicant in 2018 may be explained by two factors, namely the introduction by the applicant of a capacity surcharge and the unsatisfactory quality of its parcel delivery services. It is true that the applicant, first, calls into question the relevance of that internal document and, second, states that the quality of its parcel delivery services improved in 2019. However, the applicant does not dispute that it introduced a capacity surcharge or the unsatisfactory quality of its parcel delivery services in 2018, factors referred to in its own internal document.

49 Therefore, in so far as factors other than the capital injections referred to in the October 2017 Agreement can explain the alleged loss of customers, it was for the applicant, which bears the burden of proof referred to in paragraph 27 above, to adduce evidence to establish, in particular, that, despite those other factors referred to in paragraph 48 above, the substantial effect on its competitive position was likely to stem from those capital injections. It must be stated, however, that the applicant has not produced any such evidence.

50 Last, at the hearing, Post Danmark and PostNord Group stated that the decrease in turnover recorded by the applicant between 2018 and 2019 was less than 3%, which did not reflect the alleged 30% loss of market share stemming from the measures at issue. The applicant did not dispute that its turnover only decreased by less than 3% between 2018 and 2019. That figure is, moreover, confirmed by the information contained in the document which it produced itself during the proceedings, entitled 'Annual Report 2019'. The fact that the applicant's turnover was relatively steady during the period concerned, despite the grant of the measures at issue, tends to show that those measures are not liable to have had a substantial adverse effect on its position on the market concerned.

51 In those circumstances, even assuming that Post Danmark benefited in October 2017 from the capital injections referred to in the October 2017 Agreement and that it was in competition with the applicant on the postal services market in Denmark and the Nordic countries, the applicant has not established that its competitive position was likely to be substantially affected by the capital injections referred to in the October 2017 Agreement. It follows that it has not demonstrated, as required by the case-law, that it is individually concerned by the contested decision.

52 In the light of the foregoing, without it being necessary to rule on whether the applicant is directly concerned, the action must be dismissed as inadmissible on the ground that the applicant does not have standing to bring proceedings.

Costs

53 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the Commission, Post Danmark and PostNord Group, in accordance with the forms of order sought by them.

54 In addition, in accordance with Article 138(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Kingdom of Denmark and the Kingdom of Sweden must therefore bear their own costs.

55 Last, according to Article 138(3) of the Rules of Procedure, the General Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear his or her own costs. In the present case, it must be ruled that UPS Europe and Dansk Avis Omdeling, which intervened in support of the form of order sought by the applicant, shall bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders Danske Fragtmænd A/S to bear its own costs and to pay those incurred by the European Commission, Post Danmark A/S and PostNord Group AB;**

3. **Orders the Kingdom of Denmark, the Kingdom of Sweden, UPS Europe NV/SA and Dansk Avis Omdeling A/S to bear their own costs.**

Papasavvas da Silva Passos Półtorak

Reine Pynnä

Delivered in open court in Luxembourg on 29 January 2025.

V. Di Bucci S Papasavvas
Registrar President