II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 1 August 1990

concerning the provision in Spain of international express courier services

(Only the Spanish text is authentic)

(90/456/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 90 (1) and (3) thereof,

Having provided the Spanish authorities with the opportunity to make known their views on the objections raised by the Commission in regard to Articles 10 to 13 of the Ordenanza Postal of 19 May 1960 and Articles 19 to 22 of the Regulation on postal services (Reglamento de los Servicios de Correos) of 14 May 1964 which regulate the postal monopoly in Spain,

WHEREAS:

I. THE FACTS

The measure in question

(1) Pursuant to Articles 10 to 13 of the Ordenanza Postal adopted by Decree No 1113/1960 of 19 May 1960 [1] and Articles 19 to 22 of the Regulation on postal services adopted by Decree No 1653/1964 of 14 May 1964 [2], as amended by the Ministerial Decree of 12 July 1966 [3], Spain prohibits all undertakings other than the Post Office from collecting, transporting or distributing letters [4] — a letter being any written document of a personal and immediate nature, including commercial, legal or administrative documents — from one place to another weighing less than two kilograms, as well as post-cards.

The prohibition prevents private courier services from providing an international express courier service for written or other documents defined or regarded as letters as this service is exclusively reserved for the Post Office.

The service covered by the Decision

(2) The basic postal service and express postal services comprise two different markets. As they are markets for services and not products, it is not possible to distinguish between them solely on the basis of the type of object transported. The essential difference lies in the value added by the providers to the transport of the goods concerned.

The basic postal service consists in collecting mail from post boxes and post offices throughout the country which is sorted centrally and then delivered at regular times to the addressees. The express mail service can be regarded as forming part of the basic postal service. In Spain, express mail is governed by Article 335 of the Regulation

[1] BOE, 15. 6. 1960.
[2] BOE, 9. 6. 1964.
[3] BOE, 23. 7. 1966.

[4] Article 158 of the Regulation on postal services fixes the maximum weight of letters at two kilograms, and Article 164 of the same Regulation, annexed to this Decision, defines what constitutes a letter.

on postal services, which defines it as a method of delivering mail by means of the fastest ordinary channels and special deliveries ; it is a standardized service subject to a fixed charge.

In addition to providing a faster delivery service compared with the basic service, express courier services also provide some or all of the following services, depending on their individual sales policy :

— guarantee of mail delivery by a specified date,

— home collections of mail,

— delivery to the addressee in person,

— possibility of changing destination or address in transit,

— acknowledgement of receipt given to sender,

— monitoring of deliveries,

— individual attention given to customers and 'à la carte' service offered.

The fact that the Spanish authorities argue that the express courier service is not different from the basic postal service is not relevant here. Even if the Spanish Post Office can provide both types of service, the express courier service nevertheless calls for additional activites to those provided as part of the basic service. The fact that one undertaking provides several services does not mean that only one market is concerned.

(3) The markets for the basic postal service and for express deliveries also differ as regards the needs they satisfy. The services are not interchangeable. The express courier service meets the needs of business customers who must have a guarantee that their packages will be delivered within a given time. On the other hand, the basic service meets the needs of the general public where the price of the service is at least as important as the speed. The additional services provided by the express courier service are reflected in the higher price. In Spain, the highest charge for the basic service, i.e. delivery of a letter not exceeding two kilograms anywhere in the world — is Pta 1 260. The price for an identical letter (two kilograms) sent through the Post Office's express delivery system, the EMS — Postal Express International, which forms part of the Express Mail Service International Post Corporation network (EMS-IPC), is Pta 3 160 for European countries and Pta 6 164 for the rest of the world. It should be noted that in the Community, approximately 95 % of consignments are delivered by the Post Offices compared with 5 % by express delivery companies. The turnover of the Post Office which has a monopoly over the basic service is nonetheless only 3,5 times that of the express delivery companies. The former is a mass service with low added value, whereas the latter has a high added value. The two services do not in practice compete against each other.

Background

(4) Following a complaint lodged on 23 June 1987 by an association of Spanish courier companies, supplemented by letter dated 27 April 1988, the Commission informed the Spanish authorities by telex messages dated 14 March and 25 August 1988 of the content of the complaint and the supplementary letter. On receiving the Spanish reply on 21 September 1988, the Commission informed the Spanish authorities by telex messages dated 25 November 1988 and 16 January 1989 that extending the Spanish postal monopoly to include international express courier services could constitute a State measure likely to infringe Article 90 (1) of the EEC Treaty in conjunction with Article 86, in which case the Commission might take a decision in accordance with Article 90 (3).

The Spanish authorities finally communicated their position by letter dated 17 January 1989. At the Commission's request, the position was supplemented by letters dated 15 June and 9 October 1989. The arguments put forward by the said authorities are as follows :

1. the Post Office is not an undertaking and, even if it were, Article 90 (2) of the EEC Treaty would be applicable ;

2. the financial equilibrium of the Post Office would be threatened if free competition were allowed in the provision of the most profitable postal services such as the international express service ;

3. there is no specific postal market for express deliveries. (This argument, already examined above in points 2 and 3, cannot be accepted by the Commission).

II. LEGAL ASSESSMENT

The undertaking concerned

(5) The Post Office is a body which does not have an independent legal personality but forms part of the general administration of the Spanish State, through the Postal Administration. The Post Office, in cooperation with other postal administrations, has provided a special express delivery service since 1981. In 1987, the Post Office concluded an agreement with the postal administrations of the major European countries and other principal countries of the Universal Postal Union with a view to provi-

ding, under the name of EMS-Postal Express International, an international express delivery service within the framework of the EMS-IPC network. The service is currently provided only in provincial capitals and certain other large towns in Spain.

In addition, the EMS-IPC network is limited to the major countries of Europe, and a few other countries such as Canada and the USA.

The EMS-Postal Express International service is aimed at the same customers as the private express courier services. The Post Office is presenting it as a new, high quality, dynamic, safe and fast service governed by special rules which differ from those specified in the statutes of the UPU. Furthermore, the Post Office is continuing to provide the traditional express service subject to the payment of certain fixed postal charges.

(6) Inasmuch as the Post Office is providing services on the market it is an undertaking within the meaning of Article 90 (1) of the EEC Treaty. The provisions of the Spanish legislation, referred to in point 1 of this Decision, which give the Post Office the exclusive right to collect, transport and distribute letters from one place to another, constitute measures pursuant to Article 90 (1).

Article 90 in conjunction with Article 86

(7) Under Article 90 (1) of the Treaty, undertakings to which a Member State has granted exclusive rights within the meaning of that Article are still subject to the rules of competition contained in Article 86 of the Treaty. Those entrusted with the operation of services of general economic interest are also subject to the provisions of Article 86, unless they show that, under Article 90 (2), the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them.

Article 90 (1) prohibits State measures concerning undertakings which benefit from special or exclusive rights, insofar as these conflict with the Treaty rules; in particular Articles 7 and 85 to 94 inclusive.

Determination of the relevant market

(8) The market concerned by the State measure in question is the market for international express delivery of letters. It constitutes a value added market adjacent to, but separate from, the basic postal service.

The geographic market concerned — in which the objective conditions for competition are homogeneous — is the territory of the Spanish State. This territory satisfies the 'substantial part' criterion of Article 86, taking account of the relative importance of the Spanish market in the Community.

Existence of a dominant position

(9) Because it has been granted the exclusive right to collect, transport and distribute letters and postcards from one place to another, to install post boxes and issue postage stamps, within the territory of Spain, the Post Office holds a dominant position as regards the basic postal service.

As a result of the exclusive rights, which mean that there can be no competition on this market, the Post Office is able to operate independently of both its competitors, as they are excluded from the market, and consumers, who cannot obtain the basic service elsewhere.

Abuse of a dominant position

(10) An abuse of a dominant position within the meaning of Article 86 is committed where an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group, without any objective necessity, an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such an undertaking (1).

Articles 10 to 13 of the Ordenanza Postal of 19 May 1960 and Articles 19 to 22 of the Regulation on postal services of 14 May 1964 thus reserve for the Post Office, according to the interpretation of the Spanish authorities, not only the basic letter collection, transport and distribution service but also the new international express service for letters.

(1) Judgement of the Court of Justice of 3 October 1985 in Case 311/84, CBEM/CLT and IPB, (1985) ECR p. 3278, point 27.

(11) The Spanish Post Office provides an international express courier service which is limited in that it does not cover the entire national territory nor all of the countries in the world. On the one hand, the service on Spanish territory is only provided from post offices situated in the capital city of each province and in certain other large towns. On the other, the international express courier network in which the Spanish Post Office participates — the EMS-IPC network — covers only the largest European countries and certain others (Canada and the United States). In this situation, the demand for door-to-door express courier services is not satisfied in respect of customers resident outside the provincial capitals and a few other large towns, nor as regards customers living in countries or cities not served by the EMS-IPC network. Due to the monopoly held by the Spanish Post Office, competitors are unable to offer a service to such customers.

In addition, users of international express courier services for sending letters to or from Spanish territory are denied the choice of services offered by other express delivery companies, which compete at international level with the Express Mail Services-International Post Corporation but are excluded from the Spanish market, although their services might be better suited to users' specific needs and requirements as regards prices and quality.

Consequently, the State measure in question, together with the behaviour of the Spanish Post Office, has the effect of limiting supply and technical development within the meaning of Article 86, thus constituting an infringement of Article 90 in conjunction with Article 86 (b) of the Treaty.

Effect on trade between Member States

(12) In order for a measure to be considered as adversely affecting trade between Member States, it is not necessary to establish its actual effect on the volume of such trade; it need only, pursuant to Articles 85 and 86 of the EEC Treaty, be liable to affect trade between Member States. It is quite clear that the State measure which reserves the international express delivery of letters weighing less than two kilograms for a single undertaking in Spain affects the express delivery service between Member States.

Article 90 (2)

(13) Pursuant to Article 155 of the EEC Treaty it is the task of the Commission, subject to review by the Court of Justice, to determine, under Article 90 (2) of the Treaty, which of the services entrusted to the Post Office constitute services of general economic interest. Under that provision, the rules of the Treaty and in particular the competition rules apply to the Post Office unless their application obstructs the performance, in law or in fact, of the particular tasks assigned to it. It is for the Member State to prove that the application of the Treaty rules would have such an effect.

Spain considers that if free competition were allowed in the provision of an international express courier service, it would jeopardize the financial equilibrium of the Post Office which is essential for the operation of the tasks assigned to it. In 1988, however, the Post Office's international express service — 'EMS-IPC' — handled only 20 000 consignments, representing only 0,00039 % of the 5 075 million objects handled by the Post Office.

At present, the international express service in question forms part of the EMS-IPC network which is operated by a company governed by private law competing against private international express couriers such as DHL, TNT, UPS and Federal Express. Although the network is faced with some competition, its revenue grows annually by 35 %.

Consequently, there is no evidence that the competition in the international express courier market could harm the basic postal service or that it is necessary to eliminate competition in order to preserve the financial equilibrium of the Post Office. The need to extend the dominant position of the basic service to the international express deliveries market, which is of secondary importance to the Post Office, is not an objective necessity justifying the elimination of competition in this market.

In reality the Post Office already enjoys considerable advantages, inasmuch as it has the exclusive right to install post boxes and issue stamps. In addition, public transport undertakings are required to cooperate actively with the Post Office in the general interest and, as the Post Office employs the same staff and the same infrastructure for the different services, it achieves economies of scale which have an appreciable impact on its prices.

(14) In view of these considerations, competition in the international express courier market is not an obstacle to performance of the public service obligations imposed on the Post Office by the Spanish Government. The basic postal service monopoly held by the Post Office, which is not affected by this Decision is at present sufficient to ensure that the public service obligations are fulfilled without affecting trade to an extent contrary to the interest of the Community,

HAS ADOPTED THIS DECISION:

Article 1

The provisions of Articles 10 to 13 of the Ordenanza Postal adopted by Decree No 1113/1960 of 19 May 1960 and Articles 19 to 22 of the Regulation on Spanish postal services adopted by Decree No 1653/1964 of 14 May 1964 which reserve for the Post Office the international express collection, transport and distribution of letters are incompatible with Article 90 (1) in conjunction with Article 86 of the EEC Treaty.

Article 2

Spain shall inform the Commission within two months from the date of notification of this Decision of the measures it has taken to comply therewith.

Article 3

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 1 August 1990.

For the Commission

Leon BRITTAN

Vice-President

ANNEX

Article 164 of the postal services Regulation adopted by Decree No 1653/1964 of 14 May 1964 (BOE of 9 June 1964), as amended by the Ministeral Decree of 12 July 1966 (BOE of 23 July 1966).

1. A letter is any sealed consignment the content of which is not indicated and cannot be seen, and all writings of an immediate and personal nature, even if they are visible.

2. The following in particular are regarded as letters: business records, either fully or partially completed, estimates, passenger waybills, invoices, signed bills of exchange, transfer notices, receipts, detailed accounts and their supporting documents, other commercial documents, insurance documents; acts, certificates and various files; public or private acts or instruments and copies thereof; criminal and civil papers, delayed letters or post-cards; chess problems, betting and competition documents; land register, vehicle register and census documents and other similar papers.

3. The following are not considered to be letters even if sealed: small parcels, parcel post consignments, post-cards even if of an immediate and personal nature.

   Nor are consignments specifically given another classification by the Post Office regarded as letters, even if they satisfy the definition given in point 1 above.