

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 20 December 1989

concerning the provision in the Netherlands of express delivery services

(Only the Dutch text is authentic)

(90/16/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 given the Netherlands authorities the opportunity to make known their views on the objections raised by the Commission in respect of Articles 2 and 12 of the new Postal Law,

Whereas :

I. THE FACTS

The measure in question

- (1) By Articles 2 and 12 of the Law of 26 October 1988 on the operation of the postal service (postal code), the Netherlands prohibit all undertakings other than the franchise of the postal service, i. e. the undertaking PTT Post BV, from collecting, transporting and distributing letters weighing up to 500 grammes, unless the undertakings satisfy all three of the following conditions :

- they must be registered,
- they must provide a significantly better service than that provided by the Post Office as regards delivery times and supervision during carriage,
- the price for such services must be not lower than the minimum established by the implementing Decree (*algemene maatregel van bestuur*).

The Government of the Netherlands adopted a Decree on 19 December 1988 (*Besluit minimumtarieven koeriersdiensten*)⁽¹⁾ fixing the minimum in question at Fl 11,90 for inland deliveries or to other Member States and at Fl 17,5 for the service to non-Community countries.

The minimum is not applicable to the PTT Post BV or to its EMS service. The amounts laid down by the Decree are higher than some rates charged previously by private express couriers operating in the Netherlands, both for deliveries with the Netherlands and for those to other Member States.

Furthermore, under the Decree of 12 May 1989⁽²⁾ which defines the conditions of registration, only private express courier services are required to register their rates each year before 1 March. This second measure is designed to prevent any variation in charges negotiated with important customers. It particularly affects undertakings located outside the Netherlands as they will be obliged to register their rates annually at The Hague, irrespective of the number of letters collected in the Netherlands.

The previous situation

- (2) Prior to the entry into force of the Law of 26 October 1988, the postal service was regulated by the Postal Law of 1954. The Post Office also held exclusive rights to collect and distribute letters

⁽¹⁾ *Staatsblad* 1988, 605.

⁽²⁾ *Staatscourant*, 8. 6. 1989, No 109.

under that legislation. In practice, however, the Netherlands authorities did not object to the express delivery services provided by international couriers in the Netherlands at charges below the minimum recently set by the new Law. The service met needs which the Post Office was unable to fulfill. The monopoly way was in fact limited to a basic letter carriage system. Competition existed between the Post Office, in the form of its EMS service, and international couriers for the provisions of express delivery services.

At 1 January 1989, the express courier undertakings employed some 4 000 persons. A large proportion of the jobs in private express courier undertakings, usually SMEs, is concerned with the transport of express deliveries within the Netherlands — some of it destined for the international courier service for delivery to other Member States — which the new Dutch legislation has the effect of eliminating to the advantage of PTT Post BV.

The service in question

- (3) The postal service covers two markets: a basic postal service and an express delivery service. As services rather than products are involved, it is not possible to distinguish between the two markets 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 transporting mail from letterboxes and post offices throughout the country which is sorted centrally and then delivered at regular times to the letterboxes of the addressees. The express mail service can be regarded as a part of the basic postal service; it is standardized and integrated with the basic service, the only difference being quicker carriage within the Netherlands, subject to a lump-sum tax.

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

- home collection of packages,
- delivery to the addressee in person,
- possibility of changing destination or addressee in transit,

- acknowledgement of receipt given to sender,
- keeping track of packages,
- individual attention given to customers and 'à la carte' service offered.

The fact that the Netherlands authorities argue that the express courier service forms part of the basic postal service is not relevant here. The Dutch Post Office is able to provide both services. This does not, however, alter the fact that the rapid service calls for additional activities 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.

- (4) The market for the basic postal service and the express delivery market also differ as regards the requirements they fulfil. These services are not interchangeable. The express service meets the needs of the business world which requires a guarantee that packages will be delivered within a given time. The basic service, on the other hand, 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 express couriers are reflected in the price: the highest charge for a basic service, i.e. for a 500 gramme letter, is Fl 4,5. The charges for express deliveries, however, are nearly always in excess of Fl 4,5, even taking account of the discounts given to major customers until the Decree of 19 December 1988 entered into force. It should be noted that at Community level, 95 % of items are dealt with by the basic service, compared with 5 % by the express service. However, the turnover of the basic service was only double that of the express services. This is because the former as 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

- (5) By letter dated 7 November 1988, the Commission expressed reservations concerning Article 12 (1) and (2) of the draft postal law because it was liable to adversely affect the activities of express courier undertakings. On learning that the Law had been adopted, the Commission sent a telex on 29 November 1988 requesting further information and inviting the Netherlands authorities to send their comments on the possible incompatibility of the Law with Community Law. The telex also warned that if the Commission's interpretation should prove correct, i.e. if the new provisions excluded post office competitors from a part of the express deliveries market, the Commission could adopt a decision based on Article 90 (3). By letter dated 13 December 1988, the Netherlands authorities sent

the definitive version of the Law together with the minutes of the parliamentary debates on the new Law.

By letter dated 16 January 1989, the Netherlands authorities also replied to the substance of the questions put by the Commission. Their arguments are as follows: the legal monopoly is limited to what is necessary in order to provide the general postal service; the express service also deserves protection and the monopoly has existed since 1807. The first point is dealt with in detail in paragraphs 16 and 17. The second is not relevant as the post office itself, in thfrm of its EMS service, offers more advantageous rates than the express mail taif. It is thus in competition with its own service. The third point is not viable either as the former legislation antedates the emergencye of private express couriers, and was never used against them.

II. LEGAL ASSESSMENT

The undertaking concerned

- (6) The Netherlands post office — the PTT Post BV — is an undertaking governed by private law company but wholly owned by the State of the Netherlands. It has concluded an agreement with the postal administrations of other Member States on an express on an express courier service to and from those countries under the same name 'EMS'.

The EMS service is clearly designed for the same customers as those of private express courier companies. Furthermore, the PTT Post BV continues to provide the traditional express letter service.

- (7) PTT Post BV is a public undertaking within the meaning of Article 90 (1) of the EEC Treaty; Articles 2 and 12 of the Postal Law and the Decree of 19 December 1988 granting PTT Post BV the exclusive right to collect, transport and distribute letters weighin up to 500 grammes constitute measures within the meaning of that Article.

Article 86

- (8) Under Article 90 of the EEC 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. They are subject to the provisions of Article 86 unless it is shown, under Article 90 (2), that the application of such rules would obstruct the performance in law or in fact of the particular tasks assigned to them.

The geographical market and the service in question

- (9) The markets concerned by the State measure in question are the market for the handling of letters weighin up to 500 grammes originating in the Netherlands territory, and the similar, but separate, market for the express delivery of letters from that territory.

The territory concerned fulfils the criterion of substantiality provided for in Article 86 in view of the relative economic importance of the Dutch market in relation to the Community.

In that market, express courier services as described in points 3 and 4, are provided in sufficiently uniform conditions of competition as regards prices, characteristics and the needs they satisfy to enable them to be distinguished from other services.

Existence of a dominant position

- (10) Because it has been granted the exclusive right to collect, transport and distribute all mail weighing up to 500 grammes within the Netherlands, to install post boxes and issue postage stamps, PTT Post BV, like the post office since 1954, holds a dominant position as regards the basic postal service.

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

Abuse of a dominant position

(a) Extension of a dominant position

- (11) 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 an ancillary activity which might be carried out by another undertaking as part of its activites on a neighbouring but separate market, with the possibility of eliminating all competition from such an undertaking⁽¹⁾. The effect of the new Law is to reserve for PTT Post BV the section of the express delivery market concerning mail handled for a charge not exceeding Fl 11,9 in which, prior to the entry into force of the Law, it competed against private express delivery undertakings.

⁽¹⁾ Judgment of 3 October 1985, Case 311/84, CBEM CLT and IPB, (1985) ECR p. 3278, point 27.

The Law of 26 October and the Decree of 19 December 1988 thus extend the dominant position of PTT Post BV to the express delivery market which is separate from that of the basic service. In future, PTT Post BV will hold a dominant position on this market not only because of its infrastructure which covers the whole of the Netherlands, but also because the Law prohibits its competitors from providing an express service for less than Fl 11,9, thus reserving a whole section of that market for itself. Competition on the remaining part of the market does not exclude such a dominant position since PTT Post BV is able to adopt a market strategy which takes no account of that competition, without thereby suffering any detrimental effects. There will be no constraints on any strategy PTT Post BV adopts with regard to the express delivery service it offers major customers since its competitors will not be able to offer discounts below the legal minimum.

(b) *Imposition of unfair prices and conditions.*

- (12) Before the new Law entered into force, numerous undertakings made use of private express courier services. They considered that the Post Office services did not cater as adequately for their needs, as regards either price or quality. Those undertakings now no longer have the choice of using the post office services or private couriers for the express delivery of mail weighing up to 500 grammes in the category of prices not exceeding FL 11,9. The Law requires them to use the PTT Post BV express services on the terms laid down by the latter, whether or not they correspond to their needs.

(c) *Restriction of supply*

- (13) The new measure will adversely affect the number of providers and the quality of the service. Since private couriers can no longer provide their services at a price below Fl 11,90, their customers no longer have a service of the same quality, as the Netherlands post office and its EMS service are not as yet offering an express delivery service of comparable reliability or speed. Customers therefore clearly suffer from a disadvantage since, if they wish to continue to use this service, it will cost them at least Fl 11,9 per item, instead of the lower rate charged previously.
- (14) Furthermore, the measure prevents post office competitors which provide an express service for consignments weighing more than 500 grammes from offering a full range of fast delivery services and therefore places them at a disadvantage in comparison with the post office. The Netherlands post office can take advantage of the fact that it

alone is able to provide services for less than the minimum price in order to provide its customers with other services at a price approaching their marginal cost, whereas its competitors will have to charge all their collection and transport costs against solely those services not covered by the monopoly. By reserving the market for express deliveries at a price below the legal minimum to the Post Office, the Netherlands are creating discrimination even in the services that are not reserved.

In addition, the second condition which competitors of the Post Office in the express deliveries market must satisfy in order to continue to provide their service i. e. that the service must be better than that of PTT Post BV, discriminates not only against these competitors but also places them in a position of legal uncertainty. Although at present the service provided by private courier firms in most cases differs qualitatively from the post office service, it is possible that in future the post office service responsible for express deliveries, the EMS, will reach a comparable level of quality. Under the new Law, private couriers would then be prohibited from dealing with mail originating in the Netherlands, except in the case of packages weighing more than 500 grammes.

Effect on trade between Member States

- (15) 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, as provided for in Articles 85 and 86 of the EEC Treaty, be liable to affect trade between Member States. It is quite clear that by reserving for a single undertaking the market for express deliveries weighing up to 500 grammes, at a price below Fl 11,9, and destined for other Member States, the Netherlands Government has taken measures liable to affect the provision of express deliveries services between Member States. Even if the restriction concerned only express deliveries within the Netherlands, the measure would affect the provision of services in the Netherlands by competing undertakings established in other Member States. The fact that undertakings in other Member States which deliver consignments to the Netherlands are prohibited from transporting to or from their Dutch customers all letters now reserved for the PTT Post BV limits their possibilities of offsetting their collection and distribution costs in the Netherlands against revenue from transporting mail between their customers in the Netherlands. It also prevents them from having further recourse to Dutch sub-contractors to collect and distribute mail in the Netherlands or, at the very least, makes the service

provided by such sub-contractors more expensive. The prohibition is liable to impede the supply of express delivery services from adjacent countries or to make it more costly.

Article 90 (2)

(16) The distinction made in the Netherlands Law between the reserved service on the one hand and other postal services on the other appears to be designed to guarantee the quality of the general service. The aim of the Netherlands Government in making this distinction was to define what constitutes a service of general economic interest and what does not. Under the EEC Treaty, it is the Commission's task to assess this distinction in the light of Article 90 (2). Under that Article, the rules of the Treaty and in particular the competition rules apply to postal services unless their application obstructs the performance in law or in fact of the particular tasks assigned to such services. It is for the Member State to prove that the application of the rules would have such an effect.

(17) In the present case, the Netherlands justify extending the dominant position of the post office by the need to guarantee that it has sufficient revenue to carry out the tasks assigned to it. Competition between private couriers and the post office express service would be liable to leave the latter with only the less profitable destinations. In fact, post office profits rose from Fl 9 million to 130 million from 1986 to 1987, despite such competition. In the past, the post office had an annual turnover in the express deliveries sector of approximately Fl 40 million in spite of competition from private couriers. As regards the traditional express service, competition did not prevent the number of consignments rising from 3,5 million in 1983 to 4,7 million in 1987.

Thus there is no evidence that maintaining the competitive situation existing prior to the new Law would jeopardize the basic postal service and that the measure in question is critical for the financial viability of the post office. The need to extend the dominant position of the post office to the express deliveries market, which is of secondary importance to it, is not an objective necessity and does not justify the elimination of competition on this market.

The post office, in fact, already has quite substantial advantages in carrying out its tasks. It has the exclusive right to place post boxes and issue postage stamps. It is exempt from the obligations imposed by the Road Transport Act (*wet autovervoer goederen*) and the Decree on driving

hours (*rijtijden besluit*). It achieves economies of scale by using its staff and its infrastructure for a variety of services and reflects these in its charges, in particular by granting discounts on its EMS rates.

Furthermore, PTT Post BV is currently withstanding competition from private couriers very well. It is not obliged to provide its services throughout the Netherlands at the same rates. It offers large discounts, whose compatibility with Article 86 appears in certain cases to be doubtful⁽¹⁾. It can, therefore, like its private competitors, take account of cost differences when fixing its rates. It is therefore not established that the general interest tasks affect the tariff structure⁽²⁾ of PTT Post BV in such a way as to enable it to avoid the constraints of the competition rules in the matter of its express delivery service.

(18) In view of these considerations, continuation of the competitive structure which existed prior to the introduction of the new Law is not liable to obstruct the public service obligations which the Netherlands Government has imposed on the Post Office. The monopoly held by PTT Post BV in respect of the basic postal service, which is not affected by this Decision is, at the present moment, amply sufficient to ensure that public service obligations are fulfilled without affecting trade to an extent contrary to the interests of the Community.

HAS ADOPTED THIS DECISION:

Article 1

Articles 2 and 12 of the Netherlands Law of 26 October on the operation of the postal service, together with the provisions of the implementing Decree of 19 December 1988 which reserves for PTT Post BV the express collection, transport and distribution of postal items weighing up to 500 grammes, at a price not exceeding Fl 11,9 for EEC destinations, and Fl 17,5 for non-EEC destinations, and the obligation to register all tariffs beforehand imposed by the Decree of 12 May 1989, are incompatible with Article 90 (1) of the EEC Treaty, read in conjunction with Article 86 of that Treaty.

Article 2

The Netherlands shall inform the Commission, within two months from the date of notification of this

⁽¹⁾ See Judgment of 13 February, 1979, Case 85/76, Hoffman Laroche v. Commission (1979) ECR p. 461 (points 49 and 102 *et seq.*).

⁽²⁾ See Judgment of 11 April, Case 66/86, Ahmed Saeed Flugreisen v. ZBUW, not published.

Decision, of the measures it has taken to comply therewith.

Done at Brussels, 20 December 1989.

Article 3

This Decision is addressed to the Kingdom of the Netherlands.

For the Commission

Leon BRITTAN

Vice-President
