

Application of state aid rules in the postal sector

I have the pleasure to introduce you to the way the Commission applies state aid rules to the postal sector.

After a brief introduction, I will review with you the main legal basis that forms the framework of the Commission's assessment. I will then explain to you how in practice the Commission assesses state aid to the postal sector.

1. Introduction

The traditional structures of some services of general economic interest, which are organized on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even as these are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of employment in the sector. As recognised by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the postal sector.

The Court of Justice explained that "*in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition*" and that these rules "*must be read in conjunction with Article 86(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.*"

2. The legal basis

The postal directive adopted in 1997, which was aimed at safeguarding the postal service as a universal service in the long term, has laid down common rules regarding the "*provision of a universal postal service within the Community*"¹. A precise set of universal service obligations is set out in article 3 of the postal directive to give effect to the principles of universality, equality and continuity.

National postal incumbents have been entrusted by their government to perform these Universal Service Obligations and may benefit from exclusive rights for certain services to the extent necessary to ensure the maintenance of universal service. Moreover, the postal Directive requires the establishment in all Member States of national regulatory authorities independent of the postal operators. Operators providing the universal service will have to establish separate accounts for services open to competition on the one hand and non reserved

¹ See Postal Directive 97/67/EC

services on the other hand in order to avoid undue cross-subsidies. In addition, postal prices must be geared to costs allocated according to principles laid down in the postal directive.

In 1997, the Commission adopted a notice about how to apply competition rules in the postal sector. The Notice sets out the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is however without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Since the adoption of these texts, the case law, in particular the respective judgements of *Altmark* and *Chronopost* of July 2003, have added some guiding principles. The Court of Justice gave precision about how the Commission should perform the proportionality test and the efficiency test, highlighting thereby the need for the postal providers to have sufficiently powerful accounting instruments.

Finally, in July 2005, the Commission adopted a framework that will ensure that companies can receive public support to cover all costs incurred, including a reasonable profit, in carrying out public service tasks as defined and entrusted to them by public authorities, whilst ensuring that there is no over-compensation liable to distort competition.

3. Application to the postal sector

Besides the provision of the universal postal service and other SGEI, the universal postal providers also compete in competitive markets with private operators, including both postal markets (express mail and parcels) and non-postal markets (financial services). It is for the Member States to define which SGEI missions should be delivered by the postal operator and by which means.

a. The notion of State Aid

When financial support is granted to the entrusted postal operator to perform these SGEI, the first question is whether this compensation constitutes State aid or not.

In its *Altmark* judgement, the Court of Justice has defined a set of criteria which, if fulfilled, allows the Commission to exclude the presence of an economic advantage and, hence, the nature of State aid of the measure. The efficiency test set out in the *Altmark* case law, in particular the 4th criterion, is difficult to apply in the postal sector.

Indeed, at present, neither a tendering procedure, nor a cost structure comparison can be realised in order to exclude the presence of an economic advantage when looking at compensation for universal service requiring an extensive network. In fact, one observes that the universal service obligations requiring an extensive postal infrastructure has never been tendered in Europe. Furthermore, Member States have not yet been able to provide the Commission with the cost structure of a similar undertaking in their home country nor could they provide robust cross-country studies establishing efficiency of its Universal Service Provider. Given data availability and low cost transparency, even a comparison between national postal incumbents is hardly possible. Universal Service Obligations being similar, the

economic burden of the public service costs in the postal sector is significantly different amongst Member States.

It follows that, at present, the 4th criterion of Altmark can hardly be fulfilled in the postal sector. This conclusion does not preclude however that the 4th criterion of Altmark can become a sensible element of the Commission assessment when cost transparency increases with further liberalisation and MS following a more market oriented approach, e.g. by applying tendering procedure for some infrastructure related services.

This means that, at present, practically all compensations for SGEI in the postal sector, whose provision is closely linked to the existence of the postal infrastructure, constitute state aid within the meaning of article 87(1) EC, subject to the requirements of prior notification and to the standstill provision pursuant to article 88(3) EC Treaty.

b. The assessment of the compatibility

In line with the SGEI framework and the case law, the Commission has to check whether the measure in question is dedicated only to compensate the postal operator for the provision of public service obligations, its compatibility will be dealt with by the Commission under article 86(2) of EC Treaty. The latter provides that SGEI are not subject to the application of the Treaty rules to the extent that this is necessary to fulfil their general interest mission.

Before the granting of the compensation, the Commission has to verify whether:

- (1) the public service mission entrusted to the postal operator is clearly defined;
- (2) the financing of the SGEI is transparent and is directly related to the public service role;
- (3) there is no over-compensation in the sense that the entrusted postal operators cannot use any spare money arising from over-compensation for the public service to compete unfairly with other companies that do not get such backdoor subsidies.

In order to establish whether there is over-compensation or not, the Commission performs an in-depth analysis about the cost of the SGEI in order to verify whether the subsidy granted to the postal operator will not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit.

It follows from the Commission approach that the analytical accounting of the national postal providers must be sufficiently powerful in order to allow the Commission to analyse the cost structure of the postal operator at the level of the product or the activity for which it receives a State compensation. Indeed, the postal operator must be able to keep separate financial accounts and identify separately costs and revenues associated with the provision of the services supplied under their exclusive rights and those supplied under competitive conditions. Internal accounting systems should operate on the basis of consistently applied and objectively justified cost accounting principles. The analytical accounting of the postal operator must be checked by an independent body.

Where a state aid granted for the provision of SGEI fulfils the conditions set out in the Commission Framework, State aid is considered to be compatible under article 86(2) and can be implemented following its approval.

As long as a potential aid measure is granted for competitive activities of the universal postal provider, it is subject to the application of normal competition rules, for instance the rescue and restructuring aid guidelines.

4. Conclusion

Given the fact that the 4th criterion of Altmark is hardly fulfilled in the postal sector, practically all compensations for SGEI, whose provision is closely linked to the existence of the postal infrastructure, constitute state aid within the meaning of article 87(1) EC, which will have to be notified to the Commission for verification, before the compensation being granted to the postal operator.

The compatibility of this state compensation will then be assessed by the Commission on the basis of article 86(2) of the EC Treaty and on the Community framework.

I thank you for your attention.

Bernadette FREDERICK
DG COMPETITION
Case Handler
Unit H1