

Newsletter

The Free and Fair Post Initiative Newsletter
N° 27 – May 2011

Free & Fair Post

EDITORIAL



Philippe Bodson

Since the liberalisation of the postal market in the beginning of 2011, postal operators remain concerned about its implementation. In particular, they see the need for the Commission to verify that governments do not pay too much for the provision of the universal service or of other public services entrusted to the incumbents with the result of giving them an unfair competitive advantage vis-à-vis the other operators in the market, a concern also voiced by Commissioner Almunia.

In this respect, the FFPI is closely following the developments regarding the Reform of the EU State Aid rules on Services of General Economic Interest which was published late April 2011. In this context, this newsletter focuses on the issue of achieving more clarity at EU level with regard to the universal service for which a clearer definition and calculation of costs is required.

The latest developments on the cases involving the Danish Post and that of Deutsche Post are therefore important in order to create jurisprudence and consequently more clarity in the market. The Commission recently suggested that decisions on cross-subsidisation continue to require review on a case-by-case basis as the renewed SGEI framework would likely not clarify this issue for the postal sector. Thus jurisprudence rather than further legislative clarifications is needed to help EU governments and postal operators to understand the future of competition in the postal sector in the EU.

FFPI is also proud of welcoming the contribution of the Mail Competition Forum (UK), which will focus on definition of Universal Service and how its costs should be calculated.

Philippe Bodson ■

VIEWPOINT

Limit the Universal Service definition

*by the Mail Competition Forum (UK)**

Further to the implementation of the Third Postal Directive and on the basis of the Altmark Criteria for state aid to services of general economic interest, it is becoming increasingly important to reach a clear definition of "Universal Service" and a definite method to calculate the costs for it.

Currently, different Member States apply different definitions, triggering market insecurity and leaving room for abuses of the system. In the UK, the definition in the legislation is very broad compared to other EU Member States. In order to create a real competitive market we will need to solve the following issues:

- Whether there is the actual need for external funding of universal service obligations;
- What the definition of universal service should actually include;
- How these costs are calculated and how this funding should be carried out.

In general new entrants in the postal market feel that the EU Commission should make sure that the financing of the universal service does not become a way to cross-subsidise the incumbent's competitive markets. In order to do so, the Commission should very strictly apply State Aid rules and pursue those governments that use this system unfairly. National governments are also called to act in order to avoid any abuse by national incumbents. In particular, they should be more transparent both in the calculation of costs and in the methods used to collect all the relevant data.

Is there the need to finance universal service?

Most Member States that have already opened their markets have not provided any compensation for the Universal Service obligations (USO) even if some of them foresee the possibility to spread the net costs between all postal operators. Furthermore, the universal service has been a profitable business for years which only now is being affected by the switch of certain types of correspondence to electronic mail.

What should the definition of Universal Services include?

According to the Directive, express and document exchange services and services for heavy weight parcels should not be covered by the universal service. The situation is less clear for the services traditionally offered by public operators. All Member States include in the Universal Service basic letter post and basic parcel post. However, only some Member States include bulk parcels and periodicals.

This discrepancy in the definition of the scope of the Universal Service risks becoming a barrier to the entry of other postal operators, as the incumbents could be subsidised in some Member States for activities that are not considered as Universal Services in others.

How should the costs be calculated?

According to the Directive the calculation of the costs should be cost-oriented, transparent and non-discriminatory and it was left to the national regulators to ensure that the costs were well allocated according to these principles. In this context, the net costs for universal service obligations needs to be calculated as the difference between the net cost for a designated universal service provider of operating with the universal service obligations, and the same postal service provider operating without the universal service obligations. Currently, in most of the Member States, the allocations of the costs remain very vague and non-transparent.

Without limiting the scope of the universal service and the way costs are calculated, true competition in the postal market remains a paper solution of the politicians and a fairy tale for the real world. ■

* www.mailcompetitionforum.org - The views expressed in this letter represent the general views of the Mail Competition Forum and do not necessarily represent the particular position of any individual member organisation

CLEAR UNIVERSAL SERVICE DEFINITION AND CALCULATION OF COSTS

The imminent reform of the EU State Aid framework on Services of General Economic Interest provides a good opportunity to clarify what the Third Postal Directive has failed to do but first indications suggest a limited effect.

The debate on whether Member States should provide compensation to sustain the Universal Service Obligation is still open. The decision is dependent on how costs are calculated and how the Universal Service is defined.

The FFPI's [White Paper on postal liberalisation](#), published last December clearly outlines the provisions of the Third Postal Directive on the issue.

The Paper notes that the **definition of Universal Services** remains quite broad and open to different interpretations damaging the possibility for new operators to enter the market. In fact, as the definition is not clear, the USO could receive subsidies to distribute periodicals in some countries and not in others limiting the competition in this and other fields. In order to avoid this problem, the definition of USO should be as restrictive and as precise as possible including only basic letter and parcel services. Sweden and the Netherlands are some of the countries which comply with this definition, while others, like the UK and Germany, have a wider scope.

As for **the calculation of costs**, the national regulator is required to assess the exact costs from which the net costs can be deduced and spread between all postal operators on the basis of their annual turnover. The Commission still needs to decide whether state compensations were appropriate in the cases of Deutsche Post and the Belgian postal service.

The ruling in these cases will determine what is to be considered as unlawful state aid that distorts competition. In this regard, it is interesting to note that the Commission indicated that considerations on the calculation of costs will be made on a **case-by-case basis, effectively ruling out that the new Framework on Services of General Economic Interest will define the Universal Service and the calculation of its costs**. This will mean that the definition is likely to remain as vague as it currently is, leaving to the European Court of Justice to decide on each case. However, the Commission should still retain an important role in controlling the financing of the USO and verify that the calculation of the net costs is done in a transparent and consistent way, in particular, as Commissioner Almunia voiced publicly, to deal with the issue of overcompensation for pension 'legacy' costs.

The **separation and allocation of costs** is also of utmost importance. National regulators have the responsibility to control that this is done in a cost-oriented, transparent and non-discriminatory way. However, in most Member States, the system of accounts used for the USO still needs to be approved by the national regulators. The implementation of a clear separation of accounts of USOs, required by the

Directive, remains a work in progress even in the member States which have already fully opened their markets.

Finally, **the overall net cost** of the universal service obligation should be calculated as the sum of the net costs arising from the specific components of universal service obligations taking any intangible benefits into account.

Unfortunately not much clarification is coming from the Communication on the Reform of the EU State Aid Rules on Services of General Economic Interests (SGEI). This document, published in April 2011, establishes the basis for the development of the Framework on Services of General Economic Interest that will be published before the end of the year.

The communication's objective is to clarify some of the key concepts relevant for the **application of the state aid rules to SGEI. However, it relies on the Third Postal Directive to set out the rules for the definition of the USO and the calculation of its costs; it** therefore seems likely that further clarifications on the interpretation of the Directive will only come through rulings of the European Court of Justice.

It is important to note, however, that the Commission's decision making has been guided by the principle that USO providers (incumbents) should not be put at an advantage in competitive markets by overcompensating them for the costs of the USO or through other measures. This means that the Commission's position will remain that commercially viable postal services should not benefit from cross-subsidies. However, the Commission takes into consideration the fact that the delivery of mail has been the most vulnerable to substitution by other forms of communication.

The Communication was criticised by some stakeholders because it aims at offering a diversified response to the different types of SGEI on the basis of the nature and scope of the service provided. However, the FFPI supports this approach. The Commission should prioritise its resources to deal with state aid in sectors where intra-community trade is clearly affected and effects can be felt by consumers as well as businesses large and small. The postal sector clearly is such a sector and hopefully the renewed framework for Services of General Economic Interest will provide a step forward. ■

■ **ESSENTIAL COMPETITION DECISIONS STILL PENDING**

With the definition of the USO remaining vague and open to Member States' interpretation, the calculation of costs still uncertain and cross-subsidisation still lurking in background, the decisions on the pending competition cases become increasingly important for the future of postal services. However, the European Commission decided, on 10 May, to extend the formal investigation into the compensation that the German government granted to Deutsche Post AG (DPAG) in order to carry out the universal service obligations.

The extension concerns the subsidies paid by the state to cover the costs of the pensions of those employees who have a civil servant status. Germany claims that pension subsidies compensate 'legacy costs' from the time when Deutsche Post was a postal administration, but as Germany allowed an increase in regulated letter prices specifically to cover DPAG's pension costs, there is the suspicion of overcompensation in favour of Deutsche Post with a distortive effect on competition.

The latest development on this case was a hearing that took place on 26 May with regard to Germany's and DPAG's appeal to the injunction to provide further information to the Commission. Both parties challenge the injunction as they consider it founded on feeble legal basis, having consequences on the outcome of the case if not respected and disproportionate as providing that information would be very costly both in terms of time and budget.

The Commission, on the other hand, had already complained about the difficulty of obtaining information, quoting this as one of the reason that lead to the decision of extending the investigation.

In the meantime, the Advocate-General delivered his opinion on the antitrust case concerning Post Danmark. The Danish supreme court asked for a pre-judicial decision on the interpretation of art 102 TFEU (abuse of a dominant position). The Advocate-General concluded that if the dominant operator was to offer a selective discount to a key client of their most important competitor, in the market for direct mail (which is fully liberalised), at a price that was above its average incremental cost but below its total average cost, this would constitute an abuse of a dominant position on the basis that the selective discount would be subsidised by the revenue from activities related to the universal service obligation. This cross-subsidisation will have an unlawful exclusionary effect. In order to assess the existence of illegal cross-subsidisation further investigation needs to be conducted on whether the income including subsidisation from activities to fulfil the universal service obligation exceeds the separate cost related to the provision of the USO.

The outcome of these two cases, together with that involving the Belgian postal operator, will hopefully support the further liberalisation of the postal sector around Europe and provide a level playing- field for all market operators. In this context, it is key that the Commission plays a proactive role and pays specific attention to enforcement of competition rules. ■

- **28 June 2011: European Commission**, 2nd workshop for the postal studies, Belgium
- **27-28-29 September 2011: POST EXPO**, Germany
- **November 2011: Marketforce & the Institute of Economic Affairs' 10th Annual Conference**, The Future of the UK Postal Services, UK

