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PUBLIC SERVICES:

ECJ SETS CONDITIONS FOR MAKING COMPENSATION PAYMENTS

The European Court of Justice has confirmed that money paid to a company by a government to compensate it for fulfilling a public service obligation is not state aid. The Court has also laid down four conditions that must be satisfied in order for payments to be considered "compensation" and not "state aid". The ECJ preliminary ruling handed down on July 24 (Case C-280/00) gives guidance to a German Court, which is dealing with a complaint about a licence issued to provide a passenger bus service in the Stendal district.

(BB)

The four conditions. The Court said that the subsidies can only be deemed state aid if they confer an "advantage" on the recipient that it would not have got under normal market conditions. But there is no advantage if the company is simply being reimbursed for carrying out public service duties. The first condition to be met to avoid being classified as state aid - and thus subject to European Commission approval - is that there must be a clearly defined public service duty to discharge, the Court says. The second condition is that the compensation must be calculated in advance in an objective and transparent way. Third, the compensation cannot exceed the expenses incurred for fulfilling its obligations. Fourth, if the company is not chosen by a public procurement procedure, the level of compensation should be calculated by analysing the costs that a typical transport firm would incur.

Legal framework. The case was taken to the German Federal Court by the firm Nahverkehrsgesellschaft Altmark, which objected to the granting of a licence and subsidies to rival Altmark Trans in 1990 and 1994. The complainant claimed that Altmark was not financially viable because it could not survive without public subsidies. The legal framework surrounding the case are two EU Regulations from 1969 (1191/EEC) and 1991 (1893/EEC) that lay down rules on compensating firms for providing public transport services. The German court was not sure whether these Regulations should apply in this case, or whether they were covered by the exemptions provided for in the Regulations. The ECJ found that urban, suburban and regional transport services may be exempted from some of the Regulation's requirements, but German law must make it clear where such an exception applies.

Positive reactions. The Commission seemed fairly positive about the ruling in its reaction. A spokesman said that it was "not unhappy" about it, adding that it sets a reasonable precedent for how to deal with compensation payments. "If the Member States can assure that the four conditions are met, it would set up a good framework and exclude distortions of competition", he said. Meanwhile, the European railway lobby CER has heralded the ruling as "an important step towards giving more leeway to EU Member States in their management of public service obligations". CER Executive Director Johannes Ludewig said, "passenger rail services have to meet the needs and expectations of the users. This cannot be guaranteed without proper compensation for public service obligations imposed by the state". The CER also expressed the hope that the ruling would break the deadlock in the EU Council of Ministers over the draft Regulation to update the 1969 and 1991 Directives.

The Free and Fair Post Initiative, which represents pro-liberalisation postal users and providers,

has given a more measured welcome to the ruling. FFPI President Philippe Bodson said he would have preferred a judgement that sets an “ex-ante” justification of subsidies i.e. they would have to validate their claims before getting the money. In the current case, the disgruntled company could only take a complaint after the subsidy was granted. Mr Bodson nevertheless welcomed the four conditions set by the Court, as it demonstrates the fact that there currently is no clear definition of what a “public service obligation” is. The FFPI believes postal operators are using this legal uncertainty to get funds to compensate for inefficiency and pay for investments that have nothing to do with public service obligations. The Commission has in recent times approved large capital transfers justified on public service provision grounds to La Poste of Belgium, Poste Italiana and Royal Mail in the United Kingdom.

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