Country Reports

Belgium


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In its decision of 2 May 2013, the Commission considered that the yearly compensation in favour of bpost for the delivery of certain public services constitutes State aid within the meaning of Article 107(1) TFEU and therefore assessed its compatibility with the requirements laid down in the revised framework for State aid in the form of public service compensation. Since this decision entails one of the most in-depth Commission decisions based upon this framework so far, it provides very useful insights on how these stricter compatibility conditions will be applied in practice. In particular, it demonstrates that the Commission adopts a rather lenient approach to allow Member States to bring their national aid measures in line with the new EU State aid rules on SGEIs adopted in 2011.

I. Introduction

On 2 May 2013 the European Commission (‘Commission’) authorised under EU State aid rules the compensation for the Belgian postal incumbent bpost for discharging a series of services of general economic interest (‘SGEIs’) over 2013–2015.1 The Commission considered that the yearly compensation of around €300 million for the delivery of these public services constitutes State aid within the meaning of Article 107(1) TFEU and therefore assessed its compatibility under the new State aid rules on SGEIs adopted in 2011.

More precisely, the Commission assessed the public service compensation for bpost in the light of the criteria laid down in the framework for State aid in the form of public service compensation (‘2012 SGEI Framework’) that entered into force on 31 January 2012.2 This revised framework spells out the conditions under which large compensation amounts granted to operators outside the social services field can be found compatible with the internal market under Article 106(2) TFEU, hereby replacing the 2005 SGEI Framework.3 These compatibility conditions have been substantially modified compared to the 2005 SGEI Framework to take better account of efficiency and competition considerations and to strengthen transparency.4 Indeed, a number of substantially stricter compatibility conditions are to be distinguished in the 2012 SGEI Framework, such as the organisation of a public consultation to identify the public service needs, the compliance with EU public procurement rules and the inclusion of efficiency incentives in devising the amount of compensation.

Since the bpost case entails one of the few and definitely one of the most in-depth Commission deci-
II. Public Service Missions of bpost

Bpost is governed by the Belgian Law of 21 March 1991 on the reform of certain economic public companies (‘Law of 1991’). This law defines in general terms the public service missions that the Belgian State has entrusted to bpost. The exact contents and modalities of the public service missions are specified in so-called management contracts that are negotiated between the State and bpost. The management contracts also provide for the payment by the State of annual compensation for discharging the public service missions set out in these contracts.

Since its incorporation in 1992, bpost has signed five management contracts with the Belgian State. The Commission has already investigated State compensation under the first three contracts as well as under the 4th Management Contract for the period 24 September 2005 to 31 December 2010. This resulted in a decision of 25 January 2012 in which the Commission ordered Belgium to recover €417 million of incompatible aid from bpost, since the yearly compensations received in 1992-2010 for public service costs resulted in overcompensation.

The present decision concerns the 5th Management Contract which covers the period from 1 January 2013 until 31 December 2015. Under this contract, bpost is compensated for different SGEIs. On the one hand, bpost is compensated for the operation of an extensive retail network of postal service points which is denser and geographically more widespread than what would be commercially viable or than what is required by the needs of the universal service obligation (‘USO’) and other public service tasks. This is called the Network SGEI. On the other hand, the Belgian State undertakes to compensate bpost for the provision of several day-to-day SGEIs and ad hoc SGEIs. These so-called Product SGEIs include the distribution of newspapers and periodicals, the home delivery of pensions, the acceptance of cash deposits at the counter and the delivery of letter post items that fall within the freepost system.

Other SGEIs do not give right to compensation from the Belgian State. For instance, bpost does not receive any compensation for the delivery of the USO and related obligations.

III. Presence of Aid under Article 107(1) TFEU

The Commission first ascertained that the State compensation for the delivery of the public services by bpost constitutes State aid within the meaning of Article 107(1) TFEU. In this context, the Commission considered it clear from the outset that the compensation in favour of bpost is imputable to the State and is given through State resources, confers a selective advantage on bpost and may distort competition and affect trade between Member States.

In addition, the Commission had to verify whether the compensation to bpost could escape qualification as State aid on the basis of the Altmark judgement. In particular, it had to be ascertained whether the compensation was determined on the basis of an analysis of the costs of a typical undertaking. The Belgian authorities argued that this was the case. In order to support this claim, the Belgian authorities explained that a comparison with other Western European postal operators in terms of costs, productivity
and quality of service showed that bpost ranked among the best operators. The Commission noted however that the sample of companies used for the comparison with bpost included other national universal service providers which are not necessarily typical undertakings. Even if it could be accepted that bpost was more efficient than those universal service providers, this would not suffice to prove that bpost satisfied the fourth Altmark criterion. Therefore, the Commission considered that bpost is given an economic advantage it would not have received under normal market conditions.

IV. Compatibility Assessment under the 2012 SGEI Framework

Under the 2012 SGEI Framework, the Commission considers that public service compensation which is State aid within the meaning of Article 107(1) TFEU can be found compatible with the internal market under Article 106(2) TFEU if it is necessary for the operation of the SGEI concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the EU. In order to achieve that balance, the framework sets out a number of compatibility conditions.

Obviously, the Commission has ascertained that the State compensations to bpost abide all these conditions. Hereinafter, we shall nonetheless focus on the Commission’s assessment of some of the compatibility conditions that are new compared to the 2005 SGEI Framework.

1. Genuine SGEIs and Public Consultation

As for the existence of a genuine SGEI, the Commission upholds its traditional view that Member States have a considerable discretion when it comes to defining what they regard as SGEIs. As a matter of fact, the decision essentially underlines that the Network SGEI and the Product SGEIs at issue were already entrusted to bpost under the previous management contracts and that the Commission already accepted their qualification as genuine SGEIs.

According to paragraph 14 of the 2012 SGEI Framework, however, Member States should now also show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account. To this end, the Belgian State explained that, in December 2012, a public consultation was organised that validated that the SGEIs entrusted to bpost had an important social and economic role and met the needs and expectations of the users. The SGEIs considered being the most important are the Network SGEI, the home delivery of pensions and the distribution of newspapers and periodicals which are very important or at least important for respectively 90%, 64% and 59% of the Belgian population.

In light of the foregoing, the Commission indicated that it was satisfied that the requirement of paragraph 14 of the 2012 SGEI Framework had been fulfilled and that all SGEIs entrusted to bpost were genuine SGEIs. The test applied here seems nonetheless very slack. Indeed, no further details are provided on the consultation except for the general assertion that “[t]he Belgian State reached out to public service users and providers by surveying a representative sample over the phone through a questionnaire.” In addition, no further information is provided on the responsiveness of the public towards the other compensated SGEIs. It inevitably follows from the decision that less than 50% of the Belgian population consider these SGEIs as being very or rather important. However, it would be interesting to know where the Commission sets the limit and to learn, for instance, what percentage of the Belgian population consider an SGEI such as the printing, sale, reimbursement, replacement and exchange of fishing permits as a genuine SGEI that needs to be entrusted to bpost.

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10 In fact, with regard to several of these operators (e.g. La Poste and Poste Italiane) the Commission has in the past adopted State aid decisions where it concluded that they could not be considered as typical undertakings.
11 Paragraph 11 of the 2012 SGEI Framework.
12 Paragraphs 12-60 of the 2012 SGEI Framework.
13 See also paragraph 55 of Decision SA.33054 in which it is merely stated that the specific access requirements of the Network SGEI of Post Office Ltd “have been publicly consulted” without giving any further details.
14 Paragraph 107 of Decision SA.31006.
15 Paragraph 191 of Decision SA.31006 explains that the Belgian State has nevertheless committed to publish the information of paragraph 60 of the 2012 SGEI Framework, including the results of the public consultation, on the internet. The author was however unable to find the publication of this information.
2. Compliance with EU Public Procurement Rules

An important new element introduced by the 2012 SGEI Framework is that aid will be considered compatible with the internal market on the basis of Article 106(2) TFEU only where the responsible authority, when entrusting the provision of the SGEI to the undertaking in question, has complied or commits to comply with the EU public procurement rules.

The Belgian authorities claim that, according to the Law of 1991, several SGEIs are entrusted unilaterally by the Belgian state to bpost and that the public procurement rules would therefore not apply to these SGEIs. This claim was refuted by the Commission. The Commission considers that the ‘unilateral imposition’ argument on the basis of the Correos jurisprudence cannot apply to the present case because the exact contents and modalities of bpost’s public service missions are set out in the 5th Management Contract which is signed by the State and bpost after a negotiation process. Furthermore, the 5th Management Contract does not solely create obligations for bpost, but also imposes obligations on the Belgian State.

At the same time, the Commission recognises that bpost holds a unique logistic and retail network in terms of density and size which makes it the sole possible provider for the Network SGEI and for other SGEIs which need such networks in order to meet the requirements of the 5th Management Contract. In these circumstances, the Commission considers that these SGEIs can be entrusted to bpost through a negotiated procedure without prior publication according to Article 31(1)(b) of Directive 2004/18/EC.

On the contrary, as regards the distribution of newspapers and periodicals, which is not delivered through this unique logistic and retail network, the Commission considers it acceptable that bpost receives a compensation during the period of three years necessary to organise a competitive, transparent and non-discriminatory tendering procedure. To justify this rather lenient position, the Commission explains that discontinuing the delivery of this essential public service would be in contrast with the principles relating to the essential roles of SGEI and notably with Article 14 TFUE which provides for the EU to take care that SGEIs operate on the basis of principles and conditions which enables them to fulfil their mission.

3. Amount of Compensation

According to paragraph 21 of the 2012 SGEI Framework, “the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit”. In this respect, the 2012 SGEI Framework puts forward the net avoided cost (‘NAC’) methodology that calculates the cost of the SGEI as the difference between the net cost for the undertaking of operating the SGEI and the net cost for the same undertaking without the SGEI entrustment.

In the case at hand, the Commission considers that the principles established by the Belgian authorities for the implementation of the NAC methodology are sound and that the Belgian authorities have provided satisfactory evidence that the counterfactual scenario represents a credible picture of a counterfactual company that would be able to credibly operate the activities that would be kept by bpost in the absence of SGEI obligations. The Commission notes in particular that the NAC methodology leads to a lower net cost than the accounting methodology which has been the basis used by the Commission to accept SGEI compensations under the 2005 SGEI Framework and that the profit level of the counterfactual scenario is in line with the previous decision of the Commission on bpost and can therefore be considered reasonable.

In addition, the 5th Management Contract introduces adequate incentives for the efficient provision of SGEIs of high standard. In particular, it provides an efficiency sharing mechanism which foresees that, provided that very precise quality targets are met, 67% of the realised efficiency gains can be kept by bpost and therefore the corresponding costs.
may be compensated by the Belgian State. According to the Commission, this mechanism is well in line with the 2012 SGEI Framework since it guarantees that efficiency gains are shared between the State and bpost and will not be achieved at the detriment of quality.

A quick comparison between these elements and the compensation to Post Office Ltd for the net costs incurred to keep a non-commercially viable network for the period 2012–2015 reveals however that the Member States retain a wide margin of discretion to demonstrate that they comply with the criteria regarding the NAC methodology and the efficiency incentives.  

V. Conclusion

The decision of the Commission on the State compensations to bpost for the delivery of public services over 2013–2015 demonstrates that the Commission adopts a rather pragmatic approach towards the compatibility criteria introduced by the 2012 SGEI Framework. More precisely, it seems that the requirement to organise a public consultation prior to the definition of an SGEI is a formality that involves no substantive assessment by the Commission. The compliance with EU public procurement rules can be demonstrated by arguing that the SGEI at issue is covered by the sole provider exemption and may therefore be entrusted through a negotiated procedure without prior publication. In some cases, the rules on public procurement can even be put aside so as to avoid the interruption of the delivery of the SGEI.

On the other hand, it follows from the decision that the Commission will be very strict when it comes to the assessment of the presence of aid. In this respect, the Commission has underlined that a Member State cannot simply refer to incumbent operators in other Member States in order to demonstrate that the national incumbent is a typical well-run undertaking.

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19 See paragraphs 71–99 of Decision SA.33054.