

FREE POST?

**The Commission's Assessment Criteria of Compatibility
under Art.106(2)TFEU in the Postal Sector**

State aid & Public procurement in the European Union

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1. Introduction

Have you had post lately? Another letter delivered to you by the nice postman who comes – mostly – every day? This service you receive is part of an intricate system of economic calculations and legal balancing acts, and by now fairly regulated by EU law. Yes, postal services are important and constitute a fundamental part of the communications throughout Europe. Although – or maybe because – they have had to face competition from electronic commerce in recent decades, postal services have undergone significant progress which resulted in improvements in the efficiency and variety of new products provided by the incumbent operators.¹

Most national postal services are universal service obligations [hereinafter: USO], which according to the EU competition rules mostly equate to services of general economic interest [hereinafter: SGEI]. These kind of services are often offered on a loss-making basis and ‘entrusted’ to the operator by the national authority without the latter having a say in the matter; in the postal sector, this would, for instance, entail maintaining a network of post offices in non-profitable regions. As a consequence of the economic significance of the provision of such services, Member States [hereinafter: MSs] often compensate the economic operators for these costly activities. However, to ensure that the incumbent operators are not put in either advantageous or disadvantageous position, the European Institutions have created a system of State aid control intended to allow for both competition in the postal sector and to secure a level playing field for the economic operators, while also not preventing compensation of SGEIs where they do not affect intra-union trade.² For this purpose, several documents – both sector-specific and general – have been published by the Union institutions over the last two decades, which list numerous requirements to be fulfilled in order for compensation of postal SGEIs to be deemed compatible; these documents consist of the 1997 Postal Directive³ – amended in 2008 –, the 1998 Postal Notice⁴ and the 2005 Package⁵ – amended in 2012.

¹ Commission C, 22 December 2008, Commission staff working document on the application of EU state aid rules on Services of general economic interest since 2005 and the outcome of the public consultation, (SEC(2011) 397), p.4

² Ibid.

³ Directive 2008/6/EC of the European Parliament and the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services

⁴ Commission Notice, 06 February 1998, notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, [1998] OJ C 039, p.2

However, with almost two decades, several amendments and new case law⁶ in the field of SGEI legislation, the question arises whether the criteria listed in these documents are still the standard used in today's assessment of compatibility for postal aid under Art.106(2)TFEU. That is precisely what this research investigates; namely, does the Commission in its compatibility test still follow the established sector-specific and general factors or does the practical application show adaptations? If adaptations have been made, what factor do MSs have to take into account today when they grant advantages?

This paper is meant to uncover possible novelties in the current approach by the Commission and serve as a more detailed guidance to MSs in their preparation of compensatory measures in the postal sector. Accordingly, section 2 provides a brief overview of the development of EU postal services during the last 20 years as well as a more elaborate explanation of the relevant documents. Subsequently, section 3 deals with the Commission decisions on postal since 2005 and analyses these decisions based on a selection of pre-determined factors. Finally, section 4 offers a guideline of clarifications derived from the cases, which are not found in any of the documents, and demonstrates what effects the changes in the last 10 years precisely have on today's assessment on the compatibility of aid.

2. Background

2.1. Development of Postal Services in the EU Law Context

Most of the services provided in the postal sector are SGEIs, which is why it was decided to instigate a reform.⁷ Hence, postal services were among the network services (energy, transport and telecommunications) that started liberalising in the 1990s in order to facilitate free movement of goods and services. However, despite the effort to liberalise the postal market, the majority of

⁵ Commission Decision 2005/842/CE, 28 November 2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2005] OJ L 312;

Commission Communication, 29 November 2005, Communication from the Commission on the Community framework for State aid in the form of public service compensation (Altmark-communication) [2005] OJ C 297, p.4; Commission Communication, 11 January 2012, Communication from the Commission – European Union framework for State aid in the form of public service compensation, [2011] OJ C 8, p.15

⁶ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-07744

⁷ Commission B, 03 October 2008, Charlie McCreevy, European Commissioner for Internal Market and Services, The new Postal Directive: Postcomm Forum – What next for the postal market. (SPEECH/08/485), London, 2008

the existing national postal service providers still possessed market shares of over 95%.⁸ Therefore, next to the on going opening of the sector, the Commission stressed the significance of adopting common legislative rules. In order to facilitate the establishment of a Single Market, it issued the Postal Green Paper in 1992,⁹ which promoted the significance of a universal postal sector rules for the Union economy and the need for social cohesion.¹⁰ A major obstacle to the sector was and still is the considerable number of postal monopolies. Therefore, the Postal Green Paper offered possible steps towards the achievement of a more liberalised postal market.¹¹

The first step in the EU postal reform was the enactment of the first EU Postal directive in 1997.¹² Together with its subsequent amendments,¹³ the EU postal legislation has provided MSs with a schedule for the liberalisation of national and cross-border postal markets. The aim of the Directive is to “achieve an internal market of Community postal services, [while at the same time] ensuring a common level of universal services for all users and setting harmonised principles for the regulation of postal services”.¹⁴ By implementing the EU Postal Directives into national legislation, the MSs were expected to guarantee supply of high quality postal services and gradual opening of the letters market.¹⁵

Together with the proposal for the first Postal Directive, the Commission submitted a draft for a Postal Notice,¹⁶ which served a complementary function to the harmonisation measures. The purpose of the Notice was to provide guidelines to the MSs in their correct application of the Treaty provisions on competition to the postal sector without prejudice to the judgements given by the ECJ.¹⁷

⁸ Commission C, p.18

⁹ Commission a, 11 June 1991, Green Paper on the Development of the Single Market for Postal Services, (COM (91) 476 final)

¹⁰ Winkelmann et al 2009; ‘The Evolution of the European Postal Market since 1997: final report 2009. Study for the European Commission’, DG Internal Market and Services, 2009, p.12

¹¹ Ibid., p.16

¹² Directive 97/67/EC, 15 December 1997, of the European Parliament and of the Council on common rules for the development of the internal market of Community postal services and the improvement of quality of service, [1998] OJ L 15, p.14

¹³ Directive 2002/39/EC, 10 June 2002, of the European Parliament and of the Council amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, [2002] OJ L 176, p.21; Directive 2008/6/EC

¹⁴ Directive 2008/6/EC, Recital 56.

¹⁵ Ibid., 19 – 20.

¹⁶ Commission Notice, 06 February 1998, notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, [1998] OJ C 039, p.2

¹⁷ Ibid., 2.

Next to the development in the postal sector, the legal framework for State aid applicable to SGEIs was established with the landmark *Altmark* judgment,¹⁸ which clarified the difference between State aid and public service compensation. Compensation may not be classified as State aid under Art.107(1)TFEU if the state acts in the same way as a private investor and does not award any economic advantage to the economic operators. Further, if the compensation for an USO meets the four *Altmark* requirements,¹⁹ it is not classified as State aid and does not need to be notified to the Commission.²⁰ On the other hand, even if just one requirement is not met, the State measure is classified as aid, but may, nevertheless, be exempted under Art.106(2)TFEU in accordance with the 2005 SGEI Framework [amended in 2012].²¹

2.2. Decisive Documents

As briefly touched upon in **section 2.1.**, a selection of documents have emerged that deal directly with the compensation of public services and specifically those SGEIs in the postal sector. These documents are the – amended – Postal Directives and the Postal Notice as well as the 2005 Package – the SGEI Decision and Framework.

Regarding the compensation of USOs in postal sector, the Notice and – to a certain extent – the Postal Directives enumerate factors that have to be complied with if a State measure in favour of a particular postal operator is to be deemed compatible under Art.106(2)TFEU. The Postal Notice gives an overview of the relation between State aid and the postal operators.²² It depicts the peculiar situation of the current postal operators offering services while making financial losses or just breaking even.²³ That is why in certain cases direct and indirect financial support provided by the public authorities to such operators is acceptable in order to enable access to postal services in the first place.²⁴

Therefore, aligning the EU competition rules to the postal sector and the harmonising Postal Directive,²⁵ the Commission, in its Notice,²⁶ defined several criteria to determine which

¹⁸ Case C-280/00 *Altmark*

¹⁹ *Ibid.*, paras.89-93.

²⁰ Art.108(3)TFEU

²¹ Commission Communication 2005; Commission Communication 2012

²² Commission Notice

²³ *Ibid.*, p.19.

²⁴ *Ibid.*, p.20.

²⁵ Directive 2008/6/EC, Art. 2 (1): *postal services*: services involving the clearance, sorting, transport and distribution of postal items.

compensation could be justifiable under Art.106(2)TFEU. The first criterion concerns the ‘liberalisation’ of postal services, which requires MSs to remove special or exclusive rights in the postal services sector.²⁷ This criterion is identical to the Postal Directive, which requires the abolition of exclusive or special rights as a means to repeal all postal monopolies in the MSs.²⁸ The second condition is ‘indispensability’, meaning that the aid is only compatible if it is necessary for the operator to be able to fulfil his USO satisfactorily and if no less distortive methods to support SGEIs exists.²⁹ This criterion is equivalent to the necessity aspect of the compensation criterion; a mandatory requirement under the Framework.³⁰ If the indispensability criterion is fulfilled then the “compensation [does] not exceed what is necessary to cover the costs in discharging the public services obligation including a reasonable profit”.³¹

The third condition is ‘proportionality’, which aims to secure that granting of special or exclusive rights is in proportion to the SGEIs pursued by those rights. An important aspect of that criterion is that MSs should adapt the scope of the special or exclusive rights to the conditions and demands of the postal sector.³² The Postal Directive serves a complementary function by determining a list of requirements essential for the provision of universal services, which MSs should make sure are fulfilled.³³ The fourth condition is that MSs should ensure monitoring by an independent body of the performance of the SGEIs by the operators.³⁴ In a similar fashion, this criterion is emphasised in the Framework, which requires MSs to monitor that compensation is proportionate to the costs of providing the SGEIs and not overly compensatory.³⁵ The fifth criterion prescribes non-discriminatory access to the universal postal services network. By network the Commission recognises the public points of access in accordance with the needs of the customers or intermediaries³⁶; the same requirement of equal access is evident from Art.5(1) of the Postal Directive.³⁷ Finally, the Postal Notice prescribes the condition that operators have to

²⁶ Commission Notice

²⁷ Ibid.

²⁸ Directive 2008/6/EC, Art. 7 (1).

²⁹ Commission Notice

³⁰ Commission Communication 2005; Commission Communication 2012

³¹ Ibid., Art. 5 (1);

³² Commission Notice , p.24.

³³ Directive 2008/6/EC, Art. 5 (1).

³⁴ Commission Notice, p.23.

³⁵ Commission Communication 2005, paras. 19-20

³⁶ Commission Notice, p. 25.

³⁷ Directive 2008/6/EC, Art. 5 (1).

order their accounts in a transparent manner and make them subject to control by an independent body.³⁸

Next to the sector-specific documents on State aid, also the more general 2005 Package regarding the compensation of SGEIs – and its 2012 amendment – is important for assessing compensatory measures in the postal sector. More precisely, this Package consists of the 2005 Decision³⁹ and Framework⁴⁰ on services of general economic interest and compatibility under Art.106(2)TFEU. It completed the legislative renewal in this area of competition law, which had been started by *Altmark* and ended the period of debate and uncertainty.⁴¹ Of the Package, the Framework is especially relevant for this research since the Decision only covers a limited range of aid measures.⁴²

The Framework provides comprehensive clarification on the key concepts related to the SGEIs and is a practical guidance for the application of Art.106(2)TFEU to the compensation of public services.⁴³ The first mandatory criterion to be fulfilled is that the postal public service in question must be a genuine service of general economic interest.⁴⁴ Since the characteristics of such a postal SGEI are specifically defined in the Postal Directive⁴⁵, this criterion of the Framework should be read in accordance with the Directive when applied to aid in the postal sector. The second requirement to be adhered to is that the operation of the SGEI must be entrusted by an official act.⁴⁶ This act must further clarify certain aspects regarding the service, thus delineate the precise obligation, the duration and the method for calculating the compensation.⁴⁷ Thirdly, the Commission requires MSs to not overcompensate providers. Thus aid should not exceed the costs incurred in the performance of the public service obligations including a reasonable profit.⁴⁸ Moreover, a criterion of transparency is listed, requiring an operator to have separate accounts where different services are provided.⁴⁹

³⁸ Commission Notice, pp.24-25

³⁹ Commission Decision 2005/842/CE, p. 67

⁴⁰ Commission Communication 2005

⁴¹ Sinnaeva; 'The Report and Communication on Services of General Economic Interest: Stocktaking and Outlook for Reform', *European State Aid Law Quarterly* 2, 2011, p.211

⁴² Commission Decision 2005/842/CE, Art. 2: scope; only covering aid that is below the defined threshold

⁴³ Commission D, 23 March 2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (COM(2011) 146 final)

⁴⁴ Commission Communication 2005, section 2.2

⁴⁵ Directive 2008/6/EC, Arts. 3-5

⁴⁶ Commission Communication 2005, section 2.3.

⁴⁷ *Ibid.*, para.12

⁴⁸ *Ibid.*, para.14

⁴⁹ *Ibid.*, para.19

Since the development of intra-Union trade was still affected by distortions, which were not remedied by the Framework requirements, the Commission revised the document and added conditions aimed to mitigate the effects of the unaddressed distortions.⁵⁰ Under the 2012 Framework, the Commission extends its earlier standards by elaborating further on both factors needed in the process of entrustment⁵¹ – such as transparent and non-discriminatory procedures – and increasing the list of aspects to be considered with respect to the compensation itself.⁵² Moreover, the 2012 Framework puts much more emphasis on transparency of SGEIs subsidies and EU procurement rules in the entrustment process.⁵³

Therefore, taking into consideration both general and sector-specific provisions, MSs and operators in the postal sector have to comply with the following requirements if they wish their compensation of SGEIs to be compatible with Art.106(2)TFEU; a genuine SGEI, transparency of accounting, entrustment, compensation and control. These conditions applied to the period of 2005-2012, with the more elaborate standards of the revised Framework applying from February 2012 onwards.

3. Analysis

3.1.Methodology

The following **section 3.2.** focuses in detail on the question whether the Commission is still adhering to the criteria established in all the documents mentioned above or whether it has – by now – added new steps to its own assessment of compatibility under Art.106(2)TFEU.

To this end, a selection of Commission decisions in the field of postal services has been made for analysis. These particular decisions were selected on the basis of two factors. Firstly, they had to be issued after December 2005 because the 2005 Framework⁵⁴ on SGEI only became applicable from that time on. As the Framework essentially amended the compatibility requirements, it would be pointless to look at earlier decisions to establish the Commission's assessment methods. Secondly, the Commission decisions had to concern SGEIs and, more

⁵⁰ Commission Communication 2012, paras. 51 – 53.

⁵¹ Ibid., paras. 15-21

⁵² Ibid., paras. 21-50

⁵³ Ibid., sections 2.5., 2.6. & 2.10

⁵⁴ Commission Communication 2005, 29 November 2005, Communication from the Commission on the Community framework for State aid in the form of public service compensation (Altmark-communication), [2005] OJ C 297, p.4

specifically, those subject to a compatibility test under Art.106(2)TFEU. Since this research is particularly focused on compatibility requirements for SGEIs in the postal sector, it would be futile to look at Commission decisions that do not address this specific issue.

For the purpose of this research, the authors scrutinised the decisions based on a variety of pre-determined factors, which reflect the criteria established in the Postal Directive⁵⁵, the Notice⁵⁶ as well as the 2005 Framework. These factors are: (i) the postal service concerned as a universal service in accordance with the Postal Directive, (ii) there exists a transparency of accounts, (iii) the service has been entrusted to the undertaking by the MS, (iv) the compensation covers only what is necessary and (v) the compensation is controlled by independent bodies. Further, the authors consider if the compensation was deemed compatible; and if not, what reasons to Commission brought forward. The last factor employed in the analysis is defined as ‘additional points’. This will be used to indicate whether the Commission has added new aspects to the method of assessment contained in the documents described above. Testing the decisions for these factors will show if the European Commission strictly follows its own standards or whether deviations are observable.

This analysis does not include factors derived from the recent *de minimis* Regulation⁵⁷ on SGEI. Of course, this is not meant to imply that the *de minimis* Regulation is irrelevant for the postal sector; quite to the contrary. The reason for this choice is, however, that the *de minimis* only entered into force in May 2012. As a consequence, there are no decisions on postal services yet which also address the aspect of *de minimis*. Nevertheless, the *de minimis* thresholds are unquestionably relevant for Member States to deny the existence of aid and will, therefore, be briefly elaborated on in **section 4**.

3.2. Commission Decisions

⁵⁵ Directive 2008/6/EC of the European Parliament and the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services

⁵⁶ Commission Notice, 06 February 1998, notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, [1998] OJ C 039, p.2

⁵⁷ Commission Regulation (EU) No 360/2012, 25 April 2012, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to the *de minimis* aid granted to undertakings providing services of general economic interest, [2012] OJ L 114, p.8

Post Office Ltd [2006]⁵⁸

The Post Office Ltd [hereinafter: POL] case was decided by the Commission in February 2006. It concerned a measure, notified by the UK government in accordance with Art.88(3)EC [now Art.108(3)TFEU], which was intended to compensate POL for its postal services provided during the period 2006-2008.⁵⁹ In essence, the scope of POL's services in the UK covered the maintenance of a multitude of loss-making rural post offices in order to provide universal access to customers.⁶⁰

To prevent these offices from closing down and depriving a large part of Britain's population from access to vital infrastructure, the UK authority financed the losses incurred by POL; a measure which had already been approved by the Commission for an earlier period.⁶¹ After establishing that the measure did indeed constitute aid, the Commission proceeded to test its compatibility as a SGEI under Art.86(2)EC [now Art.106(2)TFEU].

An important thing to note is that the Commission only explicitly lists three of the established five criteria – the existence of a genuine universal service of general economic interest, the entrustment criterion and the compensation criterion – as necessary grounds for compatibility. The first factor is specifically defined by the Commission as essential – and in line with the pre-determined set of requirements – is the existence of a genuine SGEI. Recalling a previous CFI [now GC] judgement,⁶² the Commission accepts that “maintenance of an unprofitable presence in rural areas” does uncontestably constitute a SGEI.⁶³ It is, however, interesting to see that the Commission does not undertake a precise assessment on whether the service in question complies with all the criteria of universal services, as outlined by the Postal Directive; the affirmative outcome of which would qualify it as a SGEI in the postal sector.

Instead, the Commission follows a more general route. It only tests whether the UK's understanding of 'SGEI' aligns with the scope provided for by Art.16EC [now Art.14TFEU].⁶⁴ Thus, the Commission deviates from the criterion established in the section-specific Postal Notice in favour of a more general view on the definition of SGEI.

⁵⁸ Commission C(2006)434 final, on State aid N 166/2005 – United Kingdom, Government rural networks support funding to Post Office Limited (POL) for 2006-2008, Brussels, 22.II.2006

⁵⁹ Ibid., para.2

⁶⁰ Ibid., para.3

⁶¹ Ibid., para.15

⁶² T-106/95 *FFSA and other v Commission* [1997] ECR II-00229

⁶³ Commission C(2006)434 final, para.42

⁶⁴ Ibid., para.43

Secondly, the Commission assessed the entrustment criterion. In particular, whether there was an official instrument, which bestowed the service obligation on the undertaking – POL – and which also laid out the way the refund was to be calculated.⁶⁵ In line with the Package, the Commission stressed that entrustment had to occur by way of an official act; a ministerial instruction would suffice.

The last factor specifically addressed is the amount of compensation. Reiterating *Altmark*⁶⁶ and thus the Framework, the Commission states that for compensations under Art.106(2)TFEU the financial amount may not be more than what is needed to even out the costs for providing a SGEI, including a reasonable profit. To provide more clarification on what these terms entail, the Commission, referring to the Framework, recalls that ‘costs’ cover all variable costs, as well as “an appropriate contribution to fixed costs [and...] an adequate return on capital”.⁶⁷ Unfortunately for MSs concerned, no clear standard is provided what ‘appropriate’ or ‘adequate’ actually means. This would, however, be essential for an argument based on Art.106(2)TFEU. In *Post Office Ltd [2006]*, the Commission accepted the factor as met because the undertaking’s allocation of costs to particular product and service groups was provided for. However, it is noteworthy that the Commission did not look at the calculation method of the costs themselves, but only at the general cost accounting; subsequently comparing the actual costs with the compensation.⁶⁸

Next to these explicitly outlined factors, the Commission only acknowledges the criteria of ‘transparent accounts’ and ‘control over compensation’ on a side note; only half-heartedly indicating that also the UK’s provision of independent accounts is taken into consideration.⁶⁹ It may, of course, be that this factor had been under scrutiny the first time that the Commission administered the measure. Nevertheless, since these factors are specifically listed in the Postal Notice⁷⁰ and the Framework⁷¹, it would seem that the Commission should have looked closer at them; rather than just laxly putting them aside.

⁶⁵ Ibid., para.44

⁶⁶ C-280/00 *Altmark*

⁶⁷ Commission Communication 2005, para.16

⁶⁸ Commission C(2006)434 final, para.54

⁶⁹ Ibid., para.58

⁷⁰ Commission Notice, pp.24f

⁷¹ Commission Communication 2005, paras.19f

In sum, the Commission sticks to part of the criteria established in the past. Nevertheless, it appears to focus more profoundly on the general SGEI documents, rather than considering the sector-specific factors listed in the Postal Directive and Notice.

Poste Italiane [2008]⁷²

The Commission Decision on *Poste Italiane* [hereinafter: PI] was issued on 30 April 2008. It dealt with measure, notified by the Italian government via the procedure of Art.88(3)EC [now Art.108(3)TFEU], which served as a financial compensation to PI in return for offering universal postal services for the periods of 2006-2008. This universal service included performances of tasks relating to postal items and packages as well as to registered and/or insured items.⁷³ Subsequent to identifying the measure not just as aid but as illegal aid, the Commission went on to determine whether the aid was, nevertheless, compatible with the internal market based on Art.86(2)EC [now Art.106(2)TFEU].

The conditions listed as required are the same three as in *Post Office Ltd [2006]*, though arguably more defined. Firstly, a genuine service of general economic interest has to exist, even if the Commission does not provide a test regarding its assessment. Instead, it acknowledges that MSs have a wide discretion of classifying such services.⁷⁴ It is, however, worthwhile to point out that, at an earlier point in the decision, the Commission characterises PI's services as meeting the requirements of the Postal Directive.⁷⁵ For the purpose of clarity, it would have been advisable to also include this fact in the actual assessment, instead of simply referring to the MSs' discretion on the matter. The more general phrase used by the Commission relieves the criteria of the Postal Directive of much of its authority.

Secondly, the Commission again uses the same entrustment criterion; with the need for a "sufficiently clear" legal instrument,⁷⁶ bestowing the obligation of universal services upon the undertaking. Contrary to *Post Office Ltd [2006]*, the European authority is more thorough in its assessment, listing all additional relevant factors of the entrustment criterion, as given in

⁷² Commission C(2008)1606fin, on State aid n. NN 24/08 – Italy, Poste Italiane SpA, State compensation for universal postal service obligations 2006-2008, Brussels, 30.IV.2008

⁷³ Ibid., para.18

⁷⁴ Ibid., para.66

⁷⁵ Ibid., para.3

⁷⁶ Ibid., para.70

paragraph 12 of the 2005 Framework.⁷⁷ These include amongst others the precise nature and duration of the service as well as the standards for calculation, control and review of the compensation. By using these, the Commission makes its decision more complete and extensive.

Lastly, the focus turns again on the compensation criterion itself. Following specifically the wording of the Framework, the Commission concludes that, to determine the acceptable amount of compensation, the extra costs of the universal postal service must be quantified and compared to the financial support given.⁷⁸ With respect to compensation, the Commission conducted an in-depth analysis, extending the mere general information of the Framework.

In particular, it accepts the method of activity-based costing – a “fully distributed cost allocation method”⁷⁹ – as an accounting method complying with what is envisioned in the Framework and – even more important for the postal sector – the Postal Directive⁸⁰. Following a detailed assessment of the different aspects of PI’s accounting system, the European authority adds another clarification to the general layer of compensation. It establishes that in determining the amounts given for compensation a subsidy-capping mechanism – as used in *Poste Italiane [2008]* –, which takes inflation and planned efficiency gains into consideration, is a good way to ensure that no overcompensation occurs.⁸¹

However, the Commission again does not address transparency and control individually, but merely incorporates them in the assessment of compensation. It is questionable whether this is enough. Overall, the Commission shows a more extended way of analysis. It appears that the focus has shifted onto the compensation requirement as a more detailed analysis is now conducted.

Poczta Polska [2009]⁸²

The Poczta Polska decision related to *ex post* compensatory aid to the national operator Páństwowe Przedsiębiorstwo Użyteczności Publicznej Poczta Polska [hereinafter: PP] for

⁷⁷ Commission Communication 2005, para.12

⁷⁸ Commission C(2008)1606fin, paras.72f

⁷⁹ Ibid., para.76

⁸⁰ Directive 97/67/EC, Art.14(3)

⁸¹ Commission C(2008)1606fin, paras.99 & 101

⁸² Commission C(2009) 9962 final, on State aid n C 21/2005 (ex PL 45/2004) which Poland plans to implement for Poczta Polska as compensation of universal postal service obligations, Brussels, 12.12.2009

providing universal postal services in Poland.⁸³ On 30 April 2004, the Polish authorities notified the Commission of the measure under the ‘interim mechanism procedure’. It was intended to remedy the losses that PP had incurred under its postal obligations.⁸⁴ Although initiating proceedings under Art.108(2)TFEU, the Commission did not receive any comments from interested parties. After consideration of the Polish submissions, it found that the measure constituted aid within the meaning of Art.107(1) TFEU.⁸⁵

Turning to the assessment of compatibility, the Commission makes two important comments directly at the beginning. Firstly, it explicitly states that, in the analysis of an SGEI in the postal sector, it will look at three steps laid down in the Framework – the genuine SGEI, entrustment and compensation.⁸⁶ It completely omits the fact that also the Postal Directive itself and the Notice might be of importance, but rather – as in previous decisions – sticks to the more general rules. Secondly, before even looking in detail at the other criteria, the Commission already determines that it will focus the strongest on the compensation requirement.⁸⁷ For MSs and undertakings, this is an essential thing to keep in mind when preparing their own documentation with respect to (over-) compensation.

The assessment of compatibility itself follows the same scheme as in the previous cases. Starting with the factor of a genuine SGEI, the Commission recalls the wide margin of discretion MSs enjoy on the subject. However, when testing PP’s services, the Commission does not refer to the general notion of universal services, as in PI, but instead concretely points to their compliance with the concept of universal postal services defined in the Directive.⁸⁸ Thus, it determines that the sector specific requirements laid down in that document must be fulfilled.

With respect to the second criterion – entrustment –, the same standards apply as outlined in the Framework and as indicated in PI; the service must have been entrusted to the undertaking by way of official act, specifying the precise nature of the obligation as well as the territory, the undertaking concerned and the scope of its exclusive rights.⁸⁹ Next to this general notion, however, the Commission provides invaluable insight into what specifically it regards as essential; namely, that in the act itself “all parameters relevant for calculating [the] compensation

⁸³ Ibid., para.1

⁸⁴ Ibid., paras. 5 & 7

⁸⁵ Ibid., para.98

⁸⁶ Ibid., para.103

⁸⁷ Ibid., para.43

⁸⁸ Ibid., para.105

⁸⁹ Ibid., para.109

have [already] been specified”⁹⁰. Is this not the case – as evident from PP –, the entrustment criterion is not fulfilled. Interestingly, however, the Commission is seemingly willing to allow mitigation and does not follow a pure black and white test. As PP shows, if only some of the parameters are not defined, while all others are, the Commission considers this a partial fulfilment, which may still be remedied by the MSs concerned by including the lacking definitions *a posteriori*.⁹¹

As a last criterion, the Commission focuses on compensation and, as prior leaves stated, centres most of its attention on this aspect. Although stating again that it is necessary “to quantify the costs of public service obligation ... and compared them with the advantages”⁹² incurred, the European authority adds flesh to its general notion. It stresses that when devising an allocation methodology, MSs should strive to demonstrate the link between the costs and the services; especially, between the “costs of resources... and the services generated from those resources”⁹³. Therefore, it is most advisable for States to be as precise in their allocation of finances as possible. In this context, the Commission also underlines the necessity for separation of accounts⁹⁴ – transparency – and the existence of annual verification by an independent authority⁹⁵ – control. Regarding control, another clarification – not existing in any official document – is given; namely, that all types of costs incurred must be part of the audit.⁹⁶ Any limitation of the independent checks will lead to an insufficient control over compensation and thus a failure to comply with the compensation criterion.⁹⁷ Nevertheless, also here the Commission is willing to accept subsequent mitigation by the Member States to remedy any insufficiency.

In sum, PP, although mirroring the general assessment scheme of earlier decisions, adds an important insight in the test conducted by the Commission. MSs – even if not fully complying with the criteria – may avoid incompatibility by amending certain parts of their system *ex post*. It is worth noting that, so far, the Commission has only allowed changes to any administrative or procedural insufficiencies. It is likely that non-compliance with respect to the amount of the aid itself will not be able to be remedied by any means other than the retrieval of excess aid.

⁹⁰ Ibid., para.111

⁹¹ Ibid., paras. 114 & 164

⁹² Ibid., para.118

⁹³ Ibid., para.143

⁹⁴ Ibid., section V2.3.2

⁹⁵ Ibid., section V2.3.5

⁹⁶ Ibid., para.153

⁹⁷ Ibid., para.153

La Poste [2010]⁹⁸

In *La Poste [2010]*, the Commission finally decided over a measure by the French state which had been subject of intense scrutinising nation under both Art.108(3) & (2)TFEU since 2005. The measure in question took the forum of the *de facto* general state guarantee in the event of insolvency.⁹⁹ In essence, La Poste's creditors did not have to fear losing any investments should the undertaking become insolvent. As a publicly owned company, La Poste's assets were secured by law, meaning that the State guaranteed to pay all outstanding claims.¹⁰⁰ Thus La Poste had an advantage compared to its competitors, which did not have the same security connected to their assets. Concluding that the French measure did, accordingly, constitute aid in the meaning of Art.107(1) TFEU, the Commission proceeded to assess its compatibility with the provision of Art.106(2)TFEU.

La Poste [2010] is special from all other postal sector decisions regarding the assessment of compatible SGEI compensation since 2005, insofar as it is the only a measure that has been rejected by the Commission as incompatible. The reason for this decision is based on the compensation requirement. Recalling the Framework criteria, the Commission emphasised that “compensation paid cannot exceed the costs of providing the public service”¹⁰¹. This presupposes the possibility of calculating the precise value of the compensatory measure, so as to compare it with the actual costs incurred.¹⁰² However, with measure such as a general state guarantee, this calculation, according to the Commission, is not possible. Moreover, even if it was possible, the French guarantee to La Poste covered all of the latter's service activities and not just those connected to the universal postal service obligation.¹⁰³ Consequently, the compensation exceeds what is envisioned by the scope of Art.106(2)TFEU and thus has an excessive effect on trade.¹⁰⁴

Similar to PP, *La Poste [2010]* demonstrates that only a link between the aid measure and the universal service obligation – not other services – is allowed to exist if States wish to

⁹⁸ Commission C(2010) 133, on State aid C 56/07 (ex E 15/05) granted by France to La Poste, Brussels, 26.01.2010

⁹⁹ Ibid., para.251

¹⁰⁰ Ibid., para.251

¹⁰¹ Ibid., para.310

¹⁰² Ibid., para.311

¹⁰³ Ibid., para.312

¹⁰⁴ Ibid., para.313

introduce compatible guarantees; otherwise the compensation will be deemed excessive and incompatible with EU rules.

BPost [2012]¹⁰⁵

In early 2012, the Commission issued a decision on the financial support by the Belgian state in favour of DPLP [now bpost]. This support entailed a variety of measures; including pension relief, compensation for bpost's expenses of SGEIs provision, tax exemptions, state guarantees, transfer of buildings and capital injections.¹⁰⁶ Subsequent to the *Altmark* ruling, the Commission considered that these measures may indeed fall within the scope of Art.107(1)TFEU, which turned out to be true in all instances.¹⁰⁷ Only the compensation of bpost's SGEIs is, however, relevant for this research, as it is the only measure which was assessed for compatibility under Art.106(2)TFEU.¹⁰⁸

Directly from the outset of the compatibility test it becomes apparent that the Commission sticks to the amount of compensation as its main requirement. The entrustment of the SGEI is only addressed in two sentences and not even mentioned as a specific criterion as such.¹⁰⁹ Further, the Commission does not even question the genuineness of the SGEI at all. Although admittedly, the Commission has usually kept the analysis of this factor brief, it has, at least always addressed it. Instead, in *bpost [2012]*, the European authority dives straight in to the assessment of overcompensation and focuses all its efforts on this requirement.¹¹⁰ Two observations by the Commission have to be stressed, in this context, since they offer additional depth to the content of the Framework; the calculation of reasonable profit via benchmarking in the light of overcompensation and the modification by a MS of its cost accounting methodology.

Firstly, in order to determine what a reasonable profit margin is, the Commission selects a variety of companies as suitable comparators, based on their activities and the amount of risk they are exposed to, whose profits serve as benchmark for bpost.¹¹¹ In this context, not just postal

¹⁰⁵ Commission C(2012) 178 final, on State aid SA.14588 (C 20/2009) implemented by Belgium in favour of De Post-La Poste (now bpost), Brussels, 25.01.2012

¹⁰⁶ Ibid., para.24

¹⁰⁷ Ibid., 50, 158 & 223

¹⁰⁸ Ibid., section 6.3.3.

¹⁰⁹ Ibid., 232 & 233

¹¹⁰ Ibid., section 6.3.3.2.

¹¹¹ Ibid., para.248

companies are to be taken into consideration, but also comparable firms from other sectors.¹¹² Unfortunately, the Commission does not elaborate on what characteristics precisely make another operator comparable, which is a pity since it deprives the calculation of a lot of certainty, as MSs cannot definitely predict which comparators will ultimately be accepted. Nevertheless, the Commission, at least, offers an idea of who might fall into the scope of comparability.

For one, based on economies of scale, the average reasonable profit level increases with the size of a company, which renders larger firms more likely as comparators.¹¹³ Further, the capital–sales-ratio of the comparator must be similar to the beneficiary firm and not more or less capital intensive.¹¹⁴ After selecting the comparators, an evaluation of the median profit levels in the various benchmark groups is required in order to establish a default reasonable profit range, which has to be adjusted to the relative risk bpost is exposed to, which is determined by the contracts between bpost and the Belgian authorities.¹¹⁵ Finally, the amount of overcompensation is calculated by adding the annual compensation to the surplus from profit making public services and subtracting the net costs of the public service obligations as well as the reasonable profits.¹¹⁶ The amount one is left with constitutes the overcompensation and thus incompatible aid. Hence, the Decision extensively elaborates on the short section on profits found in the Framework.

Secondly, with respect to the modification of the cost accounting methodology, it was clarified that retroactive adaptation would not be accepted.¹¹⁷ As stated by the Commission, “an *ex-post* modification of past data” was not viable because “it [had] not been approved by the regulator as a basis for tariff-setting, nor [was] it being used by the State to calculate the SGEI compensation”.¹¹⁸ As such, such an action violated the principle that the commercial activities should be allocated their appropriate part of the common costs, as stated in the Postal Directive.¹¹⁹ The Commission thus takes up at least in part the sectorial provisions in its assessment, although the biggest focus is still on the Framework criteria – most specifically compensation.

¹¹² Ibid., para.299

¹¹³ Ibid., paras. 302 & 304

¹¹⁴ Ibid., para.308

¹¹⁵ Ibid., paras.312-320

¹¹⁶ Ibid., para.372

¹¹⁷ Ibid., para.137

¹¹⁸ Ibid., para.137

¹¹⁹ Directive 97/67/EC, Article 14(3)(b)(iv); Commission Communication 2005, para.16

The case *Deutsche Post [2012]* dealt with two measures by the German state dating back into the early 1990s. The measures in question consisted, firstly, the pension subsidy by the state, financing all remaining social benefits of Deutsche Post's retired civil servants.¹²¹ Secondly, it entailed public financial transfers of € 5.666 million between 1990 and 1994 as well as state guarantees for the payment of the firm's debt obligations.¹²² The 2012 Commission Decision follows an odyssey of procedural contestations. Only in January 2012, the Commission finally issued its ultimate decision, finding Germany's measures – the pension subsidy and transfers – liable of constituting aid in the meaning of Art.107(1)TFEU, while deeming the guarantees existing aid.¹²³

However, only the second measure is relevant for this research as the compatibility of the pension subsidies was not assessed under Art.106(2)TFEU, but rather Art.107(3)(a)&(c)TFEU. Interestingly, this was only the case because the German authorities rejected an assessment on grounds of SGEIs and claimed regional aid.¹²⁴ The Commission, on the other hand, had indicated that they may in fact have been a partial compliance with Art.106(2)TFEU, but emphasised that it was not obliged to analyse aid under a provision against a MS's will; Even if the measure demanded by the State did "clearly not apply".¹²⁵ The same view – that the Commission will consider Art.106(2)TFEU if the State does not rely on the article itself – has also been reaffirmed in the *Royal Mail [2012]* Decision¹²⁶ and thus arguably represents the Commission's common approach. This is important to know for MSs, because even if their compensation of SGEIs would be compatible, this will not automatically put them in a safe position if the State does not argue based on the relevant article itself.

Turning to the second aid – transfers –, the Commission keeps its standard of employing the Framework as guidance. It only briefly touches upon the genuineness of the SGEIs as well as the entrustment. Nevertheless, it appears that the 2012, the sector specific understanding of

¹²⁰ Commission C(2012), on State aid No. C36/2007(ex NN 25/2007) – implemented by Germany for Deutsche Post AG, Brussels, 25.01.2012

¹²¹ Ibid., paras. 57 & 59

¹²² Ibid., paras. 83 & 88

¹²³ Ibid., paras. 278, 427 & 442

¹²⁴ Ibid., para.289

¹²⁵ Ibid., para.288

¹²⁶ Commission C(2012) 1834, on the measure of SA.31479 (2011/C) (ex 2011/N) which the United Kingdom plans to implement for Royal Mail Group, Brussels, 21 March 2012, para. 155

universal service obligations derived from the Postal Directive has replaced the more general notion included in earlier decisions, as the Directive's standards are referred to by the Commission for verification purposes.¹²⁷

However, the trend to focus predominantly on the compensation criterion also continues in *Deutsche Post*. Under this factor, according to the Commission, three principles are essential; (i) compensation may not exceed what is necessary, (ii) it should cover all the benefits given by the government, and (iii) the compensation should actually be used for the SGEI.¹²⁸ For the purpose of calculation, it appears that a simple comparison of net costs of the SGEI with the amount of the advantages is sufficient.¹²⁹ This is in line with earlier methods used and accepted by the Commission.¹³⁰

As in previous cases, the Commission neglects to analyse the 'transparency of accounts' requirement. What is, however, significant in *Deutsche Post*, is that it not only ignores the factor in its assessment, it also completely disregards the assessment of the hired experts, which found that Deutsche Post does not meet the transparency requirement. The firm has no separate accounts, making it impossible to determine which of the firm's services generate what profits.¹³¹ Based on the Framework requirement, this should, therefore, lead to the finding of incompatibility or at least partial incompatibility. Instead, the Commission finds that Art.106(2)TFEU has been complied with.¹³² Accordingly, *Deutsche Post* seems to reflect what earlier decisions had already implicitly indicated; namely, that the transparency aspect is subordinated to the other Framework factors, in particular to the compensation criterion.

Post Office Ltd [2012]¹³³

On 28 March 2012, the Commission declared the subsidies to POL compatible with the EU state aid.¹³⁴ It was the first State aid decision in the postal sector after the publication of the 2012

¹²⁷ Commission C(2012), para.433

¹²⁸ Ibid., para.431

¹²⁹ Ibid., para.431

¹³⁰ Commission C(2008)1606fin – Poste Italiane [2008]; Commission C(2009) 9962 final – Poczta Polska [2009];

¹³¹ Commission C(2012), para.155

¹³² Ibid., para.439

¹³³ Commission C(2012) 1905 final, on State aid SA.33054 (2012/N) – United Kingdom, Post Office Limited (POL): Compensation for net costs incurred to keep a non-commercially viable network for the period 2012-15 and the continuation of a working capital facility, Brussels, 28.03.2012

¹³⁴ Ibid., para.105

Framework and concerned two measures by the UK; Firstly, for financially supporting POL for the provision of its network SGEIS during the period of 2012-2015 and, secondly, for extending POL's working capital facility.¹³⁵ After finding that the financial support did not satisfy the fourth *Altmark* criterion and thus constituted aid,¹³⁶ the Commission assessed its compatibility under Art.106(2)TFEU. Establishing that the aid fell outside the scope of the 2012 Decision on SGEIs¹³⁷, the Commission only applied the 2012 Framework.¹³⁸

Next to the earlier three factors – genuine SGEI, entrustment and competition – further requirements have been added to the revised Framework. It is clear from the Commission's words in *Post Office Ltd [2012]*,¹³⁹ that it will also expect MSs to fulfil the new criteria if aid is to be compatible with Art.106(2)TFEU. Thus, States will have to demonstrate that (i) they entrusted a genuine SGEI via an official act for a specified duration, that they complied with (ii) Dir.2006/111/EC and (iii) the EU public procurement procedures while doing so, (iii) that tenderers were treated non-discriminatorily, (iv) the State did not overcompensate the service, and (v) published all necessary information in accordance with section 2.10. of the Framework.¹⁴⁰ Accordingly, assessment standards for the compensation of SGEIs in the postal sector have arguably become more demanding in recent years with more aspects for MSs to comply with; and the Commission will follow these criteria step by step.

Two aspects of the assessment are especially interesting to point out. Firstly, the Commission provides an insight in the scope of the EU public procurement requirement included in the assessment.¹⁴¹ It indicates that the special negotiation procedure without prior publication¹⁴² may be used when entrusting an SGEI, provided that the economic operator is the only one able to provide the service.¹⁴³ Secondly, the Commission indicates as to what is acceptable as an efficiency incentive in the postal sector. It accepts that POL's obligation to meet the yearly efficiency mile in combination with the provision that failure to meet the milestones

¹³⁵ Ibid., paras. 2 & 3

¹³⁶ Ibid., para.41

¹³⁷ Commission Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11 January 2012, p. 3)

¹³⁸ Commission C(2012) 1905 final, paras. 51-52

¹³⁹ Ibid., para.53

¹⁴⁰ Ibid., para.53

¹⁴¹ Ibid., para.67

¹⁴² Directive 2014/24/EU, 29 March 2014, of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, (Text with EEA relevance), OJ L 94, Art. 32(2)(b)

¹⁴³ Commission C(2012) 1905 final, para.67

absolves the UK from the obligations to provide the subsidies to POL as sufficient to incentivise the firm.¹⁴⁴ In sum, the Decision makes it clear that the assessment standards for compatibility of postal services under Art.106(2)TFEU are more extensive with the new Framework.

Poste Italiane [2012]¹⁴⁵

The *Poste Italiane [2012]* Decision concerned a compatible financial compensation by the Italian government intended to refund PI for, firstly, providing its universal service obligation for the period of 2009-2011 as well as for, secondly, reducing its tariffs for specific group of persons.¹⁴⁶ On 20 November 2012, the Commission found that both measures constituted aid in the meaning of Art.107(1)TFEU.¹⁴⁷

With respect to the assessment of compatibility, the Commission promptly establishes that the new and more elaborate provisions of the 2012 Framework do, in general, apply.¹⁴⁸ However, an important observation that results from *Poste Italiane [2012]* is that, although the Commission will usually consider all those factors, this is not so in case of illegal aid.¹⁴⁹ As is apparent from the Commission's assessment of the Italian – illegal – aid measures and from its own statement in paragraph 74, in such a situation the compatibility test will only be conducted on the basis of four of the Framework's factors; the genuine SGEI, the entrustment act including a specification of the obligations and calculation methodology, the duration of the entrustment, and the amount of compensation.¹⁵⁰ In this context, some new clarifications are introduced.

Firstly, to constitute a universal service obligation in the postal sector, the Commission, for the first time, specifically holds that the “minimum requirements [as] laid down in the Postal Directive”¹⁵¹ have to be fulfilled. Therefore, a more stringent trend towards a sector specific analysis and a use of the *lex specialis* can be identified. Secondly, also with respect to the duration, the Commission stresses that the Postal Directive serves as an instrument of orientation;

¹⁴⁴ Ibid., paras.97-99

¹⁴⁵ Commission C(2012) 8230 final, on State aid SA.33989 (2012/NN) – Italy, State compensation for the delivery of universal service over 2009-2011, Brussels, 20.11.2012

¹⁴⁶ Commission C(2012) 8230 final, para.1

¹⁴⁷ Ibid., paras. 53 & 64

¹⁴⁸ Ibid., paras.73 & 74

¹⁴⁹ Ibid., para.74

¹⁵⁰ Ibid., sections 3.3.1, 3.3.2, 3.3.3 & 3.3.4

¹⁵¹ Ibid., para.77

in particular, Art.4(2).¹⁵² In essence, the duration of entrustment is not meant to be longer than the “depreciation of the most significant assets”¹⁵³ used in its provision. However, the Commission also establishes that the duration factor, introduced in the revised Framework, will only apply to those measures that have been enacted of the document’s publication; the criterion does not apply retroactively to earlier aid under assessment.¹⁵⁴

Overall, *Poste Italiane [2012]* is decisive in showing the implications of illegal aid on the usual assessment procedure under the 2012 Framework.

Bpost [2013]¹⁵⁵

The 2013 *bpost* decision concerned another measure notified by the Belgian state meant to subsidise part of bpost’s universal postal service obligations between January 2013 and December 2015.¹⁵⁶ This compensation was intended to cover the services bpost was entrusted with as Belgium’s main postal service provider; ranging from collection and transport of post to sorting and delivering of all kinds of items.¹⁵⁷ As with similar kinds of compensations in previous decisions, the Commission also finds that the Belgian measure constitutes aid in the meaning of Art.107(1)TFEU.¹⁵⁸

As a second step in the procedure, the Commission thus seeks to determine whether the USO was, nevertheless, compatible aid under Art.106(2)TFEU. As in *Poste Italiane [2012]*, the Commission meticulously follows the structure of the 2012 Framework in its assessment. In its assessment, the Commission regards all the requirements listed in sections 2.2.2 – 2.2.11 as necessary and indispensable factors.¹⁵⁹ Throughout the decision, the wording of the 2012 Framework serves as an ultimate guidance and the Commission scrutinises whether the case specific circumstances fall within the scope of what is envisioned by the document. With respect to two of these criteria, the Commission, however, offers additional insight as to which specific standards are to be applied.

¹⁵² Ibid., para.83

¹⁵³ Commission Communication 2012, section 2.4

¹⁵⁴ Commission C(2012) 8230 final, para.90

¹⁵⁵ Commission C(2013)1909 final, on State aid SA.31006 (2013/N) – Belgium, State compensations to bpost for the delivery of public services over 2013-2015, Brussels, 02.05.2013

¹⁵⁶ Ibid., paras.1 & 3

¹⁵⁷ Ibid., para.5

¹⁵⁸ Ibid., para.88

¹⁵⁹ Ibid., sections 3.2.2.2 – 3.2.2.11

Firstly, it makes clear that while MSs, in granting aid, have to comply with the Transparency Directive¹⁶⁰, it is not necessary to have one particular cost accounting system on the expense of other equally viable alternatives. However, what is obligatory is that the chosen system complies with the general content of the directive. In essence, this would entail a clear allocation of service costs and the financial benefit that is linked to the specific service.¹⁶¹

Secondly, the decision elaborates on the use of the ‘sole operator exemption’ in the context of the public procurement criterion.¹⁶² The Commission accepts that under certain circumstances, the negotiated procedure without publication¹⁶³ can be used in relation to SGEI entrustment. However, this is only possible if the provider chosen by the state is truly the only economic operator able to provide the service due to technical reasons – network or facilities.¹⁶⁴ The ‘sole operator exemptions’ is merely acceptable if other operators would be unable to offer the same services at an equal level of costs; meaning that the same amount of compensation would not incentivise them to offer the same SGEI in the first place.¹⁶⁵ Therefore, *bpost [2013]* elaborates on the link between EU State aid and public procurement procedures in the assessment of compatible State aid. Overall, the decision thus mirrors the Commission’s previous approach of following the structure of the 2012 Framework in its assessment of compensation of SGEIs in the postal sector.

3.3. Comparative Findings

The comparative analysis of the Commission Decisions has provided significant insight and has led to the following conclusion. Throughout all the cases, it becomes clear that the Commission pursues a general approach to assessing compensation of SGEIs in the postal sector. Rather than employing the criteria of the *lex specialis*, i.e. the Postal Directive, the preferred guidance for the assessment is the *lex generalis* – i.e. the 2005, and later 2012, EU Framework on services of general economic interest.

¹⁶⁰ Commission Directive 2006/111/EC 16 November 2006, on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [2006] OJ L 318, p.17-25

¹⁶¹ Commission C(2013)1909 final, para.123

¹⁶² Ibid., section 3.2.2.5

¹⁶³ See Directive 2014/24/EU, Art. 32(2)(b)

¹⁶⁴ Commission C(2013)1909 final, para.140

¹⁶⁵ Ibid., para.138

This methodology has direct implications for the tests of compatibility under Art.106(2)TFEU. As visible in Table 1¹⁶⁶, the Commission does usually not make use of all the factors identified in **section 3.1.**, but focuses predominantly on the existence of a genuine SGEI, the entrustment and the compensation aspect; on the expense of transparency and control. The simple reason for this lies in the Commission's use of the *lex generalis*. The general provisions of the 2005 Framework put much more emphasis on these aforementioned three factors, while transparency and control were criteria stressed in the Postal Directive and the Postal Notice. By subordinating the sector specific documents to a more general scheme of assessment, the Commission also understandably pays less attention to the criteria listed in those documents. Accordingly, the *lex generalis* conditions prevail.

Moreover, as also depicted in Table 1, this approach changed substantially with the revision of the Framework in 2012. The two decisions issued after the publication of this document follow the more extensive assessment of the new Framework; now also including transparency and control. However, this does not mean that, overall, the Commission's methodology has changed. Also today, it is still the *lex generalis* that is the main guidance in the assessment of compatibility under Art.106(2)TFEU. As such, it will also apply in special sectors such as postal services, even if more sector specific provisions exist.

Additionally, the analysis has shown that the Commission does not pursue a pure black and white test, but is willing to allow derogations under certain circumstances. Thus, as shown in *Poczta Polska [2009]*, the Commission may also declare an aid compatible on additional conditions. It is, therefore, possible for MSs to mitigate insufficiencies, regarding the procedures or administration, *ex post*. However, it is unlikely that the same will hold true for lacking compatibility with respect to the amount of the compensation itself. Therefore, the findings indicate that the Commission is more lenient regarding the entrustment criterion than it is with regard to the actual financial aid itself, as the latter must meet the requirements. Further, it has been shown that, also in case of illegal aid, the Commission may accept and adapted assessment of the necessary criteria. Hence, it is within the Commission's discretion to decide whether it applies all or just a selection of the 2012 Framework factors. Although not necessarily enhancing legal certainty, it certainly is in line with the Commission's strong power in the field of State aid.

Overall, the findings clearly demonstrate that the 2012 Framework is the document of importance when it comes to determining whether an advantage conferred on an SGEI in the

¹⁶⁶ See Annex 1

postal sector is compatible with Art.106(2)TFEU. This raises several questions. What does that really mean for MSs and undertakings concerned? What implications do the Commission decisions really have for the daily practical application of supportive State measures? The following section intends to shed light on these questions. It serves as a short guidance as to what standards MSs really have to comply with in the context of postal aid.

4. Guidance

Before going into the substance as to what MSs have to do in order for their aid measures to be covered by the special provisions of Art.106(2)TFEU, there is one major aspect about this article that must be stressed right away. As shown by the analysis¹⁶⁷, the fact that the particular compensation for a SGEI is likely to be compatible with Art.106(2)TFEU will not by itself lead to a finding of compatibility; as paradox as this may sound. MSs have to invoke an assessment under this article themselves if they wish to be on the safe side. The Commission will not make use of the provision against the MS's will; although it is not certain whether it will also refrain from testing compliance with this provision if a MS has simply omitted to use it.

With respect to the actual substance of the compatible measure, this short guidance starts from the established *status quo*¹⁶⁸, namely, that the commission will apply the criteria of the 2012 Framework in its test of compatibility regarding compensation of SGEIs in the postal sector. Based on the previous findings, this section provides additional insight into what these criteria actually mean in practice. For this purpose it mirrors the structure of the requirements, listed in sections 2.2.-2.11. of the 2012 Framework.

With respect to the first requirement – that the SGEI has to be genuine in nature¹⁶⁹ – the Decisions show a clear development in the postal sector not included as such in the Framework.¹⁷⁰ MSs intending to support the postal operator have to ensure that the service, for which the advantage is meant, must conform with the universal postal service defined in the Postal Directive¹⁷¹; more precisely Arts. 3 & 5. Accordingly, as stipulated in Art.3 Dir.2008/6/EC, postal services have to demonstrate the specific set of features to be universal.

¹⁶⁷ Commission C(2012); Commission C(2012) 1834

¹⁶⁸ See **section 3.3.**

¹⁶⁹ Commission Communication 2012, section 2.2.

¹⁷⁰ Commission C(2009) 9962 final; Commission C(2012)

¹⁷¹ Directive 2008/6/EC, Art.3 & 5

Firstly, they must be organised on a permanent basis with the specified degree of quality in the whole national territory.¹⁷² Further, the service has to cover all items listed in paragraph 4 and be provided every working day and at least five times a week.¹⁷³ Regarding the provision itself, the service has to be identical for all consumers in an equal situation on a non-discriminatory basis.¹⁷⁴ There may be no interruption, except in dire circumstances, and the service has to develop together with the societal and economic needs. If those characteristics are not met, the service will not be a USO in the meaning of the Postal Directive. As such, it is also unlikely to be considered a genuine SGEI and thus compatible under Art.106(2)TFEU.

The second requirement of entrustment via an official act¹⁷⁵ does not just need a “sufficiently clear”¹⁷⁶ specification of the public obligation and the calculation method in general. Indeed, not so much the form as the content is decisive.¹⁷⁷ The essential factor, which can tip the scale, is whether all the relevant parameters for the calculation are precisely listed and explained.¹⁷⁸ The importance of this cannot be overstated. MSs, which omit to provide a coherent set of parameters, will have their aid be deemed as not or only partially meeting the requirements. This will *de facto* lead to a finding of incompatibility of the aid. However, it can be observed as well that the Commission may allow *ex post* mitigation of insufficiencies.¹⁷⁹ MSs should, however, not rely too heavily on this possibility, as it is completely up to the discretion of the Commission whether it will be granted or not.

Third, as a newly included sub-condition, the 2012 Framework requires MSs to define the duration for which the SGEI is entrusted.¹⁸⁰ The reason for this new section was the Commission’s aim to prevent “excessively long entrustment periods”,¹⁸¹ which could invoke further distortion of the competitive market. The general rule to be found in the document is that this period may not be longer than that necessary for the “depreciation of the most significant

¹⁷² Ibid., Art.3(1)

¹⁷³ Ibid., Art. 3(4) & (3)

¹⁷⁴ Ibid., Art. 5

¹⁷⁵ Commission Communication 2012, section 2.3.

¹⁷⁶ Commission C(2008)1606fin, para.70

¹⁷⁷ Geradin; ‘Public Compensation for Services of General Economic Interest: An Analysis of the 2011 European Commission Framework’. March 2012, last retrieved on 24 May 2014 from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564, p.4

¹⁷⁸ Commission C(2009) 9962 final, para.111

¹⁷⁹ Ibid., para.164

¹⁸⁰ Commission Communication 2012, section 2.4.

¹⁸¹ Pesaresi et al.; ‘The New State Aid Rules for Services of General Economic Interest (SGEI): the Commission Decision and Framework of 20 December 2011’. 2012, last retrieved on 24 May 2014 from: http://ec.europa.eu/competition/publications/cpn/2012_1_11_en.pdf, p.12

assets required to provide the SGEI”.¹⁸² However, for the postal sector, the Commission has added another layer of specification;¹⁸³ namely that MSs should also take account of Art.4(2) of the 2008 Postal Directive. This article provides that a MS must notify the Commission of the chosen operator. Further, this choice must be regularly reviewed while the duration is limited to a “period sufficient for the return of investments”.¹⁸⁴ Thus, for this Framework criterion, the consultation of the sector specific legislation is necessary to achieve compatibility.

The fourth criterion, which MSs have to fulfil under the current regime, is compliance with Dir.2006/111/EC¹⁸⁵ – the Transparency Directive. As of yet, not much clarification has been provided by the Commission on what precisely this entailed in practice. Indeed, it is probable that this factor will only be of limited significance, since transparency and the separation of accounts are in any way expected.¹⁸⁶ However, what must always be kept in mind is that, with respect to transparent financial accounting methodologies, an undertaking has to specifically expound the relation between its costs and the activities under its SGEI and “correctly [allocate] all [these] costs with a sufficient level of adequacy”¹⁸⁷. Therefore, for the purpose of complying with the fourth criterion, MSs and undertakings have to ensure that this link is clearly and coherently established.

Fifth, when bestowing a service on an undertaking, MSs are now explicitly required to follow the EU public procurement rules¹⁸⁸ – when falling within scope of Dir.2014/24/EU. This is one of the most radical and debated new inclusions in the 2012 Framework.¹⁸⁹ It is clear from the decisions of the postal sector, that the full directive will apply to the assessment of Art.106(2)TFEU and not simply the lightens regime of Title III,¹⁹⁰ which may have been assumed due to the SGEIs’ is nature of socially necessary and important services. As a consequence, MSs can also invoke the exceptions and special procedures for entrusting in USO; for instance, the sole operator justification in the context of the negotiated procedure without

¹⁸² Commission Communication 2012, para.17

¹⁸³ Commission C(2012) 8230 final, p.77

¹⁸⁴ Directive 2008/6/EC, Art. 4(2) sub-paragraph 2

¹⁸⁵ Commission Communication 2012, section 2.5.

¹⁸⁶ Pesaresi et al, p.12

¹⁸⁷ Commission C(2013)1909 final, para.123

¹⁸⁸ Commission Communication 2012, section 2.6.

¹⁸⁹ Geradin, p.5

¹⁹⁰ Commission C(2013)1909 final

prior publication.¹⁹¹ Public procurement hence becomes an integral part of the granting of public servers aid.

With regard to the sixth, seventh and ninth requirements – the absence of discrimination,¹⁹² additional requirements,¹⁹³ transparency,¹⁹⁴ respectively – no additional insight into the precise application to postal services has been provided by the Commission via its decisions. Therefore, MSs and postal operators are advised to comply as closely with the general concepts outlined in the 2012 Framework as possible.

The last criterion – the amount of compensation¹⁹⁵ – has also proven to be the most decisive one and the one that the Commission focuses on the most in the postal sector. The general concept prevails that compensation may not exceed what is necessary for the provision of the service.¹⁹⁶ For that purpose the Framework lists a variety of sub-elements – based arguably on an efficiency maximising rationale¹⁹⁷ – to be taken into account. Next to these, however, the Commission's decisions in the postal sector provide more in-depth meaning to this criterion.

Firstly, with respect to state guarantees, MSs have to pay close attention to the necessity aspects of compensation.¹⁹⁸ If it is not possible for the Commission to calculate the precise value of the guaranteed advantage, the MS is going to fall short of compliance.¹⁹⁹ The same holds true if the Commission cannot determine that the guarantee applies only to the entrusted SGEI and not also to other activities of the postal operator.²⁰⁰ Accordingly, such an aid measure will automatically resolves in a finding of incompatibility under Art.106(2)TFEU.

Secondly, regarding the calculation itself, the Commission prefers a net avoided cost methodology,²⁰¹ but also accepts cost allocation methodologies.²⁰² To this end, postal decisions have demonstrated that an activity-based costing methodology, as applied in *Poste Italiane [2008]*²⁰³, falls within the accepted scope. Moreover, to avoid overcompensation, the

¹⁹¹ Ibid., 140; Directive 2014/24/EU, Art.32(2)(b)

¹⁹² Commission Communication 2012, section 2.7.

¹⁹³ Ibid., section 2.9.

¹⁹⁴ Ibid., section 2.10.

¹⁹⁵ Ibid., section 2.8.

¹⁹⁶ Commission C(2009) 9962 final, para. 43

¹⁹⁷ Pesaresi et al, p.14

¹⁹⁸ Commission C(2010) 133, para.311

¹⁹⁹ Ibid., para.311

²⁰⁰ Ibid., para.312

²⁰¹ Commission Communication 2012, paras.25-27

²⁰² Ibid., para.28

²⁰³ Commission C(2008)1606fin, para.76; for the precise description of the accounting methodology accepted in this decision see Annex II

Commission acknowledges that MSs may use a subsidy capping mechanism.²⁰⁴ By directly taking inflation rates and probable efficiency gains into account when calculating the financial support, such a mechanism automatically avoids the risk of overcompensation. In essence, MSs can thus deviate from the Commission's preferred methodology, but should, in such a case, ensure that they account for all costs and, already from the outset, reduce the probability of overcompensation.

Lastly, the method of calculating the reasonable profit has been clarified in *bpost* [2012].²⁰⁵ To this end, the Commission envisages a benchmark test based on the profits of comparable undertakings in both the postal as in other markets. In the context of selecting comparators, MSs have to take account of the capital-sales-ratio of potential comparable undertakings, which must resemble that of the beneficiary concerned.²⁰⁶ Furthermore, due to economies of scale in the postal sector and their effects on profit levels, bigger companies are more likely to constitute comparators than smaller ones.²⁰⁷ Ultimately, the default range for the reasonable profit has to be established by evaluating the median profit levels of all comparators. The Commission thus arguably goes considerably further than any overview on the same matter provided in the 2012 Framework.

Overall, it is brutally apparent that the Commission's assessment of compensation of SGEIs is far stricter than it was 10 years ago and that, in the postal sector, the Decisions have added – to a certain degree – additional factors to be considered. Interestingly enough, this means that aid, accepted as compatible under the 2005 Framework, would nowadays not pass the test anymore. However, since the Commission also has the duty to regularly review existing aid, this discrepancy may be remedied in the future; meaning that either MSs will have to provide more thorough information or that their aid will 'cease to exist'.

5. Conclusion

This paper set out to determine whether the Commission, when assessing the compatibility of aid for SGEIs in the postal sector, followed the criteria established in the Postal Directive and Notice as well as on the 2005 – and later 2012 – Framework; or whether adaptations were visible in its practical application. Its main aim was to offer MSs and postal operators a better insight into and

²⁰⁴ Ibid., para.99

²⁰⁵ See section 3.2., *Bpost* [2012]

²⁰⁶ Commission C(2012) 178 final, para.308

²⁰⁷ Ibid., paras. 302 & 304

guidance on what factors are particularly important for them if they wish to grant or receive compatible aid for postal SGEIs.

An analysis of the Commission Decisions in the postal sector from 2005 to today has clearly shown one thing: the main instrument of guidance to the compatibility test is the *lex generalis*, the Framework on SGEIs. Even in a sector, such as the postal services one, where *lex specialis* exists, the Commission is prone to follow a general route. With this finding in mind, it is, therefore, not surprising that the criteria stressed particularly in the sector specific documents do not find much – if any – attention in the assessment under Art.106(2)TFEU. Today, it is the 2012 Framework that has the biggest impact; also in the postal sector.

This aspect was elaborated on in the **guidance section 4.** which, in essence, served two aims. Firstly, it provided sector specific clarification on how MSs and postal undertakings have to read the conditions of the 2012 Framework with respect to the postal sector. Following the structure of the Framework itself, our guidance explained what aspects the Commission added in its practical application. Secondly, the guidance briefly posits that, given the stricter standards of the 2012 Framework, many postal aid measures, which complied with the old test, are not likely to continue to do so under the current conditions. It remains to be seen how the Commission assesses these measures under its review of existing aid, and what further insight future decisions might bring.

ANNEX I

TABLE 1: Comparative findings of factors explicitly addressed by the Commission

	(I)	(II)	(III)	(IV)	(V)
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	GENUINE SGEI IN ACCORDANCE WITH DIR.	TRANSPARENCY OF ACCOUNTS	ENTRUSTMENT CRITERION	COMPENSATION CRITERION	CONTROL CRITERION
<i>POST OFFICE LTD.</i> [2006]	x		x	x	
<i>POSTE ITALIANE</i> [2008]	x		x	x	
<i>POCZTA POLSKA</i> [2009]	x	x	x	x	x
<i>LA POSTE</i> [2010] incompatible				x	
<i>DEUTSCHE POST</i> [2012]	x		x	x	
<i>BPOST</i> [2012]			x	x	
<i>POST OFFICE LTD.</i> [2012]	x	x	x	x	x
<i>POSTE ITALIANE</i> [2012]	x	x	x	x	x
<i>BPOST</i> [2013]	x	x	x	x	x

ANNEX II

POSTE ITALIANE'S ACCOUNTING SYSTEM²⁰⁸

²⁰⁸ Commission C(2008)1606fin, on State aid n. NN 24/08 – Italy, Poste Italiane SpA, State compensation for universal postal service obligations 2006-2008, Brussels, 30.IV.2008

(80) The integrated accounting system of PI consists of:

- the general accounting system: costs and revenues are recorded in function of their nature (PI's chart of accounts is made of about 2000 accounts);
- analytical accounting system: the above costs are attributed to cost centres (about 26000);
- ABC system: the costs of the cost centres are attributed to the activities (146 activities in 2006); the costs of the activities are attributed to products (149 products in 2006).

(81) PI's analytical accounting divides costs into:

- Direct costs: these are costs of resources specifically used for the production of a product or a service. They can be directly attributed to a specific product/service through the analysis of the general accounts. In 2006, they represented [...] * % of PI's total operating costs (EUR [...] million)²⁷. Typical examples of these costs are the external charges (e.g. advertisement cost of a specific product; outsourcing cost of a specific activity).
- Direct production costs: they are the costs of the divisions producing products and services. These costs are attributed to products through the ABC system. This system is based on the logic that the activities consume resources and the products absorb the activities. Basic elements of this methodology are the costs drivers, i.e. resource drivers and activity drivers. The resource drivers are the technical/physical parameters that determine the usage of the resources from the activities (e.g. full time equivalent, square meters, working time of equipment etc). The activity drivers are parameters that permit to attribute parts of the costs of the activity to the single product (e.g. n. of products, n. of deliveries, etc). In 2006, they represented [...] % of PI's total operating costs (EUR [...] million)²⁸.
- Indirect production costs: they are staff costs of PI's divisions (administration costs of the mail division; administration costs of the territorial network division etc.). They are attributed to product through the "cost to cost" methodology, i.e. in function of the costs of activities which are already attributed to products. In 2006, they represented [...] % of PI's total operating costs (EUR [...] million)²⁹.
- Central costs: they are the costs of the staff departments (e.g. Communications and External Relations; Legal Affairs; Human Resources and Organization etc). They are attributed to product through the "cost to cost" methodology, i.e. in function of the costs of activities which are already attributed to products. In 2006, they represented [...] % of PI's total operating costs (EUR [...] million)³⁰.

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