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State aid and SGEIs: (Almost) Nothing New Under the Sun (C?434/19 and C?435/19 Poste Italiane)

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In the last decade, the EU scene has been characterised by a more flexible application of State aid rules, partially due to the persistent emergencies across the continent. But this trend has not significantly affected the application of Art. 106(2) TFEU or, more generally, the rules governing the financing of services of general economic interest ("**SGEIs**"). In fact, these rules seem to have achieved a good level of stability even though they are based on a delicate equilibrium between Member States' prerogatives in the design of public services and the protection of the level playing field.

It is almost ten years since the adoption of the Almunia package, and only a few conceptual problems of a legal nature remain unresolved. It is thus no surprise that the recent Court of Justice's caselaw on the matter offers poor innovations and that the *Poste Italiane* judgment is no exception, although it does provide an opportunity to examine some of the unresolved issues.

The *Poste Italiane* judgment

On 3 March, the Court of Justice issued its judgment in the *Poste Italiane* case (Joined Cases C?434/19 and C?435/19, *Poste Italiane SpA v Riscossione Sicilia SpA*; *Agenzia delle entrate v Poste Italiane SpA*). It concluded that a measure requiring agents responsible for collecting the Italian municipal real estate tax ("**ICI**") to hold a current account with *Poste Italiane* (to enable taxpayers to pay that tax) and to pay a fee for the related management qualifies as State aid if the referring court, i.e.,/in this case, the Supreme Court, ascertains that the requirements under Art. 107 TFEU, as clarified by the Court of Justice in its judgment, have been met.

Indeed, under Italian law, taxpayers subject to the ICI were required to pay the amount owed to one of the collecting agents: (i) directly, or (ii) into the agent's current account at the post office. Because only *Poste Italiane* provides the services for current accounts at the post office, it benefits from a statutory monopoly and determines the fees to be levied on each management operation.

Riscossione Sicilia and the Italian tax authority, which are both ICI collection agents, refused to pay the management fees for the period 1997–2011 and, after two complex administrative proceedings brought by *Poste Italiane*, the two cases landed before the Supreme Court, which referred the case to the Court of Justice for a preliminary ruling on three requests. With the first

and second questions, it substantially asked: (i) whether the obligation for the agents to hold a current account in their name with *Poste Italiane* and to pay the related fees may be qualified as an SGEI, and, more generally (ii) whether this measure constitutes State aid. With the third question, it asked whether this measure is in breach of Art. 102 TFEU.

The Court of Justice concluded that the *Poste Italiane*'s post-office current account services cannot be qualified as an SGEI and thus do not satisfy the first *Altmark* condition. Indeed, contrary to what is required by the well-settled caselaw, *Poste Italiane* was not entrusted by one or more acts of public authority that precisely defined the nature, duration and scope of the alleged public service obligations. On the contrary, except for the obligation to contract with all the collecting agents, *Poste Italiane* had no additional obligations to those that apply to the banking services sector. Indeed, it was free to set the level of its fees, and its contractual relationship with the collecting agents was identical to that of its other post-office current account clients since it applied the same financial terms. Based on this, the Court of Justice concluded that the *Poste Italiane*'s right did not fulfil the *Altmark* test and may thus be regarded as a selective advantage but that it was a matter for the referring court to verify.

As to the other requirements under Art. 107 TFEU, the Court of Justice merely gave some clarification to the referring court about how to ascertain their fulfilment, including by giving some possible alternative scenarios and indicating the elements to focus on in light of its caselaw.

The clarification especially concerned the State resources requirement, for which the Court of Justice, after recalling the extensive case law on the matter, specified that it was not likely that the measure involved State resources because: (i) it entailed an obligation to purchase services, and (ii) no indications suggested a State's dominant influence over the resources. However, the Court of Justice pointed out that it is necessary for the referring court to determine whether the collecting agents constituted undertakings appointed by the State to manage a State resource, by verifying whether a full offset mechanism was in place for the additional costs resulting from that purchase obligation.

As to imputability, the Court of Justice was quite clear in clarifying that the measure at issue was based on legislative and regulatory provisions and, therefore, is likely imputable to the State. The Court of Justice reached a positive conclusion also with reference to the effects on trade between Member States and distortion of competition requirements.

Lastly, the Court of Justice ruled that the third question was inadmissible because the referring court had failed to provide any information to enable the Court of Justice to assess whether the constituent elements of a dominant position under Art. 102 TFEU existed in the context of the cases in the main proceedings.

The first *Altmark* condition and the constant tension between the Commission and the Member States

In the case at issue, the failure to fulfil the first *Altmark* condition is self-evident given that *Poste Italiane* was not entrusted by one or more acts of public authority that precisely defined the nature, duration and scope of the alleged public service obligations.

However, more in general, one of the unresolved legal conceptual problems relating to the

financing of SGEIs revolves around the first *Altmark* condition, more precisely, the notion of SGEI, which constitutes a completely autonomous notion elaborated at the EU level. Indeed, in the absence of EU sectoral rules, Member States enjoy a wide margin of discretion in defining a given service as an SGEI, and the only control is exercised by the Commission, whose competence is however limited to manifest errors.

Nevertheless, the concept of manifest error is still uncertain, and this has led the Commission to apply quite a lenient approach in some cases. But the Commission should distinguish between the parameters of an objective nature at the basis of the notion of SGEI and those of a subjective nature (e.g., the existence of a cultural tradition) and apply a stricter approach with regard to the former when examining the responsiveness of a service to a genuine need of the society. Development of the caselaw in this direction is desirable, and references for a preliminary ruling, if properly used, may play a key role in this respect.

Altmark conditions and Art. 106(2) TFEU

Another unresolved conceptual problem that is touched on the *Poste Italiane* judgment concerns the interplay between the *Altmark* conditions and Art. 106(2) TFEU. The Court of Justice, in concluding its reasoning on the first two questions, clarified that, because the first *Altmark* condition is also required by Art. 106(2) TFEU, this compatibility legal basis did not apply in the case in question.

This conclusion was based on the fact that both the Monti package and the Almunia package strongly assimilate the two assessments: the SGEI Decision's and the SGEI Framework's requirements of compatibility mirror the first three *Altmark* conditions. This rigid *Altmark*-dependent approach is not only erroneous from a legal perspective but also constrictive and dangerous for companies and Member States. Indeed, the conditions set by the *Altmark* judgment allows the exclusion of the existence of an advantage and thus concern the notion of aid. Conversely, Art.106(2) TFEU deals with the compatibility analysis.

Although the caselaw has partially clarified this distinction, the case law is far from settled because the Commission tends to interpret the SGEI Decision and Framework as requiring fulfilment of the first three *Altmark* conditions (and sometimes even the fourth). Clearer, detailed clarification of this difference is thus needed and may be provided by amending the SGEI Decision and Framework or by the Court of Justice issuing a landmark judgment.

The unanswered question: is this an exclusive right?

The final aspect to address concerns the advantage requirement more generally. It is evident that the first question referred by the Supreme Court was flawed. As explained above, the measure at issue clearly does not fulfil any of the *Altmark* conditions, and the advantage element should have been and should be analysed by the referring court from another perspective.

The Supreme Court should have asked the Court of Justice whether *Poste Italiane*'s right to collect fees for the management of the post-office current accounts, which the collecting agents were legally required to open in their name in order to receive ICI payments, could be qualified as an

exclusive right under EU law, also in light of the fact that taxpayers were still allowed to instead make this payment directly to the collecting agencies. This is the key element to be ascertained in the present case, because, according to State aid caselaw, granting special or exclusive rights without adequate remuneration in line with market rates – or no remuneration as in the present case – may imply foregoing State revenues and the granting of an advantage.

The Court of Justice, even though not specifically called into question on this aspect, should have given the referring court an indication in this respect.

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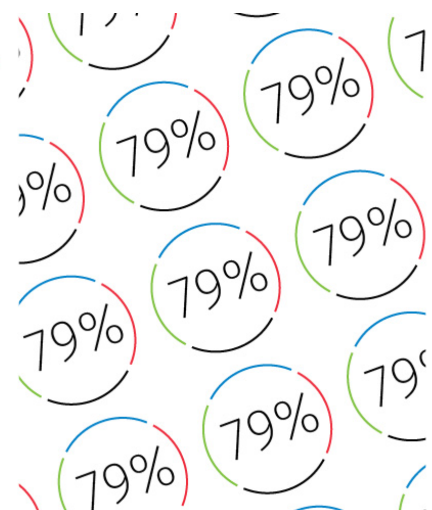

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