

European Public Services Briefings 1

European Union Competition policy and the Liberalisation of Postal Services

Andy Morton

European Union Competition policy and the Liberalisation of Postal Services

January 2011

The European dimension to postal sector liberalisation¹ is often overlooked as successive UK governments have pursued the liberalisation route for its universal postal service: the Royal Mail. Postal sectors in Europe, traditionally dominated by public sector monopolies, have been progressively opened up to increased competition courtesy of European Union (EU) directives, introduced since the mid-1990s as part of EU's competition agenda and Single Market Programme. This long process of phased liberalisation has come to fruition recently with the last remnants of universal service providers' protected services being abolished. On January 1st 2011 the Directive introducing 'full' liberalisation into European postal sectors was introduced the EU.

1. Introduction and Background

Successive UK governments have aggressively pursued far reaching liberalisation programmes of its public services and utilities taking the forms of full or semi-privatisation and tendering. Because of this the liberalisation agenda of the EU has been somewhat obscured and has received little attention. The EU's competition agenda has however had a significant impact on UK public policy concerning public and social service provision.

The impact of the EU areas like post will be all the more clear once hypothetical public policy choices to revert away from liberalisation and toward public means of ownership and provision are made. It is hoped that the central conclusion taken from below is that the EU, and its institutions like the European Commission, has formed a formidable barrier to this. It should at least be accepted that an adequate understanding is necessary of the crucial role of the EU in postal service liberalisation that has been witnessed here in Britain and across Europe.

EU policy and law in the area of postal services is outlined below to demonstrate how the EU has been involved in the postal liberalisation agenda since the 1990s and how this has been reconciled with the public service goals of universal service providers like the UK's Post Office. This demonstrates the central role the EU has played in liberalising the UK and European postal sectors and the barrier it would represent if public policy sought to move away from the competition-marketisation model.

¹ Here "Liberalisation" is used as a more general term than privatisation as the more general process of market opening that liberalisation describes is not that same as formal privatisation of public sector companies like the proposals at the time writing for the UK's Royal Mail.

2. EU Policy providing the Liberalisation agenda of Postal Services

2.1. Background to EU Liberalisation agenda.

The ratification in 1993 of the Maastricht Treaty brought with it a widening of the Single European Market's net. Under its 'Trans-European Networks (TENs)' and Single Market Programmes the EU sought to open up network and utilities industries to competition.

By introducing liberalisation reforms to the four TENs sectors (telecoms, transport, postal and energy sectors) the European Commission sought to break up long-standing public sector monopolies that dominated national industries in these areas. This process to date has reached an advanced stage, to varying degrees, in each of these areas with the notable exception of the Energy sector.

In national transport and postal sectors however the process of market opening has progressed despite the persistent questions about the place of Universal Service Operators (USPs²) and their public and social service goals within a competitive framework. Resistance to liberalisation in postal sectors has remained strong despite the process now being very nearly complete.

With the 'full' liberalisation of postal services supposedly being reached by January 1st 2011 serious questions over the future of the universal postal service and companies like the Royal Mail remain. These include questions of social policy concern such as the employee rights of those working for companies like the Royal Mail.

The provision of postal services is subject to both EU State Aid rules governing subsidy and compensation for public bodies and those of EU public procurement rules. On top of this however a formidable body of Directive text has been produced at the European level to introduce and govern a liberalised Single European Postal Market.

This is due not only to the special role that such a network industry could play in facilitating cross border activity in a Single European Market but also due to the unique set of issues concerning the traditions of universalism that many European postal networks have long operated under.

2.2. The Postal Services Directives.

In 1995 the European Commission unveiled a proposal for a Directive to mark the first stage in creating this Single European Postal Market. The European Commission's stated long-term goal was the 'full' liberalisation of national postal sectors in creating one, single European postal 'market'. 'Full' liberalisation includes all aspects of postal services including all letter and parcel markets must be subject to competition. This is in contrast to semi-liberalised arrangements that entail the protection of certain services performed by incumbent public sector companies.

² The term used in EU parlance for those incumbent, usually public sector companies that operated postal monopolies in EU member states.

The first Postal Services Directive was passed in 1997 and was subsequently amended by Directives in 2002 and 2008³. Among the reforms proposed in the first 1997 Directive was the creation of an independent postal services regulator, a legal definition of *Universal Service Providers* (USPs), usually represented by incumbent public sector companies and monopolies, and these were reinforced by a legal definition of their *Universal Service Obligations* (USOs)⁴.

The Commission also sought a phased approach within this to introduce liberalisation gradually so that USPs would not be subjected to the full blast of a fully competitive postal market in one go. This phased approach was marked by defining particular postal services as reserved to USPs with the intention that these would eventually be whittled away on the road to full competition.

The 1997 Directive defined those 'reserved areas' where the incumbent public sector USP had monopoly over service. These reserved services included the delivery of letters and parcels below a certain weight would be the sole responsibility of USPs with anything above that open to competition and private provision. The whittling away of this reserved area occurred as follows:

- **The 1997 Directive:** Service delivery of letters and parcels below 350g in weight or, that costing five times less than standard service (basic tariff), were reserved to USPs. The delivery of letters and parcels above this that open to private provision constituted an opening of only 3% of European postal sectors.
- **The 2002 Directive:** The reserved area above was reduced to 100g and three times the basic tariff. This represented an opening of 16% of postal sectors. The Commission originally wanted lower this area to 50g. This halted and amended by the European Parliament in resulting in the eventual weight classification above.
- **The 2008 Directive:** Following a review in 2006 by Internal Market Commissioner Charlie McGreevy the Commission unveiled a third proposal to amend the 1997 Directive. The new Directive provided for the introduction of full competition in European postal sectors and the abolition of any reserved services for USPs. This Directive came into force on January 1st 2011 with some exceptions for some Member States such as new members and those, like Greece, with particular geographical issues making this impractical.

Despite some decisions of the European Court of Justice which have been rather more positive on the role of USPs and their universal service role member states generally have largely been acquiescent to the Commission's demands to open up their postal 'markets'. In bucking this trend France has been very reluctant to do this and have had more than a few confrontations with the Commission. Despite some of these needing the Court of Justice to resolve France has slowly relented to the liberalisation programme.

³ Directives 97/67/EC, 2002/39/EC, and 2008/06/EC

⁴ In general terms in regards to public service provision these are termed *Public Service Obligations* (PSOs). These are a legal tool associated with many continental Countries such as France, Italy and Spain used to formally embed the social and public service obligations of a public service of company. This tool has been adopted by the EU to try and reconcile public service goals with the goals of its competition agenda..

At the other end of the spectrum Sweden, Finland and the UK have already fully liberalised their postal sectors. This means that all the services that Britain's Post Office provides are completely exposed to competition from private sector companies like UPS and the Dutch company TNT. This has created pressures upon its universal franchise to go alongside the enormous domestic political pressures for reform which have damaged the public Post Office.

3. Reconciling Universalism and social rights with EU Liberalisation

In light of the abolition of the reserved area the European Parliament, increasingly the defender of 'Social Europe' causes, fought hard to modify the Directive as it had with the previous 2002 Directive. On top of successfully stretching out the time-frame for the Directives implementation to 2011 the Parliament tried to make sure that employee terms and conditions in the postal sector were respected in the Directives provisions. This has been one of the main concerns of European social democrats and trade unions especially after the experience of the UK, Germany and Sweden in this area. However, the basic problems of attempting to provide a universal, public service under a competitive framework also remain.

3.1. The Universal Postal Service in Europe: SGEI vs. Competition law and the provision of universal services in the EU.

In EU jargon many of what we call 'public' or 'social' services here in the UK are termed *Services of General Interest (SGI)*. Questions as to how these fit with the Single Market programme and competition law is subject to some confusion. This is due to the use of adjunct and similar phrases such as *Services of General Economic Interest* and *Social Services of General Interest (SSGI)*.

However the European Commission, the principal agent in defining these notions and advising EU member states as to their application, has taken a very liberal view of these and has, unfortunately and quite bizarrely, defined many public services, including postal services, as being *Services of General Economic Interest*.

The Commission has deliberately defined SGI in rather vague terms. So vague in fact that it is perfectly feasible to define all public services as being as much economic as social services. This was underlined in a Commission communiqué in 2007. This unfortunately includes postal services and those other sectors that come under the TENs agenda. In being defined as SGEI these 'services', under article 106(2) of the EU Treaty, are subject to EU competition rules.

This placing of postal services within the market-making areas of EU law has been fleshed out by the three Directives outlined above. Reconciling the market-making principles of EU single market law with public service missions of many SGI has been far from smooth.

The removal of the reserved area from the EU's liberalised postal services regime, even with USP and USO provisions still present and intact, introduces a State Aids problem: EU State Aid rules require all subsidies, or aid 'in-kind', provided to public services and companies must be declared and approved by the European

Commission through the formal notification process outlined in the Treaty⁵. Moreover separate accounts must exist for particular services to ensure subsidy is provided and used transparently.

If the Commission doesn't like what the subsidy is being used for it can refuse the request. Furthermore if it is used in a way contrary to that originally defined by a USO, or if said subsidy is used without being formally declared the Commission can, through informal means, extract concessions from the offending member state government. This will often bring demands centred on further or accelerated liberalising reforms in exchange for the Commission not opening legal proceedings for any perceived infringement⁶. These can have severe consequences which include the repayment of subsidy which would imperil many public companies which are far from profitable.

If the Post Office wanted to respond to its new predominantly private market environment and offer new services under its USO the government, on its behalf, would have to notify the European Commission first and await approval for any subsidy put forward to this end. The Commission has always taken a very liberal view on such things. It has long displayed a clear bias toward the rights private operators, in the symbolic role of using cross-border rights to provide services, and taking a dim view on any national public sector endeavour that could restrict the opportunities open to private companies.

If a USP in the postal sector sought to extend its universal service obligation into potentially profitable areas to assist in providing its non-profitable services the EU will not look kindly upon this. This is reinforced by the Commission's approach in other areas where public monopolies used to operate.

The famous *Corbeau* case in 1993 demonstrated this bias in regards to a Belgian operator who sought to provide local delivery services. Such responsibilities in Belgium in the early 1990s by law came under the monopoly of its USP. The Court of Justice ruled against the Commission back then saying that rules providing for a public service monopoly where compatible with EU law. This helped shape the Commission's first proposal for postal service liberalisation two years later.

Would the Court of Justice take such a pro-universal service view now? This is unlikely given the decisions it's handed down in its more recent case law. Plus, even if its approach is more balanced than the European Commission's on these issues the inherent conflict between public monopoly and private competition can't be reconciled by the Court in the way it did in *Corbeau* given the abolition of the reserved area in the 2008 Directive. The reserved area was by definition providing for a monopoly of certain services. With this removed any universal right cannot be enforced by the Court.

Some of more serious effects of liberalisation upon universal postal services are likely only to become clear in the rest of the EU over the next few years or so when full liberalisation starts to kick in. But the lessons of the UK in regards to its

⁵ Article 108 (3) EC Treaty

⁶ This scenario could arise in light of the Royal Mail asking for financial aid from the UK government in the event it could no longer service its pension deficit. Such aid would need to be declared to the Commission who could then exploit this to extract policy concessions.

liberalisation programme and its effects on service provision, and on other factors like labour relations, should make clear what is coming.

3.2. Employee rights issues and Liberalisation

The British example of postal liberalisation is a good case study of poor labour relations and a degraded service, resulting from liberalisation and its process of restructuring. The UK's Communication Workers Union cite the loss of 55'000 jobs since liberalisation reforms were first introduced in the 2000 Postal Services Act which ratified the first 1997 EU Directive.

This experience of extensive job losses is seen in the other countries. Sweden, Finland, Germany and Belgium have also had their incumbent USP shed large numbers of employees.

The place of employee rights has become central to the debate in Brussels over postal sector liberalisation not just due to the heavy job losses endured in examples like that of the UK but also due to the spectre of the dreaded 'Country-of-origin-principle'⁷. The Commission has been desperate to introduce this principle into a raft of European service sectors and was only prevented doing so by the European Parliament when it successfully gutted it from the infamous Services Directive in 2004.

In heeding the concerns of the Parliament and trade unions the 2008 Postal Services Directive is endowed with provisions designed to ensure that respect is paid to *domestic* labour regulations. This, according to the Directive, applies to both that mandated in legislation, like a national minimum wage, and that set by collective agreement. There have been some complaints including from Dutch postal company TNT that its access to the German postal market was halted due to an increase in the German minimum wage in the postal sector (in between €8 and €9.80).

On this point there are some serious concerns, as there are in other sectors where mobile firms are active, over how the European Court of Justice is viewing minimum wages. This does not just stem from wage levels set in collective agreements but also those minimum wages provided in law that don't appear to be 'nationally applicable'. However this is not a concern limited to postal or utilities sectors but to all sectors subject to cross-border competition and mobile firms⁸.

The Court of Justice's and the Commission's zealous attempts to push the 'country-of-origin-principle' into European service sectors has raised with it the spectre of 'wage dumping'. The potential for wage dumping once the single postal

⁷ The 'Country-of-Origin-Principle' was first introduced in the 2004 'Bolkestein' draft of the Services Directive (eventually ratified in 2006) which sought to allow firms carrying out contracts or business in another member state (other than where the company is legally based) to only have to adhere to the labour regulations of their home (country of origin) state and not the state they were operating. Trade unions demanded, successfully, this clause be removed due to fears it could trigger 'social dumping'. The threat of its backdoor inclusion still hangs over many Commission initiatives and is in fact enforced by the European Court of Justice.

⁸ The Court of Justice also includes areas of Public Services such as Healthcare systems like the UK's NHS as constituting 'economic' services therefore making them open to the law of the Single European Market and competition policy.

market in Europe is complete will be considerable. Despite the claim made above by TNT in regards to the German minimum wage for postal workers there is a large disparity in the wage levels between private sector employees and those working for the national USP in Germany.

Many developments in European service sectors including postal sectors have yet to fully emerge due to the lags and unevenness in liberalisation process in Europe. The threats to employee working terms and conditions is considerable and in many cases, like the UK, this is already there to be seen.

4. Conclusions

The European institutions have long sought to use the Single European Market and its four freedoms to advance the cause of European integration. It has sought to encourage private sector companies to exploit these cross border rights in bringing about a truly European market by championing economic rights of free movement. This goal takes primacy over other concerns such as those typically associated with the 'European Social Model' such as the public services provided by a welfare state and social rights provided by law.

Many examples of high rhetoric coming from the European Commission and the Court of Justice can be cited highlighting their concern for the big social questions associated with 'Social Europe'. But any objective assessment of EU policy and law in areas of public service provision must identify the clear bias toward competition, liberalisation and the rights of private sector operators in the name of completing the Single European Market.

The above case of postal sector liberalisation in many examples, like the UK, has resulted in degrading of the universal service brand and an obstruction to universal service provision. In other countries it has been the EU's liberalisation agenda which has delivered such outcomes. EU law has had a considerable effect on Britain postal market too. The Royal Mail now must contend not just with the effects of a fully liberalised UK postal sector but in coming years a fully liberalised *European* postal market.

These pressures faced by the Royal Mail, lest we forget, are also pressures for policy-makers who must deal with questions of maintaining the universal service amidst its competitive constraints and longer term problems such as its pension deficit. These pressures it would seem have pushed politicians of the previous & current governments to cuts its losses and go further down the liberalisation route by seeking to privatise segments of the Royal Mail. The current government proposals to privatise all of the Royal Mail minus the Post Office certainly go further than what is demanded through EU law but there cannot be any delusions as to the pressures to privatise this has created.

What it is hoped is made evident above, if not from contributions elsewhere, is that reconciling universal service goals in a competitive framework is unworkable due to the competitive pressures that this puts on the universal service. With a fully liberalised European Market being created, theoretically from January 1st 2011, these pressures upon the universal postal service will only increase.

AJB Morton.

Key

EU - European Union

TEN - Trans-European Networks

SGI - Services of General Interest

SGEI - Services of General Economic Interest

SSGI - Social Services of General Interest.

USP - Universal Service Provider

USO - Universal Service Obligation

References

- *The Limits of Competition Law - Markets and Public Services*. T. Prosser, (2005) Oxford University Press.
- 'Services of General Interest and European Community law. J-B. Cruz. in *EU Law and the Welfare State in G.De Burca* (2005).
- 'Services of general economic interest and universal service in EU law'. W.Sauter, (2008). *European Law Review*. No. Issue 2.
- *Communication on Services of general interest, including social services of general interest: a new European commitment*. 2007. 20/11/2007.
- Liberalisation and privatisation of public services and the impact on labour relations: T. Brandt & T. Schulten. Hans Böckler Foundation. December 2007
- *Liberalisation, privatisation and regulation of postal services in Europe - First international experiences in the run-up to new European regulations*. Discussion paper by T. Brandt for the Project *Privatisation of Public Services and the Impact on Quality, Employment and Productivity (PIQUE)* - the Hans Boekler-Stiftung Institute. 2007.