

V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – DANIA

Pomoc państwa SA.57991 (2021/C) (ex 2021/NN) – Dania

Rekompensata z tytułu wykonywania obowiązku świadczenia usługi powszechnej dla Post Danmark 2020

Pomoc państwa SA.55918 (2020/FC) – Dania

Domniemana pomoc państwa na rzecz Post Danmark z tytułu wykonywania obowiązku świadczenia usługi powszechnej w 2020 r.**Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej**

(Tekst mający znaczenie dla EOG)

(2021/C 469/02)

Pismem z dnia 23 lipca 2021 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Danię o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego części wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka, w odniesieniu do którego Komisja wszczyną postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

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Otrzymane uwagi zostaną przekazane władzom duńskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

PROCEDURA

W dniu 22 grudnia 2019 r. *Brancheorganisation for den danske vejgodstransport A/S („ITD”)*, duńskie stowarzyszenie z branży transportowej i logistycznej, złożyło skargę dotyczącą pomocy państwa, w której twierdzi, że rekompensata z tytułu wykonywania obowiązku świadczenia powszechnych usług pocztowych powierzonego Post Danmark A/S stanowi niezgodną z rynkiem wewnętrznym pomoc państwa.

W dniu 21 marca 2021 r., w następstwie kontaktów przedzgłoszeniowych, władze duńskie zgłosiły rekompensatę na rzecz Post Danmark z tytułu wykonywania obowiązku świadczenia usługi powszechnej w 2020 r.

OPIS ŚRODKA POMOCY

Środek dotyczy rekompensaty w wysokości 225 mln DKK (30 mln EUR), która ma zostać przyznana Post Danmark z tytułu wykonywania obowiązku świadczenia usługi powszechnej. Podstawą rekompensaty są dwie indywidualne licencje podpisane odpowiednio w dniach 20 grudnia 2019 r. i 25 czerwca 2020 r., rozporządzenie ministra transportu oraz umowa zawarta między Post Danmark a władzami duńskimi.

Post Danmark w swojej obecnej formie została założona w 2009 r. w następstwie połączenia ze szwedzką spółką pocztową Posten AB. Po połączeniu utworzono spółkę holdingową PostNord AB, która jest wspólną własnością Szwecji (60 % udziałów) i Danii (40 % udziałów). Prawa głosu są podzielone równo.

Post Danmark prowadzi działalność na duńskich rynkach pocztowych i oferuje różne usługi pocztowe, takie jak doręczanie listów, paczek, przesyłek ekspresowych, usługi kurierskie, usługi poczty elektronicznej, usługi transportu towarowego oraz prowadzenie sieci urzędów pocztowych. Od czasu liberalizacji duńskiego rynku pocztowego w 2011 r. Post Danmark działa w warunkach pełnej konkurencji z innymi operatorami pocztowymi zgodnie z dyrektywą pocztową. Jako operator świadczący usługę powszechną przedsiębiorstwo Post Danmark jest zobowiązane do zapewnienia dostępności wszystkich powszechnych usług pocztowych, w tym np. doręczania listów o masie do 2 kg i paczek o masie do 20 kg po przystępnych cenach na całym terytorium Danii przez co najmniej pięć dni w tygodniu.

OCENA ŚRODKA

Władze duńskie uważają, że środek stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE i jest zgodny rynkiem wewnętrznym na podstawie art. 106 ust. 2 TFUE, ponieważ spełnia wszystkie wymogi określone w *komunikacie Komisji – Zasady ramowe Unii Europejskiej dotyczące pomocy państwa w formie rekompensaty z tytułu świadczenia usług publicznych* ⁽¹⁾ („zasady ramowe dotyczące usług świadczonych w ogólnym interesie gospodarczym”).

Również Komisja uważa, że środek stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE, ma jednak wątpliwości co do tego, czy spełnione są wszystkie wymogi zgodności wynikające z zasad ramowych dotyczących usług świadczonych w ogólnym interesie gospodarczym.

Komisja doszła do wstępnego wniosku, że rekompensata z tytułu wykonywania obowiązku świadczenia usługi powszechnej jest zgodna z szeregiem przepisów zawartych w zasadach ramowych dotyczących usług świadczonych w ogólnym interesie gospodarczym. W szczególności, że rekompensata jest ukierunkowana na rzeczywistą usługę świadczoną w ogólnym interesie gospodarczym, że akt powierzenia zawiera wymagane elementy, że czas trwania jest wystarczająco ograniczony w czasie, że przestrzegane są odpowiednie przepisy dotyczące zamówień publicznych, że Dania wprowadziła wystarczające zachęty do skutecznego wykonywania obowiązku świadczenia usługi powszechnej oraz że przestrzegane są wymogi w zakresie przejrzystości.

Komisja ma jednak wątpliwości co do zgodności z niektórymi innymi przepisami zasad ramowych dotyczących usług świadczonych w ogólnym interesie gospodarczym:

- Zgodność z dyrektywą Komisji 2006/111/WE z dnia 16 listopada 2006 r. w sprawie przejrzystości stosunków finansowych między państwami członkowskimi a przedsiębiorstwami publicznymi, a także w sprawie przejrzystości finansowej wewnątrz określonych przedsiębiorstw ⁽²⁾ (pkt 18 zasad ramowych dotyczących usług świadczonych w ogólnym interesie gospodarczym): W dniu 15 stycznia 2021 r. Rigsrevisionen, duński organ kontroli państwowej, opublikował bowiem sprawozdanie, w którym podaje w wątpliwość nadzór regulacyjny nad kontami księgowymi Post Danmark i poświadczanie tych kont przez audytorów zewnętrznych. Dania przekazała sprawozdanie Komisji, a Komisja aż do chwili, gdy władze duńskie nie rozwieją w odpowiedni sposób wątpliwości wyrażonych przez Rigsrevisionen, może jedynie podzielać wątpliwości Rigsrevisionen. Jest to szczególnie ważne, ponieważ Dania wykorzystwała dane księgowe jako dane wejściowe do obliczenia kosztów netto ponoszonych przez przedsiębiorstwo Post Danmark w związku z wykonywaniem powierzonego mu obowiązku świadczenia usługi powszechnej. Obliczenie kosztów netto stanowi podstawę do ustalenia poziomu rekompensaty przysługującej Post Danmark.
- Zastosowanie metodyki nieponiesionych kosztów netto (pkt 25–27 zasad ramowych dotyczących usług świadczonych w ogólnym interesie gospodarczym): Metodyka nieponiesionych kosztów netto wymaga ustalenia, jak działałoby przedsiębiorstwo Post Danmark w przypadku braku obowiązku świadczenia usługi powszechnej, który mu powierzono, i prowadzi do tzw. scenariusza alternatywnego. Komisja ma wątpliwości co do oszacowania wpływu niektórych założeń przyjętych w tym scenariuszu alternatywnym na koszt doręczania listów lub paczek.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589 ⁽³⁾ wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od beneficjenta.

⁽¹⁾ Dz.U. C 8 z 11.1.2012, s. 15.

⁽²⁾ Dz.U. L 318 z 17.11.2006, s. 17.

⁽³⁾ Rozporządzenie Rady (UE) 2015/1589 z dnia 13 lipca 2015 r. ustanawiające szczegółowe zasady stosowania art. 108 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. L 248 z 24.9.2015, s. 9).

TEKST PISMA

The Commission wishes to inform Denmark that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. THE PROCEDURE

- (1) On 22 December 2019, the Commission received a complaint from ITD on the compensation granted by Denmark to Post Danmark A/S ('Post Danmark') for the delivery of the Universal Service Obligation ('USO') for postal services over the first six months of 2020.
- (2) On 17 January 2020, the Commission forwarded ITD's complaint to Denmark accompanied with a request for information.
- (3) On 6 February 2020, Denmark requested an extension of the deadline to reply to the request for information until 17 March 2020. The Commission granted this extension on the same day.
- (4) On 17 March 2020, Denmark reacted to the complaint and replied to the Commission's questions.
- (5) On 25 March 2020, the Commission forwarded Denmark's submission of 17 March 2020 to ITD with the request to express their views.
- (6) On 15 April 2020, ITD requested an extension of the deadline to reply to the Commission's letter dated 25 March 2020 until 8 May 2020. The Commission granted the extension on the same day and granted a further extension until 11 May 2020.
- (7) On 11 May 2020, ITD replied to the Commission's letter of 25 March 2020.
- (8) On 15 May 2020, ITD submitted additional information on its complaint.
- (9) On 26 May 2020, the Commission forwarded ITD's submissions of 11 May and 15 May 2020 to Denmark with the request to clarify the issues brought forward in these two submissions.
- (10) On 18 June 2020, Denmark requested an extension of the deadline to reply to the Commission's letter dated 26 May 2020 until 17 July 2020. The Commission granted the extension on the same day.
- (11) On 17 July 2020, Denmark replied to the Commission's letter of 26 May 2020.
- (12) On 20 July 2020, ITD submitted additional information by which it extended its complaint also to USO compensation granted to Post Danmark for the second half of 2020.
- (13) On 5 February 2021, ITD submitted additional information.
- (14) On 8 February 2021, the Commission asked Denmark to comment both on ITD's submission of 20 July 2020 and of 5 February 2021.
- (15) On 8 March 2021, Denmark requested an extension of the deadline to reply to the Commission's letter dated 8 February 2021 until 14 March 2021. The Commission granted the extension on the same day.
- (16) On 12 March 2021, Denmark replied to the Commission's letter of 8 February 2021. On the same day, after prenotification contacts, Denmark notified USO compensation for Post Danmark for the whole of 2020.
- (17) On 29 April 2021 and 4 June 2021, Denmark expressed its agreement to extend the two-month deadline laid down in Article 4(5) of the Procedural Regulation⁽¹⁾ for the adoption of a decision by the Commission until mid-July 2021.
- (18) Denmark exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,⁽²⁾ and to have this Decision adopted and notified in English.

2. DETAILED DESCRIPTION OF THE MEASURE**2.1. The beneficiary: Post Danmark**

- (19) The provision of postal services as an integrated part of the Danish government dates back to 1711. The nationwide circulation of postal items was introduced in 1865. Until 1995, the postal services in Denmark were conducted under the responsibility of the Ministry of Public Works.

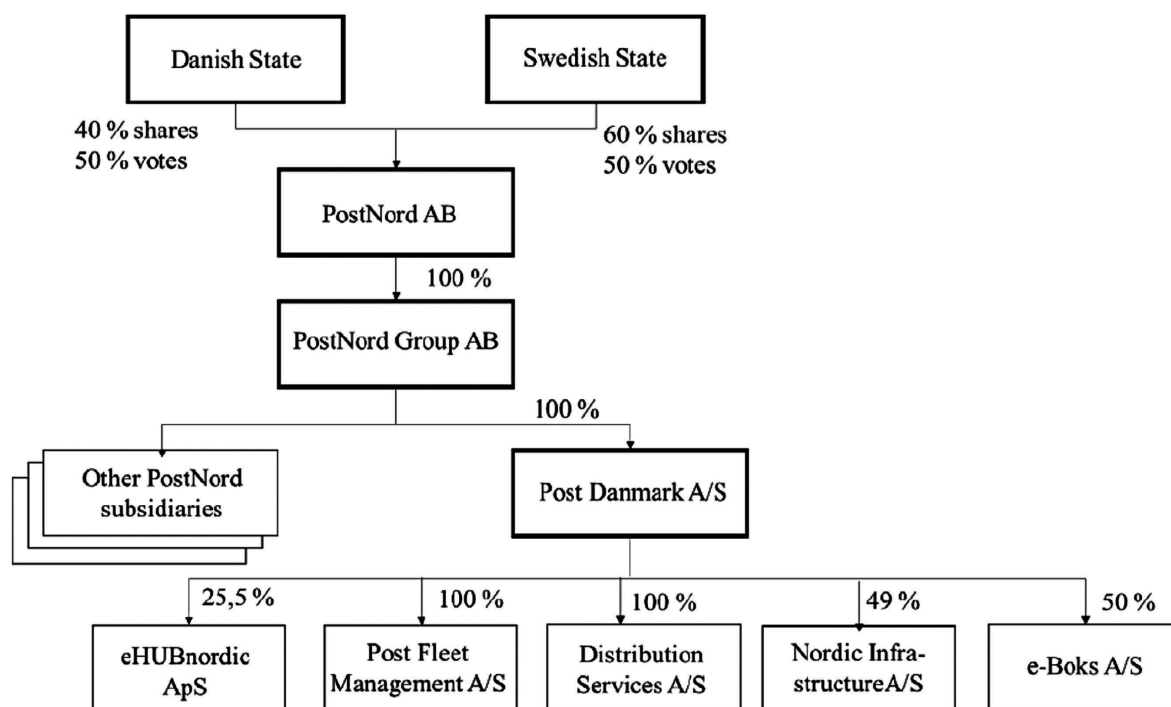
(1) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9), ELI: <http://data.europa.eu/eli/reg/2015/1589/oj>

(2) Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

- (20) By Act No. 88 of 8 February 1995 ⁽³⁾, Denmark transferred all of the activities of the postal service to Post Danmark, which was established as an independent public enterprise ('SOV'). Pursuant to the Postal Services Act ⁽⁴⁾, Post Danmark had a legal monopoly on domestic and cross-border letters.
- (21) The Danish Minister of Transport established Post Danmark as a State-owned limited liability company under Act No. 409 of 6 June 2002. ⁽⁵⁾ Pursuant to § 4 of this act, the State could sell up to 25 % of Post Danmark's shares. In 2005, Post Invest S.A. (administered by CVC Capital Partners) acquired 22 % of the shares in Post Danmark and 3 % of the shares were offered to the employees. Post Invest S.A. sold its stake in the company back ⁽⁶⁾ to Denmark, right before the company merged ⁽⁷⁾ with the Swedish postal operator Posten AB in 2009. ⁽⁸⁾ Following the merger, PostNord AB was created.
- (22) The intention behind the merger was to establish a more robust undertaking and to meet increasing pressure on the undertaking's core product, i.e. the distribution of letters. PostNord AB is co-owned by Denmark (40 %) and Sweden (60 %) while voting rights are shared 50-50, and is the 100 % owner of PostNord Group AB ('PostNord Group'). The structure of the company is shown in **Figure 1**.

Figure 1

Corporate structure of PostNord AB



- (23) PostNord Group is mainly active on the Swedish, Danish, Norwegian and Finnish markets for postal services, and provides courier, cargo and logistics solutions in the Nordic region and in Europe.
- (24) Post Danmark is a wholly owned subsidiary of PostNord Group and is active on the Danish postal markets, where it offers a variety of postal services such as the delivery of letters, parcels, express deliveries, courier services, electronic mailbox services, cargo services, and the operation of a network of post offices.

⁽³⁾ Lov om Post Danmark, Nr 88 of 8 February 1995, <https://www.retsinformation.dk/eli/lta/1995/88>

⁽⁴⁾ Lov om postvirksomhed, Nr 89 of 8 February 1995, <https://www.retsinformation.dk/eli/lta/1995/89>

⁽⁵⁾ Lov om Post Danmark A/S, Nr 409 of 6 June 2002, <https://www.retsinformation.dk/eli/lta/2002/409>

⁽⁶⁾ See: <https://www.cvc.com/media/press-releases/2009/02-02-2009-123603833>

⁽⁷⁾ The legal basis for the merger was in Denmark provided by: Lov om ændring af lov om Post Danmark A/S, LOV nr 542 of 17 June 2008, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=120348>

⁽⁸⁾ Commission Decision of 21 April 2009, Case No COMP/M.5152 — Posten AB / Post Danmark A/S. Notification of 26.2.2009 pursuant to Article 4 of Council Regulation No 139/2004, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5152.

- (25) Post Danmark has been operating in full competition with other postal operators since the liberalisation of the Danish postal market in 2011, in accordance with Directive 97/67/EC of the European Parliament and of the Council⁽⁹⁾. Denmark has entrusted Post Danmark with the USO under the Danish postal act⁽¹⁰⁾, involving in particular the delivery and distribution of letters across the territory of Denmark. Post Danmark faces competition especially in the parcel market and the market for the distribution of newspapers and magazine mail.

2.2. The Universal Service Obligation

- (26) Post Danmark was designated as USO provider for 2020 through two individual licenses. The first license covers the period from 1 January 2020 until 30 June 2020 and was issued on 20 December 2019. The second license covers the period from 1 July 2020 until 31 December 2020 and was issued on 25 June 2020⁽¹¹⁾.
- (27) The terms of the USO are fixed in the company's individual license issued on 30 May 2016⁽¹²⁾, which expired on 31 December 2019, and which is prolonged by the two licenses.
- (28) The individual license of 2016 includes provisions for service level, quality and prices and specifies e.g. that Post Danmark has a distribution obligation for products covered by the USO for at least 5 working days a week:
- Products covered by the distribution obligation are addressed letters; addressed periodicals (daily, weekly and monthly) and other addressed items with standardised printed content (e.g. catalogues) weighing up to 2 kilos; addressed parcels weighing up to 20 kilos (with the exception of B2B parcels governed by contractual terms); and items for the blind weighing up to 7 kilos (delivered free of postage charges).
 - Furthermore, Denmark has opted to impose uniform tariffs on single-piece items in accordance with Article 12 of Directive 97/67/EC of the European Parliament and of the Council.
 - The provision of services under the USO is subject to quality standards laid down in Post Danmark's individual license in accordance with Article 17 of Directive 97/67/EC of the European Parliament and of the Council. Those quality standards require that 93 % of all ordinary intra-national letters and parcels must be distributed within respectively five and one working days. The quality standard for intra-Community cross-border express mail is that 85 % of such postal items must be delivered within three working days of submission and 97 % must be delivered within five working days from submission. The quality standard for addressed shipments of periodicals, magazines, journals, catalogues etc. is fixed by Post Danmark itself.
 - Prices for services provided under the delivery obligation must be cost-based, transparent and non-discriminatory. Only single-piece items are required to be offered at uniform prices throughout the country. Single-piece items include stamped letters and parcels not covered by a contract with Post Danmark. The Danish Transport, Construction and Housing Agency approves the price for domestic ordinary letters weighing up to 50 grams sent as single-piece items. Post Danmark sets the price of other mail items.
 - Post Danmark has to maintain a nationwide service network of postal service points able to perform all services covered by the delivery obligation.
- (29) Same requirements as those stated in recital (28) apply for the provision of USO for the year 2020.

2.3. Previous USO compensation decisions for Post Danmark

- (30) Denmark has granted compensation to Post Danmark for the delivery of the USO over the period 2017-2019.
- (31) This USO compensation was approved in the Commission's decision SA.47707 of 28 May 2018 ('the 2018 Decision')⁽¹³⁾.
- (32) The 2018 Decision was appealed by ITD and on 5 May 2021, the General Court upheld the Commission's decision as regards the USO compensation⁽¹⁴⁾.

⁽⁹⁾ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14).

⁽¹⁰⁾ See Postloven, LOV nr 1536 of 21 December 2010, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=135208>. The law has been amended several times.

⁽¹¹⁾ Both licenses have as title 'Midlertidig tilladelse til Post Danmark A/S'.

⁽¹²⁾ Danish Transport and Construction Agency, Ny individuel tilladelse til Post Danmark A/S, 2 June 2016, available at: <https://www.trafikstyrelsen.dk/da/Post/Lister/Publikationsliste>

⁽¹³⁾ Commission Decision SA.47707(2018/N) of 28 May 2018, State compensations granted to PostNord for the provision of the universal postal service — Denmark, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_47707

⁽¹⁴⁾ Judgment of the General Court of 5 May 2021, ITD, *Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240.

2.4. The Rigsrevisionen's report

- (33) The Rigsrevisionen is an independent institution placed under the Danish Parliament. Its task is to determine whether the public accounts are correct (financial audit). It also examines whether government-funded agencies and enterprises comply with laws and regulations in force (compliance audit) and whether the administration focusses on economy, efficiency and effectiveness (performance audit).⁽¹⁵⁾ The audits carried out by the Rigsrevisionen assist the Danish Public Accounts Committee and the members of the Danish parliament in their work. The Rigsrevisionen audits the financial statements of all government departments, agencies and other public bodies and performs major studies of specific policy areas.⁽¹⁶⁾
- (34) On 26 March 2020, the Rigsrevisionen launched an audit on the accounting practices of Post Danmark. The final report of that audit was published on 15 January 2021.⁽¹⁷⁾
- (35) The purpose of the audit was to assess whether the Ministry of Transport's supervision of Post Danmark's accounting practice in the period from 2011 to 2019 has been adequate. By adequate supervision, the Rigsrevisionen means supervision that could reassure the Ministry of Transport that Post Danmark's accounting practice was in accordance with accounting regulations and the requirements of Directive 97/67/EC of the European Parliament and of the Council. In this regard, the Rigsrevisionen concluded that the supervision *'has not been entirely adequate'*. It stated that the supervision of the Transport Authority on the adequacy of accounting practices of Post Danmark accounts was not sufficient to ensure compliance with applicable accounting regulations and Directive 97/67/EC of the European Parliament and of the Council.

2.5. The notified measure

- (36) The notified measure concerns compensation for Post Danmark for the provision of the USO in 2020. Denmark has notified this measure under the SGEI Framework⁽¹⁸⁾.
- (37) The legal basis for the measure is composed of the following legal texts:
- (a) The two individual licenses issued to Post Danmark (recital (26)) which together entrusted the provision of the USO to Post Danmark for the whole of 2020 in accordance with the Postal Act and subject to the terms provided in the individual license of 30 May 2016, which had expired on 31 December but has accordingly been prolonged.
- (b) A decree ('aktstykke') whereby the Minister for Transport requests the Financial Committee of the Danish Parliament to consent to payment of the notified amount as compensation to Post Danmark for the postal USO imposed on Post Danmark for the period 1 January 2020 to 31 December 2020.⁽¹⁹⁾
- (c) An agreement between Denmark and Post Danmark.⁽²⁰⁾ The agreement provides for detailed principles for monitoring, calculating and reporting, including an ex post control mechanism for the purpose of verifying that Post Danmark has not been overcompensated. The agreement contains a provision which states that the USO compensation for the second half of 2020 is granted subject to the Commission's approval.
- (38) The compensation to be granted to Post Danmark shall not exceed the net costs of the USO and is subject to a cap of DKK 225 million (approx. EUR 30 million).

3. THE COMPLAINT

- (39) ITD makes the following claims in respect of the USO compensation for 2020⁽²¹⁾:
- (40) First, according to ITD, the USO compensation for Post Danmark for the year 2020 constitutes State aid and is incompatible with the internal market as the conditions of the SGEI Framework are not fulfilled.

⁽¹⁵⁾ See: <https://uk.rigsrevisionen.dk/about-us>

⁽¹⁶⁾ See: <https://uk.rigsrevisionen.dk/our-work>

⁽¹⁷⁾ The report is available on the website of the Rigsrevisionen: *Beretning om tilsynet med Post Danmarks regnskabspraksis*, beretning nr. 10/2020, 15 January 2021, <https://rigsrevisionen.dk/revisionsager-arkiv/2021/jan/beretning-om-tilsynet-med-post-danmarks-regnskabspraksis>

⁽¹⁸⁾ Communication from the Commission — European Union framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

⁽¹⁹⁾ The decree is dated 19 August 2020 (nr 2020-6466) and was endorsed by the Financial Committee on 27 August 2020.

⁽²⁰⁾ Kontrakt vedrørende midlertidig kompensation til Post Danmark A/S for befordringspligten i Danmark, dated 25 June 2020.

⁽²¹⁾ Claims unrelated to the USO compensation are not the subject of this Decision.

- (41) In particular, ITD, basing itself on the assumption that the net cost of the USO will be calculated by Denmark for 2020 in the same way as it was calculated for 2017-2019 in the 2018 Decision, reiterates arguments previously made in the context of the action for annulment ⁽²²⁾ of the 2018 Decision (see recital (32)) on the NAC methodology:
- (a) First, ITD is worried that the NAC calculation will not take account of activities that would be continued due to them being profitable in the long-term (but which are loss-making in the short-term due to the costs of the transformation plan ⁽²³⁾).
 - (b) Second, ITD is worried that the NAC calculation does not include corporate reputation and ubiquity.
 - (c) Third, ITD claims that the NAC calculation violates paragraphs (39)-(43) of the SGEI Framework as any efficiency incentives would be unattainable by Post Danmark, since even after the implementation of the transformation plan ⁽²⁴⁾ Post Danmark has remained to be inefficient and is about to go bankrupt. ITD continues by stating that whatever efficiency standards (including those in recital (28) of the 2018 Decision) will be applicable to Post Danmark for the USO will be insufficient because Post Danmark is about to go bankrupt and can therefore not live up to them.
- (42) In addition, ITD claims that the USO compensation will be used for other activities than USO activities ⁽²⁵⁾. In this light, ITD refers to non-USO activities such as keeping Post Danmark afloat and several activities provided by a sister company of Post Danmark, PostNord Logistics A/S ⁽²⁶⁾.
- (43) *Second*, ITD refers to the alleged monopoly that Post Danmark has on the issuance and sale of stamps at prices set by the State for letters weighing up to 50 grams covered by the USO. ⁽²⁷⁾ According to ITD, the income that Post Danmark would receive as a result of the stamp sale would lead to overcompensation of Post Danmark for the provision of the USO.
- (44) ITD considers that the Commission has not taken into account the income from stamps in the NAC calculation for the USO over 2017-2019 and is concerned that this will also not be the case for the USO compensation for 2020. ITD considers that because the prices of stamps have increased in 2018 ⁽²⁸⁾ the income from stamps should have been enough to cover the genuine USO costs.
- (45) In addition, ITD claims that the income from stamps is used for other purposes than the financing of the USO.
- (46) *Third*, ITD reiterates a claim it also made in the context of the complaint related to the measures covered in the 2018 Decision. According to ITD, Section 4(3)(c) of the 2006 and 2011 Accounting Regulation obliged Post Danmark to allocate all common costs to the USO account — irrespective of whether a portion of these costs were incurred for carrying out non-USO activities. ITD considers that this practice violates Directive 97/67/EC of the European Parliament and of the Council, which requires in Article 14(3)(b)(iv) that costs must be distributed between USO and non-USO accounts ‘in an appropriate manner’. The fact that with the introduction of the 2014 Accounting Regulation this apparent contradiction has been removed is according to ITD irrelevant since Post Danmark continued to reflect Section 4(3)(c) in its so-called ‘Accounting Rules and Principles’ (*Principper og Metoder*), which is a section in the internal Post Danmark guidelines on the interpretation of the Accounting Regulations.

⁽²²⁾ Judgment of the General Court of 5 May 2021, ITD, *Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240, paragraph 86-93.

⁽²³⁾ The transformation plan is referred to as the new production model in Section 2.2 of the 2018 Decision.

⁽²⁴⁾ Referred to in the 2018 Decision.

⁽²⁵⁾ Judgment of the General Court of 5 May 2021, ITD, *Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240, paragraph 94.

⁽²⁶⁾ ITD explains that the vehicles financed by Post Danmark for the USO will only be used for the USO for 60 % of their capacity while the remaining (40 %) will be used for PostNord Logistics’ freight services, without Post Danmark billing PostNord Logistics for the use of the vehicles. In addition, Post Danmark’s employees would provide services for PostNord Logistics without remuneration, the customer service of PostNord Logistics would be carried out by Post Danmark without payment and Post Danmark would pay for IT (software and hardware) that is used by PostNord Logistics without remuneration.

⁽²⁷⁾ In this regard, ITD refers to Article 20 of Danish Law no. 1040 of 30 August 2017 (the Danish Postal Act), which provides that ‘[t]he company holding the Universal Service Obligation must issue stamps (with “Denmark” printed on them)’ and Article 15(4) of the same law which provides that ‘[t]he Transport Minister authorises the price of the stamps for letters weighing up to 50 grams’.

⁽²⁸⁾ ITD refers to a PostNord press release ‘Billigere pakker på posthuset fra 2019’ dated 28 September 2018 where it is stated ‘og derfor justerer vi priserne fra årsskiftet’.

- (47) With regard to Post Danmark's cost allocation, ITD also refers to the report from the Rigsrevisionen (see Section 2.3). According to ITD, taking into account the conclusions of the Rigsrevisionen, the Commission cannot rely anymore on the Danish Transport Authority's surveillance of Post Danmark's account, a PwC report from 2014 on Post Danmark's costs allocation⁽²⁹⁾ or other auditor declarations for its compatibility assessment of the USO compensation.

4. DENMARK'S REACTION TO THE COMPLAINT

- (48) Denmark takes the view that for the first six months of 2020, the USO compensation was compatible under Article 106(2) TFEU since it had fulfilled the conditions of the SGEI Decision.⁽³⁰⁾ Consequently, Denmark took the view that this USO compensation did not have to be notified to the Commission pursuant to Article 1 of the SGEI Decision.
- (49) For the second half of 2020, Denmark argues that the compensation meets the conditions of the SGEI Framework. This split compatibility assessment originates from the fact that the USO was initially only entrusted to Post Danmark for the first six months of 2020, pending discussions at the national level on what should happen in the second half of 2020. On 25 June 2020, it was decided to prolong the USO entrustment of Post Danmark for another 6 months (see recital (26)); however since the EUR 15 million cap provided in Article 2(1)(a) of the SGEI Decision was reached, compatibility was sought under the SGEI Framework instead.
- (50) While Denmark maintains that the USO compensation for the first half of 2020 is compatible under the SGEI Decision and for the second half of 2020 under the SGEI Framework, it is of the view that, in any event, a compatibility analysis for the full year under the SGEI Framework will also lead to the conclusion that the USO compensation meets all the conditions set out in the SGEI Framework. Based on discussions with the Commission, Denmark has ultimately notified the USO compensation for Post Danmark for the whole year of 2020 under the SGEI Framework and not just the period from 1 July 2020 to 31 December 2020.
- (51) As regards the calculation of the Net Avoided Cost prescribed by the SGEI Framework, Denmark refers to the Commission's assessment in the 2018 Decision where it was concluded that USO compensation for the period 2017-2019 was compatible with the internal market.⁽³¹⁾
- (52) As regards the role of the stamp income, Denmark first notes that Section 20 of the Postal Act requires Post Danmark to issue stamps. This is a legal obligation, but, according to Denmark, Post Danmark has not been entrusted with a monopoly or exclusive right in this respect.⁽³²⁾ Even if Post Danmark would have an exclusive right to issue and sell stamps, this is, according to Denmark, in line with Directive 97/67/EC of the European Parliament and of the Council⁽³³⁾. Moreover, Denmark notes that it is incorrect to say that the prices of stamps are 'set by the State' (see recital (43)). According to Section 15(4) of the Postal Act, the Minister for Transport approves (and not 'authorises' as indicated by ITD⁽³⁴⁾) the prices for single letters under 50 grams set (suggested) by Post Danmark. In any event, Denmark explains that it has taken into account the stamp income in the NAC calculation.
- (53) As regards the alleged cross-subsidization, Denmark notes that ITD essentially claims that the Accounting Regulation for Post Danmark in the period 2006-2013 deviated from the wording of Directive 97/67/EC of the European Parliament and of the Council, and that this led Post Danmark to allocate all common costs to the USO activities rather than allocating some of these costs to the non-USO activities as required by Directive 97/67/EC of the European Parliament and of the Council.

⁽²⁹⁾ See recital (137) of the 2018 Decision.

⁽³⁰⁾ Commission Decision 2012/21/EU of 20 December 2011 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, 11.1.2012, p. 3, available at: [http://data.europa.eu/eli/dec/2012/21\(1\)/oj](http://data.europa.eu/eli/dec/2012/21(1)/oj)

⁽³¹⁾ This conclusion was later upheld by the General Court, see footnote 14.

⁽³²⁾ To further substantiate this, Denmark refers to the political agreement of 27 May 2010 on ensuring the universal service in a liberalised market, which was attached to the preliminary works of the Postal Act adopted on 21 December 2010 (LOV nr 1536 af 21/12/2010) and contains the following wording: 'The designated Universal Service Provider... has an exclusive right and an obligation to issue stamps with "Denmark" printed on them' (translation provided by Denmark). In Danish this reads as: 'Den til enhver tid befordringspligtige virksomhed ... har eneret og forpligtelse til at udstede frimærker påtrykt 'Danmark'. Only the obligation to issue stamps is mentioned in the wording of the Postal Act (and not the exclusive right). In addition, the license for Post Danmark to provide postal services mentions only an obligation to issue stamps.

⁽³³⁾ See Article 8 of Directive 97/67/EC of the European Parliament and of the Council. In addition, recital (20) of the same Directive states: 'for reasons of public order and public security, Member States [...] are entitled to appoint the entity or entities responsible for issuing postage stamps identifying the country of origin'.

⁽³⁴⁾ Denmark explains that the word used in Section 15(4) of the Postal Act is 'godkender', which rather translates as 'approves'.

- (54) According to Denmark, that allegation has already been made by ITD in the context of the complaint related to the measures covered by the 2018 Decision. According to Denmark, in the period 2006-2013, the Accounting Regulation was based on an incremental cost test and a principle of causality. While Section 4(3)(c) of the 2011 Accounting Regulation deviated in wording from Directive 97/67/EC of the European Parliament and of the Council, the intention, according to Denmark, of the provision was merely to explain the consequences of Article 14(3) of Directive 97/67/EC of the European Parliament and of the Council, and the actual accounting practice did not breach the requirements of that Directive. Denmark notes that in fact, common costs such as IT and overhead were allocated proportionally between USO activities and non-USO activities, and it is simply not correct when the complainant claims that no common costs have been allocated to the non-USO activities.
- (55) For the rest, Denmark refers to the Commission's assessment in recitals (196)-(199) of the 2018 Decision by which the Commission rejected ITD's arguments concerning misallocation of costs.

5. PRELIMINARY ASSESSMENT OF THE USO COMPENSATION

5.1. Lawfulness

- (56) Denmark has already granted and paid out half of the notified amount (DKK 112 million, approx. EUR 15 million) to Post Danmark. According to Denmark, that part of the compensation was granted initially under the SGEI Decision, which allows aid for SGEIs to be granted without notification to the Commission as long as the aid does not exceed an annual amount of EUR 15 million (Article 2(1)(a) of the SGEI Decision).
- (57) Denmark explained that at the time, no decision had been made as regards additional USO compensation to Post Danmark after June 2020 and beyond those DKK 112 million. On that basis, Denmark concluded that USO compensation for the first half of 2020 should not be considered unlawful. As regards the USO compensation for the second half of 2020, Denmark has explained that the legal basis contains a standstill obligation (recital (37)(c)).
- (58) However, the Commission considers that the USO compensation for the first and second half of 2020 cannot be assessed separately. Indeed, despite the existence of two different licences, Post Danmark was entrusted with a single SGEI notably as the content of the USO is exactly the same in the two successive periods⁽³⁵⁾. In this regard, Article 2 (1) a) of the SGEI Decision refers to an 'annual compensation for the provision of services of general economic interest', hence the overall compensation is assessed on an annual basis.
- (59) As a consequence, with the USO compensation for the period 1 July 2020 — 31 December 2020 the annual amount of EUR 15 million allowed by the SGEI Decision is exceeded and therefore the SGEI Decision no longer applies.
- (60) Eventually, Denmark has notified the full compensation for 2020 under the SGEI Framework (see recital (50)). However, as the compensation for the period 1 January 2020 — 30 June 2020 was already granted, this constitutes unlawful aid.

5.2. Existence of aid

- (61) Pursuant to Article 107(1) TFEU, a measure qualifies as State aid if the following cumulative conditions are met: i) it has to be imputable to the Member State and granted out of State resources, ii) it has to confer an economic advantage to an undertaking, iii) the advantage has to be selective, and iv) the measure has to distort or threaten to distort competition and affect trade between Member States.

5.2.1. Measure imputable to the State and through State resources

- (62) In order to be qualified as State aid, a measure must be imputable to the State and granted directly or indirectly by means of State resources. State resources include all resources of the public sector⁽³⁶⁾ including resources of intra-State entities (decentralised, federated, regional or other).⁽³⁷⁾

⁽³⁵⁾ The Commission considers that the architecture of the SGEI package would be rendered ineffective if it were to be considered that entrusting exactly the same service in two different consecutive periods (within the same year) suffices to define two separate SGEIs. The Commission recalls that, below the threshold of EUR 15 million, the SGEI Decision applies, with no notification obligation and lighter compatibility rules; over this threshold, the stricter requirements of the SGEI Framework must be respected.

⁽³⁶⁾ Judgment of the Court of First Instance of 12 December 1996, *Compagnie nationale Air France v Commission of the European Communities*, Case T-358/94, ECLI:EU:T:1996:194, paragraph 56.

⁽³⁷⁾ Judgment of the Court of 14 October 1987, *Federal Republic of Germany v Commission of the European Communities*, Case 248/84, ECLI:EU:C:1987:437, paragraph 17; Judgment of the Court of First Instance of 6 March 2002, *Territorio Histórico de Álava — Diputación Foral de Álava (T-92/00), Ramondín, SA and Ramondín Cápsulas, SA (T-103/00) v Commission of the European Communities*, joined Cases T-92/00 and T-103/00, ECLI:EU:T:2002:61, paragraph 57.

- (63) The compensation for the provision of the USO has already partly been paid by the Denmark from the national budget (see recital (56)). The remaining part will also be paid by Denmark from its own budget, as established by the different legal bases (see recital (37)). Moreover, the measure is imputable to the State as it is granted on the basis of State legislation (recital (37)).
- (64) Therefore, the notified measure is imputable to the State and is granted through State resources.

5.2.2. *Measure granted to an undertaking*

- (65) Public funding granted to an entity can only qualify as State aid if that entity is an undertaking within the meaning of Article 107(1) TFEU. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity⁽³⁸⁾. The qualification of an entity as an undertaking thus depends on the nature of its activity, with no regard to the entity's legal status or the way in which it is financed⁽³⁹⁾. An activity must generally be considered to be economic in nature where it consists in offering goods and services on a market⁽⁴⁰⁾.
- (66) In the present case, Post Danmark offers postal services against remuneration on the Danish postal market and in competition with other providers. Therefore, offering postal services on that market constitutes an economic activity. For this reason, with regard to the activities financed by the USO compensation, Post Danmark qualifies as an undertaking in the meaning of Article 107 (1) TFEU.

5.2.3. *Advantage*

- (67) An advantage, for the purposes of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention⁽⁴¹⁾. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present. Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention. Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (68) However, pursuant to the judgment of the Court in the *Altmark* case⁽⁴²⁾, the granting of an economic advantage can be excluded for compensation for costs incurred to provide an SGEI if the following four cumulative conditions are met:
- i. First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined;
 - ii. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
 - iii. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public services obligation, taking into account the relevant receipts and a reasonable profit;
 - iv. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure that would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided within the same sector, would incur, taking into account the receipts and a reasonable profit from discharging the obligations.

⁽³⁸⁾ Judgment of the Court of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74.

⁽³⁹⁾ Judgment of the Court of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, ECLI:EU:C:1991:161, paragraph 21; Judgment of the Court of 12 September 2000, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74.

⁽⁴⁰⁾ Judgment of the Court of 16 June 1987, *Commission of the European Communities v Italian Republic*, Case 118/85, ECLI:EU:C:1987:283, paragraph 7.

⁽⁴¹⁾ Judgment of the Court of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, Case C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of 29 April 1999, *Kingdom of Spain v Commission of the European Communities*, Case C-342/96, ECLI:EU:C:1999:210, paragraph 41.

⁽⁴²⁾ Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, Case, C-280/00, ECLI:EU:C:2003:415, paragraph 87 to 95.

- (69) Due to the cumulative nature of the four *Altmark* criteria, if any of these criteria are not fulfilled, the compensation will be deemed to constitute an advantage in the meaning of Article 107(1) of the TFEU. The Danish authorities acknowledge that the fourth *Altmark* criterion is not fulfilled. The Commission also considers that the fourth *Altmark* criterion is not met since in the absence of a public procurement procedure that allows for the selection of the tenderer capable of providing the service at the least cost to the community, the Danish authorities have failed to demonstrate that the level of compensation was determined on the basis of the analysis of the costs of a well-run undertaking within the same sector, taking into account the receipts and a reasonable profit.
- (70) Since one of the four cumulative *Altmark* conditions is not fulfilled in the present case, the compensation for delivering the USO confers an advantage on Post Danmark.

5.2.4. *Selectivity*

- (71) Article 107(1) TFEU requires that a measure, in order to be defined as State aid, favours 'certain undertakings or the production of certain goods'. The Commission notes that the USO compensation will be granted to Post Danmark only. Given that the present case concerns an individual aid measure, the identification of the economic advantage (see recitals (67) to (70)) is sufficient to support the presumption that the measure is selective⁽⁴³⁾. In any event, it does not appear that other undertakings in the same or other sectors in a comparable factual and legal situation benefit from the same advantage. Hence, the measure is selective within the meaning of Article 107(1) TFEU.

5.2.5. *Effect on trade and distortion of competition*

- (72) Public support to undertakings constitutes State aid within the meaning of Article 107(1) TFEU if it 'distorts or threatens to distort competition' and insofar as it 'affects trade between Member States'.
- (73) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes⁽⁴⁴⁾. A distortion of competition is assumed when a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.
- (74) As regards the effect on trade, the case law of the Court of Justice has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States⁽⁴⁵⁾. It is not necessary to establish that the aid has an actual effect on trade between Member States.
- (75) As regards the present case, the Commission observes that Post Danmark operates in the Danish postal market. The Danish Postal market has been liberalised as of 2011 (see recital (25)) and Post Danmark therefore operates in competition with other providers.
- (76) Certain competitors of Post Danmark, in particular firms providing parcel delivery services, are part of international groups which also operate in other Member States (e.g. UPS). In addition, Post Danmark's mother company (via its subsidiaries) is active in other Member States (e.g. Sweden, Finland).
- (77) Therefore, the public service compensation granted to Post Danmark strengthens its position vis-à-vis other postal undertakings competing in intra-Union trade.
- (78) The Commission concludes that the notified measure is liable to affect trade and distort competition.

5.2.6. *Conclusion on the existence of aid*

- (79) Based on the above, the Commission concludes that the compensation for Post Danmark for the delivery of the universal postal service in 2020 fulfils the criteria established in Article 107(1) TFEU and therefore, the measure constitutes State aid within the meaning of that provision.

⁽⁴³⁾ See cases Judgment of the Court of 4 June 2015, *European Commission v MOL Magyar Olaj- és Gázipari Nyrt.*, C-15/14 P, ECLI:EU:C:2015:362, paragraph 60; Judgment of the Court of 30 June 2016, *Kingdom of Belgium v European Commission*, C-270/15 P, ECLI:EU:C:2016:489, paragraph 49; Judgment of the General Court of 13 December 2017, *Hellenic Republic v European Commission*, T-314/15, ECLI:EU:T:2017:903, paragraph 79.

⁽⁴⁴⁾ Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the Court of First Instance of 15 June 2000, *Alzetta Mauro and others v Commission of the European Communities*, joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 ECLI:EU:T:2000:151, paragraph 80.

⁽⁴⁵⁾ Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, ECLI:EU:C:1980:209, paragraphs 11 and 12; Judgment of the Court of First Instance of 30 April 1998, *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities*, Case T-214/95, ECLI:EU:T:1998:77, paragraphs 48-50.

5.3. Compatibility

5.3.1. *Compatibility assessment under the 2012 SGEI Framework*

- (80) Insofar as the USO compensation benefiting Post Denmark amounts to State aid within the meaning of Article 107(1) TFEU, its compatibility with the internal market needs to be assessed.
- (81) The Danish authorities claim that the notified measure constitutes compensation for delivering an SGEI, namely the USO. Such compensation is to be assessed for compatibility under Article 106(2) TFEU.
- (82) Article 106(2) TFEU provides that *'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'*
- (83) In accordance with that provision, the Commission may declare compensation for SGEIs compatible with the internal market, provided that certain conditions are met. The Commission has laid down the conditions under which it applies Article 106(2) TFEU in the 2012 SGEI Decision and the 2012 SGEI Framework.
- (84) The Danish authorities have notified compensation of DKK 225 million (approx. EUR 30 million). To the extent that the compensation to be granted to Post Denmark is above EUR 15 million per year, that compensation does not fall within the scope of the 2012 SGEI Decision, as set out in its Article 2.
- (85) State aid falling outside the scope of the 2012 SGEI Decision may be declared compatible with Article 106(2) TFEU if it is necessary for the operation of the SGEI concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. In that regard, the 2012 SGEI Framework sets out the guidelines for assessing the compatibility of SGEI compensation.

5.3.1.1. *Genuine service of general economic interest as referred to in Article 106 TFEU*

- (86) As indicated in recital 46 of the Commission's SGEI Communication⁽⁴⁶⁾, Member States have a wide margin of discretion regarding the nature of services that could be classified as being services of general economic interest. The Commission's competence is limited to checking that the margin of discretion is applied without manifest error as regards the definition of the SGEI and to assessing any State aid involved in the compensation. Paragraph 56 of the 2012 SGEI Framework confirms Member States' wide margin of discretion to define SGEI.
- (87) Paragraph 14 of the 2012 SGEI Framework states that: *'Member States should show that they have given proper consideration to the public service needs supported by way of a public consultation or other appropriate instruments to take the interests of users and providers into account.'*
- (88) The USO as defined in Article 3 of Directive 97/67/EC of the European Parliament and of the Council is recognised as a genuine SGEI⁽⁴⁷⁾. As a result, Member States do not have to prove by way of a public consultation or other appropriate instruments that they have given consideration to public service needs when entrusting an operator with the USO as defined in Article 3 of that Directive.
- (89) The Danish authorities have confirmed that the USO entrusted to Post Denmark corresponds to the minimum requirements outlined in Article 3 of Directive 97/67/EC of the European Parliament and of the Council. In addition, the Danish authorities relied on the option in Article 3(5) of that Directive and increased the weight limit of universal service coverage for postal parcels to 20 kilograms, and on Article 12 therein to impose uniform tariffs for single-piece items (letters and parcels) and for the delivery of items to the blind for free. The Commission considers that Denmark therefore does not have to prove by way of a public consultation or other appropriate instruments that it has given consideration to public service needs and so preliminarily concludes that the requirement set out in paragraph 14 of the 2012 SGEI Framework does not apply in this instance.

5.3.1.2. *Need for an entrustment act specifying the public service obligations and the methods for calculating compensation*

- (90) As indicated in paragraph 15 of the 2012 SGEI Framework, the concept of SGEI within the meaning of Article 106 TFEU requires that the undertaking in question has been entrusted with the operation of the SGEI by way of one or more acts.

⁽⁴⁶⁾ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

⁽⁴⁷⁾ Article 3(1) of Directive 97/67/EC provides: *'Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.'*

- (91) As required by paragraph 16 of the 2012 SGEI Framework, those entrustment acts specify, in particular:
- (a) The precise nature of the public service obligation and its duration;
 - (b) The undertaking and territory concerned;
 - (c) The nature of the exclusive rights assigned to the undertaking;
 - (d) The description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and
 - (e) The arrangements for avoiding and repaying any overcompensation.
- (92) In the case at hand, the entrustment of Post Danmark is composed of the three different legal acts described in recital (36):
- (a) The USO is imposed on Post Danmark through the individual licenses issued to Post Danmark in December 2019 and June 2020 and covers the period from 1 January 2020 to 31 December 2020 (see recital (26)). These licenses extend the license issued in May 2016, which expired on 31 December 2019 and which establishes the terms for the provision of the USO;
 - (b) The compensation mechanism is described in a decree submitted by the Ministry of Transport, Construction and Housing to the Financial Committee of the Danish Parliament, covering 2020 (recital (37)(b)); and
 - (c) As regards detailed principles for monitoring and reporting, including an ex post control mechanism for the purpose of verifying that Post Danmark has not been overcompensated, these are described in an agreement between the Danish State and PostNord (recital (37)(c)).
- (93) Considering the above, the Commission preliminarily concludes that the entrustment of Post Danmark for 2020 is in line with the relevant requirements of the 2012 SGEI Framework.

5.3.1.3. Duration of the period of entrustment

- (94) As indicated in paragraph 17 of the 2012 SGEI Framework, *'the duration of the period of entrustment should be justified by reference to objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of the period of entrustment should not exceed the period required for the depreciation of the most significant assets required to provide the SGEI.'*⁽⁴⁸⁾
- (95) As described in recital (26), Post Danmark's USO licence covers one year. While the Danish authorities have not provided any specific data on the depreciation period of the most significant assets used in the delivery of the USO, the Commission considers, with reference to the practice in other Member States, that an entrustment period of only one year can be accepted.⁽⁴⁹⁾ Moreover, as regards Post Danmark, the Commission has accepted a longer duration before (see the 2018 Decision).

5.3.1.4. Compliance with Directive 2006/111/EC

- (96) According to paragraph 18 of the 2012 SGEI Framework, *'aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.'*⁽⁵⁰⁾
- (97) Under sections 14(1) and 18(7) of the Postal Act as well as recital 10 of Post Danmark's individual license from 2016 (which has been prolonged until 31 December 2020), Post Danmark is subject to a national Accounting Regulation that requires it to keep separate accounts in line with Directive 2006/111/EC. The Accounting Regulation also adheres to Article 14(3) of Directive 97/67/EC of the European Parliament and of the Council. Post Danmark is required to ensure detailed registration of data; have a clear separation of accounts between the USO and other services; and apply uniform and objective criteria in order to allocate costs.
- (98) The Danish authorities have clarified that costs are allocated in the following manner:
- (a) costs which can be directly assigned to a particular service or product shall be so assigned;

⁽⁴⁸⁾ Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

⁽⁴⁹⁾ For example, in France (La Poste), Italy (Poste Italiane), Spain (Correos) and Greece (ELTA), the period of entrustment is up to 15 years.

⁽⁵⁰⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

- (b) common costs, that is costs which cannot be directly assigned to a particular service or product, shall be assigned as follows:
- whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
 - when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;
 - when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the universal services and, on the other hand, to the other services;
 - common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services.
- (99) The Danish authorities have also clarified that Post Danmark may only use other cost allocation methods if it obtains the consent of the Regulator, who also assesses whether the accountancy code is adhered to, and that the accounts are verified by an authorised public accountant.
- (100) Finally, the Danish authorities argue that a review by PwC in 2014 concluded that there is well-founded reasoning behind the choice of allocation keys.

Doubts on the cost allocation methodology

- (101) Despite Denmark's explanations and the review of Post Danmark's cost accounting in 2014, at this stage, and taking into account the report of the Rigsrevisionen from 15 January 2021 (see recital (34)), the Commission has doubts on the cost accounting methodology of Post Danmark and thereby on the separation of accounts of Post Danmark.
- (102) Article 14(2) of Directive 97/67/EC of the European Parliament and of the Council stipulates that the internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles. To this end, that directive sets a number of criteria that the cost allocation methodology shall meet, while at the same time it requires that a statement concerning compliance with the aforementioned criteria is published periodically by a competent body which is independent of the universal service provider (in the case at hand this is the Transport Authority).
- (103) The Commission's practice, which has been confirmed by the General Court⁽⁵¹⁾, is to base its assessment of whether this is complied with on the regulatory review at national level and the annual review by an independent auditor.
- (104) However, in this specific case, the Commission has received information from Denmark that the Rigsrevisionen in its report from 15 January 2021 raised doubts about the regulatory supervision of Post Danmark's accounts and the validation of these accounts by external auditors (see recital (33) to (35)). Following the conclusions from the Rigsrevisionen, the Commission, in this specific case, can therefore no longer base its assessment on the regulatory review and the annual review by independent auditors of Post Danmark's accounting. While it is possible that the cost accounting itself was correct and only the supervision was not adequate, the fact that the supervision has not been adequate subsequently casts doubts on the reliability of the costs accounting itself. Until the Danish authorities provide the necessary information to dispel the doubts that result from the Rigsrevisionen's conclusion that the supervision of Post Danmark's accounts has not been entirely adequate and until the cost accounting is reliable, the Commission can only have doubts whether the requirements provided in paragraph (18) of the SGEI Framework are met.

5.3.1.5. Compliance with EU Public Procurement Rules

- (105) According to paragraph 19 of the 2012 SGEI Framework, '*Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary EU legislation. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.*'

⁽⁵¹⁾ Judgment of the General Court (Seventh Chamber) of 15 October 2020, *První novinová společnost a.s., venant aux droits de Mediaservis s. r. o. v European Commission*, Case T-316/18, ECLI:EU:T:2020:489, paragraph 198.

- (106) Pursuant to Article 7(2) of Directive 97/67/EC of the European Parliament and of the Council, Member States are not obliged to organise a tendering procedure for the designation of the USO provider.
- (107) In the present case, the Danish authorities have opted for the direct entrustment of Post Danmark, in conformity with Directive 97/67/EC. It follows that public procurement rules are not applicable and that the direct entrustment of Post Danmark as the USO provider is in line with paragraph 19 of the 2012 SGEI Framework.

5.3.1.6. *Absence of discrimination*

- (108) According to paragraph 20 of the 2012 SGEI Framework, *'Where an authority assigns the provision of the same SGEI to several undertakings, the compensation should be calculated on the basis of the same method in respect of each undertaking.'*
- (109) In accordance with section 14 of the Postal Act, the USO is only entrusted to Post Danmark. The Commission therefore preliminarily concludes that the requirement of paragraph 20 of the 2012 SGEI Framework is not applicable.

5.3.1.7. *Calculation of the net cost of the Universal Postal Service over 2020*

5.3.1.7.1. *Net Avoided Cost methodology*

- (110) According to paragraph 21 of the 2012 SGEI Framework, *'The amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.'* In this respect, paragraph 24 of the 2012 SGEI Framework foresees that *'The net cost necessary, or expected to be necessary, to discharge the public service obligations should be calculated using the net avoided cost methodology where this is required by Union or national legislation and in other cases where this is possible.'*
- (111) According to paragraph 25 of the 2012 SGEI Framework, *'Under the net avoided cost methodology, the net cost necessary, or expected to be necessary, to discharge the public service obligations is calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost or profit for the same provider of operating without that obligation.'*
- (112) The Danish authorities have calculated the net cost necessary to discharge the public service by using the Net Avoided Cost (NAC) methodology as described in the following paragraphs.
- (113) The NAC consists of the difference in profits of Post Danmark between the so-called factual scenario (corresponding to the actual situation, where Post Danmark operates with USO) and the counterfactual scenario (corresponding to a hypothetical situation, where Post Danmark does not have the USO).
- (114) In their calculations, Denmark has estimated that the NAC for 2020 amounted to DKK 394 million (ca. EUR 53 million) which is significantly higher than the notified compensation of DKK 225 million (approx. EUR 30 million).

Description of factual scenario

- (115) The factual scenario for the period 1 January to 31 December 2020 takes Post Danmark's ordinary operations in consideration and is based on Post Danmark's financial accounts for the period 1 January to 31 October 2020 and the projections of the results for November and December. The key market assumptions behind the estimated development in revenues in the period are as follows:
- (a) The B2C ⁽⁵²⁾-market will experience a substantial growth due to increased e-commerce.
 - (b) Increased digitization will continue to affect letter volumes as senders in the financial sector as well as public authorities still are in the process of converting their letters into digital post.
 - (c) The market for newspapers and magazine mail is shifting towards omni-channel business models with combined focus on digital channels and print, which decreases the volumes in these postal services markets significantly.

⁽⁵²⁾ Business to Consumer

- (116) The estimated revenues and costs of Post Danmark under the factual scenario correspond to the figures presented below in Table 1:

Table 1

Factual scenario

| Breakdown of revenues (MDKK) | 1 January to 30 December 2020 |
|----------------------------------|-------------------------------|
| Economy mail | [...] |
| Export mail | [...] |
| Import mail | [...] |
| Magazines / newspapers | [...] |
| Other franking (includes stamps) | [...] |
| Others mail | [...] |
| Priority mail | [...] |
| B2B ⁽¹⁾ national | [...] |
| B2C collect | [...] |
| B2C home | [...] |
| C2X ⁽²⁾ | [...] |
| Export parcels | [...] |
| Import parcels | [...] |
| Other logistics | [...] |
| Parcels other | [...] |
| Other operating income | [...] |
| Total revenues | [...] |
| Breakdown of Costs (MDKK) | |
| Personnel costs | [...] |
| Other costs | [...] |
| Capital interests | [...] |
| Depreciation | [...] |
| Total costs | [...] |
| Profit MDKK | [...] |

⁽¹⁾ Business to Business

⁽²⁾ Consumer to other

Description of counterfactual scenario

- (117) Denmark suggested a counterfactual scenario with certain changes in Post Danmark's network and delivery process.
- (118) In this scenario, the following USO activities would be discontinued since Denmark considers that they have an overall negative impact on Post Danmark's business absent the USO:
- (a) proclaim return receipt ⁽⁵³⁾;
 - (b) newspapers and magazines;
 - (c) international letter post items and parcel post items carried under the Universal Postal Union convention and other international postal agreements: Post Danmark would only continue to offer inbound and outbound parcels under the franchise with DPD using the DPD network and their collaborators and through PostNord's own intra-group network; and
 - (d) delivery of the free service for the blind.
- (119) In addition to discontinuing certain services, Post Danmark would optimise its services by making the following changes:
- (a) The business letter service in the counterfactual scenario would only include home delivery in larger cities and home delivery of said letters would discontinue in rural areas as well as in smaller towns. This would mean that Post Danmark would visit each household in the larger cities one day of the week and, thus, be able to consolidate more items and significantly reduce the number of routes in rural areas and smaller towns;
 - (b) Post Danmark would close [...] letter sorting center and reduce the number of distribution hubs from [...] to [...];
 - (c) Pursuant to the USO obligations, Post Danmark is obliged to maintain full-service postal outlets, i.e. outlets offering all services encompassed by the USO, on a number of smaller islands. In the counterfactual scenario, Post Danmark would not offer full-service on smaller islands with no fixed link. Instead, a limited range of postal products would be available at the service points on these smaller islands. If the inhabitants on the small islands require services, which are not available on the small island, the inhabitant would then have to buy the service online or visit a service point on the mainland;
 - (d) Post Danmark would reduce the number of red postal mailboxes from [...] to [...]. A network of [...] red postal mailboxes would be optimal from a commercial point of view in a scenario where Post Danmark has no USO constraints.
 - (e) Post Danmark would optimize the use of quality measurements. The individual license from 2016 (as prolonged for 2020) requires Post Danmark to pay for an independent research institute to carry out monthly representative quality measurements of domestic letters subject to the USO.
- (120) In Table 2, a breakdown of the avoided costs and forgone revenues in the counterfactual scenario for each of the aspects listed in recital (118) and (119) is provided. The forgone revenues and avoided costs are broken down according to the differences between the factual and the counterfactual scenario.

Table 2

Avoided costs and foregone revenues

| Avoided Costs (MDKK) | 1 January to 31 December 2020 |
|---|-------------------------------|
| Optimizing the business letter service | [...] |
| Discontinuation of the free service for the blind | [...] |
| Discontinuation of distribution of newspapers and magazine mail | [...] |

⁽⁵³⁾ Proclaim return receipt (*postforkyndelse* in Danish) are letters containing a writ or other document to be served on the recipient. Only the courts, public authorities other than the courts, and approved private boards of complaint or appeal can send proclaim return receipt.

| Avoided Costs (MDKK) | 1 January to 31 December 2020 |
|---|-------------------------------|
| International letter post and parcel post items under UPU | [...] |
| Optimizing the number of red mail boxes | [...] |
| Optimizing product offering on small island without fixed link | [...] |
| Optimizing the use of quality measurements | [...] |
| Discontinuation of proclaim return receipt | [...] |
| Total avoided costs | [...] |
| Foregone Revenues (MDKK) | 1 January to 31 December 2020 |
| Optimizing the business letter service | [...] |
| Discontinuation of the free service for the blind | [...] |
| Discontinuation of distribution of newspapers and magazine mail | [...] |
| International letter post and parcel post items under UPU | [...] |
| Optimizing the number of red mail boxes | [...] |
| Optimizing product offering on small island without fixed link | [...] |
| Optimizing the use of quality measurements | [...] |
| Discontinuation of proclaim return receipt | [...] |
| Total foregone revenues | [...] |
| Gross nett avoided costs | [...] |

(121) The figures in Table 3 below are obtained by adjusting the revenues and costs of the factual scenario (see Table 1) based on the impact of the assumptions of the counterfactual scenario (see Table 2).

Table 3

Counterfactual scenario

| Breakdown of revenues (MDKK) | 1 January to 30 December 2020 |
|------------------------------|-------------------------------|
| Economy mail | [...] |
| Export mail | [...] |
| Import mail | [...] |

| Breakdown of revenues (MDKK) | 1 January to 30 December 2020 |
|----------------------------------|-------------------------------|
| Magazines / newspapers | [...] |
| Other franking (includes stamps) | [...] |
| Others mail | [...] |
| Priority mail | [...] |
| B2B national | [...] |
| B2C collect | [...] |
| B2C home | [...] |
| C2X | [...] |
| Export parcels | [...] |
| Import parcels | [...] |
| Other logistics | [...] |
| Parcels other | [...] |
| Other operating income | [...] |
| Total revenues | [...] |
| Breakdown of Costs (MDKK) | |
| Personnel costs | [...] |
| Other costs | [...] |
| Capital interests | [...] |
| Depreciation | [...] |
| Total costs | [...] |
| Profit MDKK | [...] |

Description of the process of calculating the NAC

(122) The NAC corresponds to the avoided costs minus the foregone revenues of the counterfactual scenario, correcting for intangible benefits.

Avoided Costs

(123) The avoided costs are indicated in Table 2. The main part of the cost savings would result from the reduction in personnel.

Foregone revenues

- (124) The foregone revenues are indicated in Table 2 and include in particular the loss of business following the discontinuation of certain services.
- (125) Post Danmark has estimated the foregone revenues resulting from the optimisation of business services by using its experience with previous changes in prices and product offerings. Post Danmark has continuously monitored customers' behaviour in relation to price changes, in particular, and has predicted customer behaviour using price elasticities and customer surveys.

Intangible benefits

- (126) Intangible benefits could contribute to the improvement in profitability that a postal services provider enjoys due to its status as the USO provider. They can often not be captured in the counterfactual scenario but still need to be taken into account in the NAC calculation.
- (127) Intangible benefits could include economies of scale and scope, advertising effects from intellectual property, demand effects due to the VAT exemption, universal coverage advantages, bargaining power and better customer acquisition.
- (128) The intangible benefits taken into account by Denmark for the calculation of the NAC are the VAT Exemption (A) and intellectual property assets (B). The benefits associated with the VAT exemption and intellectual property assets together amount to DKK [...] million. Denmark does not take into account economies of scale (C), bargaining power (D) and universal coverage (E) since it does not consider those to be an intangible benefit.

A — VAT exemption

- (129) According to the VAT Directive, implemented in the Danish Value Added Tax Act⁽⁵⁴⁾, the postal services encompassed by the USO are exempted from VAT. The VAT exemption does not apply to such services if individual terms have been negotiated. The exemption implies that Post Danmark has a competitive advantage with regard to customers who cannot deduct VAT, e.g. private citizens. The partial exemption from VAT has the downside that Post Danmark cannot deduct VAT paid for purchases related to the provision of VAT exempt services (USO).
- (130) The benefit is calculated based on a counterfactual scenario where all of Post Danmark's business is subject to VAT. The benefit of the VAT exemption comes from an increased demand for Post Danmark's products. In the absence of the VAT exemption, some prices would be higher for some customers (customers who cannot deduct VAT). This would lead to changed customer behaviour, which would mean a loss of revenue due to falling volumes. Customers' behaviour and the loss of revenue are calculated based on price elasticities. The calculations take into account that the VAT exemption, on the other hand, reduces the possibility of reclaiming VAT included in Post Danmark's input purchases.
- (131) The calculations of the effect of being subject to VAT is based on the assumption that VAT will be charged on top of current prices. Therefore, imposing VAT translates to an increase in price of 25 % (VAT rate in Denmark), but only for the customers that cannot deduct VAT.
- (132) The benefit of being exempted from VAT on USO services without individually negotiated terms is estimated to be DKK [...] million in 2020. Table 4 presents the benefits that Post Danmark achieved from the USO VAT exemption during the year 2020.

Table 4

Valuation of VAT exemption (MDKK) in 2020

| | |
|-------------------------------|-------|
| Reduction in costs | [...] |
| Loss of revenues | [...] |
| Value of VAT exemption | [...] |

⁽⁵⁴⁾ Danish Value Added Tax Act, LBK nr 1021 of 26.9.2019 (link: <https://www.retsinformation.dk/eli/lta/2019/1021>).

- (133) The table illustrates that the benefit Post Danmark achieved in the factual scenario for full year 2020 (DKK [...] million) is the difference between the loss in revenue that would occur if Post Danmark was subject to VAT and the benefit of it being able to deduct VAT. Hence, in the factual scenario, the revenue from customers that cannot deduct VAT is larger than in a situation where Post Danmark is subject to VAT. Thus, the exemption from VAT provides a benefit in the form of revenue from more customers that cannot deduct VAT.

B — Intellectual property assets

- (134) Intellectual property assets related to the USO result in particular from the advertising on visible contact points, such as mail boxes and installations for customers' self-service collection of parcels.
- (135) Post Danmark has estimated the benefits from intellectual property assets related to the USO, based on an assessment of branding value made by an external market research analyst regarding 2020⁽⁵⁵⁾. The assessment of branding value is estimated in relation to the number of visible contact points established by Post Danmark. The visible contact points are e.g. red mailboxes and installations for customers' self-service collection of parcels and some of Post Danmark's vehicles. Overall, the branding value has decreased in recent years, mainly due to a lower level of activity of Post Danmark which has resulted in fewer trucks and vehicles being used today, for example, and the number of mailboxes being continuously optimized.
- (136) Taking into account the above, for 2020, the benefits from intellectual property assets of Post Danmark's USO business is estimated to be DKK [...] million.

C — Economies of scale

- (137) The Danish authorities consider that Post Danmark does not benefit from economies of scale in the factual scenario as, in the context of the rapid decline in mail volume of letters, the size of Post Danmark has rather presented a significant challenge as it has not been possible to adjust operations to face market developments.

D — Bargaining power

- (138) The Danish authorities note that as concerns suppliers, Post Danmark is subject to the Utilities Directive⁽⁵⁶⁾, and that all contracts with suppliers are therefore subject to competition and the principles of equal treatment and transparency. On balance, the Danish authorities consider that Post Danmark does not enjoy bargaining power beyond that of other large companies.

E — Universal coverage

- (139) While there may be a benefit in the USO provider's universal coverage (both business- and private customers may find national coverage convenient and be compelled to use the services of the USO provider), this is considered as a strength in the e-commerce market and will therefore be maintained in the counterfactual scenario.
- (140) Therefore, the fact that Post Danmark is the Universal Service provider in Denmark and must uphold territorial coverage for that reason is not in itself an intangible benefit or a strength that should be taken into account in the calculation of the NAC.

5.3.1.7.2. Description of the results of the NAC calculation

- (141) Taking into account Table 2 and the value of the intangible benefits, the NAC amounts to DKK 394 million (Table 5 below).

Table 5

| NAC Calculation (MDKK) | 1 January to 31 December 2020 |
|-------------------------|-------------------------------|
| Total avoided costs | [...] |
| Total foregone revenues | [...] |

⁽⁵⁵⁾ Assessment made by *annalect* (January 2020).

⁽⁵⁶⁾ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243), ELI: <http://data.europa.eu/eli/dir/2014/25/oj>

| NAC Calculation (MDKK) | 1 January to 31 December 2020 |
|----------------------------|-------------------------------|
| Gross avoided costs | [...] |
| Intangible benefits | [...] |
| Nett avoided costs | 394 |

5.3.1.7.3. Verification by Denmark of the reliability of the net avoided cost calculation

- (142) According to Denmark's calculations, Post Danmark would achieve an EBIT (earnings before interest and taxes) margin of 3,8 % in 2020 and an average labour productivity of 0,997 DKK million in the counterfactual scenario.
- (143) To assess whether the calculated indicators are realistic, Denmark has compared the key indicators in the counterfactual scenario with corresponding key indicators for three other companies in the postal and transport industry: Danske Fragtmænd A/S, Posten Norge AS and Deutsche Post DHL Group. The latter two were chosen because they still distribute a significant amount of letters, the former because it is one of the largest players on the Danish market for freight and parcel distribution.
- (144) Denmark calculated EBIT margins and labour productivity for the three benchmark operators for the years 2017 to 2019 as the data from those companies was most recent at the moment of notification. A comparison of the results to the ones calculated in Post Danmark's counterfactual scenario (for 2020) is shown in Table 6 and Table 7 below.

Table 6

Benchmarking Post Danmark's EBIT

| Year | 2017 | 2018 | 2019 | Average |
|--|-------------|-------|-------|---------|
| Danske Fragtmænd A/S | 0,8 % | 2,7 % | 1,9 % | 1,8 % |
| Posten Norge AS | 2,8 % | 2,2 % | 3,3 % | 2,8 % |
| Deutsche Post DHL Group | 6,2 % | 5,1 % | 6,5 % | 5,9 % |
| Year | 2020 | | | |
| Post Danmark A/S (counterfactual scenario) | 3,8 % | | | |

Table 7

Benchmarking Post Danmark's labour productivity (million DKK/FTE)

| Year | 2017 | 2018 | 2019 | Average |
|----------------------|-------|-------|-------|---------|
| Danske Fragtmænd A/S | 2,853 | 3,094 | 3,043 | 2,997 |
| Posten Norge AS | 1,061 | 1,157 | 1,211 | 1,143 |

| Year | 2017 | 2018 | 2019 | Average |
|--|-------------|-------|-------|---------|
| Deutsche Post DHL Group | 0,873 | 0,843 | 0,869 | 0,862 |
| Year | 2020 | | | |
| Post Danmark A/S (counterfactual scenario) | 0,997 | | | |

(145) Based on the above data, Denmark claims that Post Danmark's estimations for EBIT and labour productivity are relatively conservative and well within the average figures seen within the sector. According to Denmark, these figures would confirm the reliability of the assumptions incorporated in the counterfactual scenario⁽⁵⁷⁾.

5.3.1.7.4. Doubts of the Commission on the reliability of NAC

Doubts as regards the input data

(146) As explained in recital (101) to (104), the report of the Rigsrevisionen raises doubts about the regulatory supervision of Post Danmark's accounts and the validation of these accounts by external auditors.

(147) For the NAC calculation, Denmark has used as input data the accounting data of Post Danmark. As explained in recital (104), the doubts expressed by the Rigsrevisionen on the supervision necessarily also put in question the accuracy of the actual accounting data, even though the Rigsrevisionen did not express itself on this. Therefore, the Commission has doubts at this stage, for the same reasons as those explained in recital (104) concerning the cost allocation methodology, that the NAC calculation meets the requirements of the SGEI Framework.

Doubts on the measurement of the impacts of certain assumptions

(148) In addition, the Commission has specific doubts as regards the effect of certain assumptions made on the costs and revenues of Post Danmark in the counterfactual scenario of the NAC.

(149) These doubts relate to the impact on the unit costs⁽⁵⁸⁾ (fixed and variable) of Post Danmark following the suggested changes in the counterfactual scenario:

(a) Denmark considers in the counterfactual scenario that the volume of the business is reduced; however, Denmark considers that the unit costs do not increase despite this downsizing of the company. The Commission has doubts on this since in principle lower volumes tend to lead to higher unit costs and vice versa.

(b) Denmark considers that the closure of [...] sorting centre and [...] distribution hubs does not lead to an increase in the costs of delivering letters and parcels. However, the Commission has doubts on that assumption because of longer distances that need to be travelled in the counterfactual scenario to deliver a letter or parcel, which would normally tend to increase these costs rather than that these costs stay at the same level;

(150) In fact, any change in the unit costs in the counterfactual scenario affects the NAC amount. In particular, an underestimated unit cost in the counterfactual scenario would unduly increase profits in that scenario which in turn would unduly increase the NAC. If the NAC is inflated, the verification of the absence of overcompensation is not possible.

(151) Based on the reasoning in recitals (147) — (150), the Commission has doubts that the NAC calculation complies with the requirements of the SGEI Framework.

⁽⁵⁷⁾ Danske Fragtmænd A/S's labour productivity is something of an outlier. This can be explained by the fact that Danske Fragtmænd A/S is a transport and logistics company, which transports goods and offers warehouse facilities to customers. Delivery costs and the average price of goods are significantly higher than delivery costs and average prices on letters and parcels.

⁽⁵⁸⁾ Cost of delivering one letter or one parcel.

5.3.1.7.5. Claims from the complainant on the NAC methodology

Stamp revenues

- (152) ITD claims that the revenues from stamps have not been taken into account in the NAC calculation and that their inclusion could lead to overcompensation for the USO.
- (153) The Danish authorities have explained that stamps have been taken into account when calculating the NAC. The revenues from stamps is part of the category 'other franking' in Tables 1 and 3.
- (154) The Commission has been able to verify the underlying data of Tables 1 and 3 and considers that the revenues resulting from the sale of stamps have been duly taken into account by the Danish authorities in the NAC calculation. The category 'other franking' in those tables includes several elements to pay for postal services such as franking machines, stamps, online letter postage⁽⁵⁹⁾ and unfranked replies (i.e. whereby the recipient pays).

Misallocation of costs

- (155) The Commission takes note of ITD's claim that Post Danmark would have misallocated its costs and thereby would have inflated the USO costs, which, in turn, could have led to a higher NAC. This issue will be assessed in the framework of the formal investigation procedure (see recitals (101) to (104)).

Calculation of the NAC

- (156) As regards the specific alleged deficiencies brought up by ITD on the elements to be taken into account in the calculation of the NAC presented in recital (41), the Commission notes that the same arguments were brought by ITD in the context its action for annulment related to the 2018 Decision. On 5 May 2021, the General Court upheld the Commission's NAC calculation for the USO entrusted to Post Danmark 2017-2019, related to the three elements raised by ITD.⁽⁶⁰⁾
- (157) As regards ITD's concern that the NAC calculation does not take into account the activities that would be continued in the counterfactual scenario due to them being profitable in the long-term, the Commission considers that the counterfactual scenario is provided by the Member State and that while it should represent a realistic scenario, it does not necessarily have to be the most optimal design of such a scenario. The Commission notably focusses on the impact of the counterfactual scenario on the accounts of the USO provider (i.e. Post Danmark), rather than its design. A less optimal scenario whereby activities would be discontinued despite that they could be profitable (in the long-term) and thus Post Danmark would not maximise profits from those activities would only consequently lower the NAC since no further profits are added⁽⁶¹⁾.
- (158) Thus the inclusion of the allegedly profitable part of Post Danmark's activities in the discontinued activities in the counterfactual scenario have only had as a consequence that the NAC of Post Danmark, as well as the compensation it is entitled to, are lower than they would otherwise have been.
- (159) The question whether certain activities are included or not in the counterfactual scenario due to them being profitable or not in the long-term is of no relevance. The calculation of the NAC is not based on short-term profitability. In this particular case, the counterfactual scenario covers only 2020, which is the period for which Denmark wants to grant USO compensation to Post Danmark.
- (160) The design of the counterfactual scenario starts from the actual situation of the undertaking in terms of organisation, infrastructure, activities and extrapolates a stable counterfactual scenario of that undertaking were it not be subject to the USO. It is important to understand that, in this design, the transition between the current factual situation and the counterfactual situation is not considered. The counterfactual scenario describes the situation of the undertaking when all necessary transitions have been implemented.
- (161) On that basis, the only relevant question when designing the counterfactual scenario is whether an activity is profitable in a stable counterfactual scenario. If activities are profitable in the counterfactual scenario, including them increases the NAC compared to a scenario where they are not included. The distinction between short-term and long-term profitability made by ITD is therefore not relevant as it is based on a misunderstanding of the NAC methodology.

⁽⁵⁹⁾ One could buy one or multiple codes online and write them on the envelope or print the code and stick it on the envelope.

⁽⁶⁰⁾ Judgment of the General Court of 5 May 2021, *ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240.

⁽⁶¹⁾ This may be illustrated by the following simplified calculations. Assume the cost of delivery of parcels nationwide is 200 and the revenue is 150, such that it is a loss-making activity. Now assume that the cost of delivery in urban areas is 75 while the revenue is 100, such that parcel delivery in urban areas is actually profitable. By discontinuing the entire activity, Post Danmark's NAC on this activity would be equal to the avoided costs (200) minus the foregone revenues (150) = 50. If Post Danmark were to discontinue only the non-urban delivery of parcels, its NAC for the activity would be equal to the avoided costs (200-75) minus the foregone revenues (150-100) = 125 - 50 = 75.

(162) In addition, the General Court already confirmed this assessment:

'the inclusion of profitable activities in the counterfactual scenario would have had the effect of increasing Post Danmark's profits in such a scenario and thus of increasing the difference, necessary for calculating the NAC, between the revenue derived from the USO and that which Post Danmark would have generated in the absence of the USO. Therefore, if the counterfactual scenario had included the continuation of other profitable activities, the possibility that the NAC calculation would have resulted in over-compensation would have been reduced, as would, consequently, the risk of the compensation at issue being incompatible with the internal market.'

'That conclusion is not called into question by the argument put forward by the applicants in the reply that the activities which they allege to be profitable are in fact profitable only in the long term, with the result that, for the creation of the counterfactual scenario, established in relation to the short-term period from 2017 to 2019, such activities would lead to losses.' ⁽⁶²⁾ (emphasis added)

(163) As regards ITD's concern that the NAC calculation does not deduct intangible benefits from corporate reputation and ubiquity, the General Court dismissed the evidence provided by the applicants in the context of the 2017-2019 period ⁽⁶³⁾. In the present case, ITD did not provide any evidence that could cast doubts on the NAC calculation beyond those expressed in recital (147) to (150). Since the factual circumstances in this regard appear to have remained the same compared to the 2018 Decision, the Commission considers that Denmark is right in not taking into account corporate reputation and ubiquity as intangible benefits in the NAC calculation.

(164) This conclusion is further supported by the General Court that has stated:

(a) as regards ubiquity:

'In the present case, in paragraph 159(iii) of the contested decision, the Commission stated that distributors of catalogues, magazines and newspapers were, according to the Danish authorities, fully prepared to select distributors that do not offer universal territorial coverage. That finding, which the applicants do not dispute, tends to establish that Post Danmark does not enjoy, by virtue of its status as a universal service provider, an intangible benefit linked to ubiquity.' ⁽⁶⁴⁾ (emphasis added)

(b) and as regards corporate reputation:

'in the absence of the USO, Post Danmark would discontinue the distribution of letters since that service is unprofitable. Therefore, any loss of reputation limited to the letter post sector would not impact Post Danmark's situation in the absence of the USO since Post Danmark would no longer be active in that sector.' ⁽⁶⁵⁾ (emphasis added)

(165) Considering the above, the Commission does not share ITD's doubts as regards the inclusion of activities that would be profitable in the long term and as regards the deduction of intangible benefits related to ubiquity and corporate reputation.

5.3.1.8. Efficiency incentives

(166) Paragraph 39 of the 2012 SGEI Framework states that: *'In devising the method of compensation, Member States must introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so.'*

(167) The provision of the services under the USO is subject to the quality standards laid down in Post Danmark's individual license in accordance with Article 17 of Directive 97/67/EC of the European Parliament and of the Council (see recital (28)).

(168) Post Danmark is required to appoint an independent external market analyst to monitor the fulfilment of the quality standards on domestic letters and to report the results to the Regulator every month. If Post Danmark fails to live up to the quality standards, a penance is imposed ⁽⁶⁶⁾.

(169) Denmark plans to pay a fixed USO compensation to Post Danmark of at most DKK 225 million for 2020. The net cost of discharging the public service obligations has been calculated at DKK 394 million (see Table 5). The maximum compensation to be paid to Post Danmark amounts to only 57,1 % of the NAC of the USO. As long as it does not lead to overcompensation, Post Danmark is allowed to absorb all the efficiency gains achieved which constitutes a strong incentive for efficiency. The Commission also notes that due to the quality standards and penance system described above, these efficiency gains should not prejudice the quality of the service provided.

⁽⁶²⁾ Ibid, paragraph 123-124.

⁽⁶³⁾ Ibid, paragraph 138-159.

⁽⁶⁴⁾ Ibid, paragraph 155.

⁽⁶⁵⁾ Ibid, paragraph 148.

⁽⁶⁶⁾ See in this regard also recital (119)(e) where it is explained that Post Danmark would optimize these quality measurements in the absence of the USO.

- (170) Considering the above, the Commission considers that Denmark has introduced sufficient incentives for the efficient provision of the USO.
- (171) As regards ITD's claim that the NAC calculation violates paragraphs 39-43 of the SGEI Framework because any efficiency incentives would be unattainable by Post Danmark, the Commission notes that the SGEI Framework requires the introduction of efficiency incentives for the provision of the SGEI concerned. This is, however, not the same as the level of efficiency of the SGEI provider, to which ITD refers as regards Post Danmark (recital (41)(c)).
- (172) If it would be demonstrated that a given SGEI provider would be an efficient provider at the outset or if the cost of the USO were calculated taking into account an efficient provider, and the USO compensation was lower than the net cost of such an efficient provider, then the fourth Altmark criteria would in fact be met, and there would be no advantage for the USO provider in question, and thus such compensation would not constitute State aid.
- (173) In the present case it was concluded that the fourth Altmark criterion was not met⁽⁶⁷⁾, and that the compensation to Post Danmark thus constituted State aid as the compensation to Post Danmark for the USO is not based on the net cost of an efficient provider.
- (174) It should further be noted that also ITD's argument that whatever efficiency standards will be applicable to Post Danmark those will anyways be insufficient is to be rejected. The quality criteria described in recital (28) are — as is also apparent from that recital — quality criteria which are laid down in Post Danmark's individual license, and Post Danmark would, in accordance with Danish law, be required to comply with these quality criteria regardless of whether it received USO compensation. Those quality criteria are the same as in the period covered by the 2018 Decision⁽⁶⁸⁾. It should be noted in this regard, that the SGEI Framework clearly caters for the fact that efficiency incentives can be designed in a different way, and that one way to design such system could be for Member States to define upfront a fixed compensation which anticipates and incorporates the efficiency gains that the undertaking can be expected to make over the lifetime of the entrustment act⁽⁶⁹⁾, as has been done in the present case (recital (169)).
- (175) Moreover, as regards the USO compensation assessed in the 2018 Decision, the General Court has concluded (along the same line with the reasoning of the Commission in recitals (171) — (174)):

'the applicants are wrong to claim that the compensation at issue did not contain any efficiency incentives on the ground that its beneficiary, Post Danmark, was on the brink of bankruptcy and, therefore, could not be regarded as an efficient service provider. Such an argument is based on confusion between, first, efficiency incentives as required under paragraphs 39 to 43 of the SGEI Framework, which seek to ensure that the provision of an SGEI provides efficiency gains while ensuring quality service and, secondly, the idea that the NAC is calculated on the basis of an efficient service provider.

In that regard, the question whether the level of compensation needed must be determined on the basis of an analysis of the costs that an efficient service provider would have incurred in performing the USO is not relevant when assessing the compatibility of the aid in the context of the application of Article 106(2) TFEU. Taking into account the economic efficiency of the universal service provider would be tantamount to requiring that such a service always be provided under normal market conditions, which could potentially obstruct the fulfilment, in law or in fact, of the particular task assigned to undertakings entrusted with the operation of an SGEI. Article 106(2) TFEU is specifically intended to prevent such a situation'⁽⁷⁰⁾ (emphasis added)

- (176) Considering the above, the Commission does not share ITD's doubts, and preliminarily concludes that there are efficiency incentives for the provision of SGEI.

5.3.1.9. Transparency

- (177) Paragraph 60 of the 2012 SGEI Framework states that: *'For each SGEI compensation falling within the scope of this Communication, the Member State concerned must publish the following information on the internet or by other appropriate means:*
- (a) *the results of the public consultation or other appropriate instruments referred to in recital 14;*
 - (b) *the content and duration of the public service obligations;*

⁽⁶⁷⁾ Recital (70).

⁽⁶⁸⁾ See recital (28) of the 2018 Decision.

⁽⁶⁹⁾ Paragraph 40 of the SGEI framework.

⁽⁷⁰⁾ Judgment of the General Court of 5 May 2021, *ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240, paragraph 164-165.

(c) *the undertaking and, where applicable, the territory concerned;*

(d) *the amounts of aid granted to the undertaking on a yearly basis.*

(178) Paragraph 60 (a) does not apply, as no public consultation has been carried out (see recital (89)). The Danish authorities already published the content, duration and identity of the undertaking on the internet.⁽⁷¹⁾ They have committed to publishing the amount of aid granted to Post Danmark on the internet as well.

5.3.1.10. *Additional requirements which may be necessary to ensure that the development of trade is not affected to an extent contrary to the interests of the Union*

(179) Paragraph 52 of the SGEI Framework states that, even when the requirements of the framework are met, *'in some exceptional circumstances, serious competition distortions in the internal market could remain unaddressed and the aid could affect trade to such an extent as would be contrary to the interest of the Union.'*

(180) In such exceptional circumstances, the Commission may require additional conditions or request additional commitments from the Member States to mitigate serious distortions of competition, as stated in paragraph 53 of the SGEI Framework.

(181) Paragraph 54 of the SGEI Framework further states: *'Serious competition distortions such as to be contrary to the interests of the Union are only expected to occur in exceptional circumstances. The Commission will restrict its attention to those distortions where the aid has significant adverse effects on other Member States and the functioning of the internal market, for example, because they deny undertakings in important sectors of the economy the possibility to achieve the scale of operations necessary to operate efficiently.'*

(182) The Commission recalls that additional requirements are only considered necessary in exceptional circumstances of serious distortions of competition that remain unaddressed by the other requirements of the 2012 SGEI Framework. In particular, the Commission restricts its attention to distortions where the aid has significant adverse effects on other Member States and the functioning of the internal market.

(183) The Commission has not identified the need for additional conditions or commitments beyond compliance with the conditions of the SGEI Framework, as this was already the case in the 2018 Decision.

(184) The Commission also notes that ITD identifies as an issue the fact that the USO compensation may be used for other activities than USO activities.

(185) However, first, in this regard, as confirmed by the General Court, an assessment by the Commission as to whether public service compensation is compatible with the internal market consists in verifying, irrespective of whether the corresponding amount is actually allocated to it, whether such a public service exists and imposes a net cost on the undertaking responsible for providing it. This applies all the more for postal services, as the first paragraph of Part C of Annex I to Directive 97/67 provides that *'recovery or financing of any net costs of universal service obligations may require designated universal service providers to be compensated for the services that they provide under non-commercial conditions'*. The General Court in *ITD and Danske Fragtmænd v Commission* stated that the expression 'recovery or financing' used in that provision excludes any requirement that the transfer of funds corresponding to compensation for the universal service actually be used for the performance of such a service.⁽⁷²⁾

(186) Second, Article 1(g) of Regulation 2015/1589 states that misused aid means aid used by the beneficiary in contravention of a Commission decision. The General Court in *ITD and Danske Fragtmænd v Commission* stated that only if it were established that Post Danmark had not fulfilled its obligations under the USO could it be found that the compensation at issue had been misused.⁽⁷³⁾

(187) It follows from recitals (185) and (186) that, in the case at hand, USO compensation could be used for other activities than the USO and that this is not prevented by Directive 97/67. Moreover, there is no indication that Post Danmark has not fulfilled its obligations under the USO and therefore no misuse of aid can be established.

(188) Considering the above, the Commission at this stage preliminarily concludes that in the case at hand there are no reasons to require conditions or to request commitments from the Member State.

⁽⁷¹⁾ See footnote 12.

⁽⁷²⁾ Judgment of the General Court of 5 May 2021, *ITD, Brancheorganisation for den danske vejgodstransport A/S and Danske Fragtmænd A/S v European Commission*, Case T-561/18, ECLI:EU:T:2021:240, paragraphs 170 and 172.

⁽⁷³⁾ *Ibid*, paragraph 176.

5.3.2. **Conclusion**

- (189) Based on the above, the Commission at this stage has doubts that the requirements of the 2012 SGEI Framework, in particular those related to the cost allocation methodology and the calculation of the net avoided cost, are fulfilled as regards the compensation for the provision of USO in 2020 for Post Danmark and consequently whether this compensation could be declared compatible with Article 106 (2) TFEU.
- (190) The Commission notes that for the sake of urgency, Denmark exceptionally accepts the adoption and notification of the Decision in the English language.

6. **CONCLUSION**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the TFEU, requests Denmark to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Denmark that Article 108(3) of the TFEU has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
