



Europe Economics Postal Executive Briefing

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The sunset clause and the negotiations over the next Postal Directive

In the latest in our series of Postal Executive Briefs (all available at our website at www.europe-economics.com) we consider the implications of the sunset clause.

Introduction

There is wide interest in the idea that “sunset clauses” may be a way of preventing regulation which has outlived its purpose from remaining in force; and the EU Postal Directives are subject to a sunset clause.

The possibility that the Amended Postal Directive¹ may expire under the activation of a sunset clause might become an important factor in the postal negotiations now underway, pressing some negotiators more than others towards reaching an agreement.

This brief argues that if the sunset clause were indeed to be triggered it would bring significant costs to many Member States, including those who have already opened their mail markets, as well as to the European Commission.

Background

Article 27 of Directive 2002/39 states that:

“The provisions of this Directive, with the exception of Article 26, shall expire on 31 December 2008, unless otherwise decided in accordance with Article 7(3). The authorisation procedures described in Article 9 shall not be affected.”

The final sentence of this Article was inserted in the last round of negotiations possibly prompted by some Member States aiming to gain an advantage in this round of the negotiations.

Reading across from Article 27, Article 26.2 states that:

“Should this Directive lapse, the measures taken by the Member States to implement it may be maintained to the extent that they are compatible with the Treaty.”

Under Article 9, which does not depend on the Directives remaining in force, Member States are permitted to issue authorisations (including individual licences) for non-reserved services within the scope of the universal service, to the extent necessary in order to guarantee compliance with essential requirements and to safeguard the universal service. Through these authorisations Member States can impose universal service obligations and requirements concerning the quality, availability and performance of the relevant services and to establish a compensation fund for the purposes of compensating the USP for any burdens imposed by the net costs of universal service provision.

If the sunset clause were to come into effect the key question would be whether or not

¹ Directive 2002/39



postal regulations were consistent with the Treaty.

It is worth noting here that whilst the integration of EU postal markets is far from complete, an EU internal postal market is starting to emerge and actions which affect any of the main operators in this sense affect all the national markets. (See “the Birth of the New European Postal Market” at www.europe-economics.com).

The relevant Treaty rules

In assessing the compatibility of measures taken by Member States the key relevant articles of the Treaty are those contained in the common rules on competition:

- Article 81 (prohibits agreements between associations such as price fixing, controlling production, cartels, discrimination, bundling etc).
- Article 82 (outlaws abuse of dominant position).
- Article 86 (deals with special or exclusive rights).
- Article 87 (sets out rules governing the used of state aids).

As we have seen in previous Executive Briefs (available at www.europe-economics.com), under the framework harmonisation achieved in the Amended Postal Directive Member States have pursued significantly different strategies for their national postal markets and for their USPs.

The lack of detailed harmonisation appears to have been one of the causes of a relatively large number of competition cases which have arisen in the sector. These

include significant cases under Article 82,² under Article 86.2³ and under Article 87.⁴

The apparent effects of the sunset clause

What would be the effects of the sunset clause?

Those Member States which have already fully opened their postal markets and where regulators use licensing to regulate the market may appear sheltered from the fall-out of such an event, which would appear to leave them free to pursue current arrangements.

(This appears to have been the thinking behind the insertion of the authorisation exception in Article 27 of the Directive.)

On this basis, the UK and possibly Sweden (and by 2007 perhaps also Germany and the Netherlands) could conceive of pursuing a negotiating policy where the sunset clause might be a reasonable fall back position.

However, such an analysis (and such a policy) might under-estimate the wider impact that the activation of the sunset clause on all the EU postal markets.

The more complex reality

Perhaps the most obvious of the effects of the expiry of the Directives would be a significant increase in regulatory and legal uncertainty.

Given the removal of a defined regulatory framework through the Directives, it is possible that operators or regulators would seek an early legal clarification of key

² e.g Deutsche Post fidelity rebates case.

³ e.g Corbeau case.

⁴ e.g:Deutsche Post State Aids case.



regulatory principles and definitions, referring cases or issues to the European Court of Justice (ECJ).

Such demands for legal clarification, possibly combined with a greater incidence of competition complaints could soon place considerable strain on the capacity of the European Institutions, particularly the ECJ, DG Internal Market and DG Competition.

National regulators might thus face a greater risk of a legal challenge to their decisions which may be passed (to be heard) to a European court, with a consequent delay, and with some uncertainty as to the outcome (the interpretation of Article 82, which would be an important element in this, is largely untrodden ground.)⁵

The likely practical effects on the market are even less clear. For example it is not certain whether or not the expiry of the Directive would by itself lead to greater competition in the mail market.

USP incumbent advantages (of scale, customer inertia and early mover advantage) would remain. Greater regulatory uncertainty might restrict competitive entry further making investment decisions appear more risky. Some Member States might still use authorisations to impose obligations on operators including compensation funding schemes for their USPs.⁶

The expiry of the Directive might also produce unanticipated consequences.

It is possible that some market players would move to exploit the temporary regulatory vacuum to enter mail markets and to operate in a more aggressive manner, for example

cross subsidising operations in national markets.

In this sense it could be argued that the activation of the sunset clause might also further strengthen moves towards a European oligopoly in postal provision, with smaller operators unable to enter other national markets now facing possibly less protection from the larger players.

The sunset clause and the postal negotiations

In light of this wide range of possible outcomes, the question of which negotiators are put under most pressure by the sunset clause is not easily resolved.

The Costs for the “liberalisers”

The potential expiry of the Amended Postal Directive might result in regulatory uncertainty combined with continued regulatory asymmetry which could well restrict the potential for competition to develop in national markets.

The expiry of the Directive could also set back (for a few years at least) moves at European level towards a more effective regulation of dominant postal suppliers, enabling more effective competition to develop.

Greater regulatory uncertainty could also deter entrants from taking the investment decisions necessary to build up European postal networks, delaying the appropriate development and consequent benefits of the internal market.

Such uncertainty might also undermine market confidence and delay moves in the Member States towards the privatisation of the USPs and towards sector reform.

⁵ European Competition Law Review (ECLR), Vol 26: Issue 2 (February 2005).

⁶ Nine Member States have set up the capability to do this already although only in Italy is such a fund being used.



Costs for the “conservatives”

There are also clearly risks in allowing the Directive to expire for those cautious about mail market opening.

In the short run, the expiry of the Directive might undermine the protection which some USPs enjoy. Market entrants could use the period of regulatory uncertainty to move into national markets and challenge the incumbent USP to justify any reservation or exclusive rights under Treaty rules. They could then appeal under European law against any attempt to prevent them from operating.

Depending on the response of the national regulator this might lead to the immediate liberalisation of the mail market without any regulatory protection (for example licensing or compensation funding) for the USP. Thus it could be argued that the expiry of the Directive could in one scenario, create a stronger momentum for the liberalisation of the sector. This may be a risk which some Member States are not be willing to bear.

Costs for the European Commission

The European Commission might be thought to have failed to follow through its policies, and be unhappy to face a possibly unsustainable level of regulatory uncertainty in the sector as stakeholders sought legal clarification through the courts. Further, efforts to promote the internal market and reduce the regulatory asymmetry across the Member States would be set back.

Conclusions

From this analysis, it does not appear to be in the interests of any of the key partners in for the sunset clause to be triggered.

- National regulators might face an increased possibility of legal challenge to their actions with the potential of the significant delay in decision implied by a likely reference to a European court.
- USPs might face immediate entry into their mail markets and a legal challenge to their special rights.
- Potential entrants might face increased regulatory uncertainty.
- Finally the European Commission would surely face severe criticism for its handling of the postal file from the Member States, an increasing scale of regulatory burdens and considerable political pressure to find solutions to the resulting legal problems.

Alongside these particular costs would be impact of market instability and continued regulatory asymmetry. There is therefore little comfort to draw from such a scenario, suggesting that it is important that negotiators should achieve a positive agreement for the sector and avoid ‘the sunset clause’.

Europe Economics is an independent economics consultancy, specialising in economic regulation, competition policy and the application of economics to public policy and business issues.

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