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(Pareri)

PROCEDIMENTI RELATIVI ALL'ATTUAZIONE DELLA POLITICA DELLA
CONCORRENZA

COMMISSIONE

AIUTO DI STATO — REGNO UNITO

Aiuto di Stato n. C 7/07 (ex NN 82/06 e NN 83/06) — Presunto aiuto a favore di Royal Mail e POL**Invito a presentare osservazioni a norma dell'articolo 88, paragrafo 2, del trattato CE**

(Testo rilevante ai fini del SEE)

(2007/C 91/10)

Con lettera del 21 febbraio 2007, riprodotta nella lingua facente fede dopo la presente sintesi, la Commissione ha comunicato al Regno Unito la propria decisione di avviare il procedimento di cui all'articolo 88, paragrafo 2, del trattato CE in relazione a talune misure.

La Commissione ha deciso di non sollevare obiezioni in merito ad altre misure di cui alla lettera che segue la presente sintesi.

Gli interessati possono presentare osservazioni in merito alle misure riguardo alle quali la Commissione avvia il procedimento entro un mese dalla data di pubblicazione della presente sintesi e della lettera che segue, inviandole al seguente indirizzo:

Commissione europea
Direzione generale Concorrenza
Protocollo Aiuti di Stato
SPA 3 6/5
B-1049 Bruxelles
Fax (32-2) 296 12 42

Dette osservazioni saranno comunicate al Regno Unito. Su richiesta scritta e motivata degli autori delle osservazioni, la loro identità non sarà rivelata.

TESTO DELLA SINTESI

DESCRIZIONE DELLE MISURE IN MERITO ALLE QUALI LA
COMMISSIONE AVVIA IL PROCEDIMENTO

PROCEDIMENTO

Beneficiario

Le misure riguardo alle quali la Commissione ha avviato il procedimento di cui all'articolo 88, paragrafo 2, sono state portate all'attenzione della Commissione mediante denunce o attraverso lo scambio di corrispondenza con le autorità del Regno Unito a seguito di tali denunce. Nessuna delle misure in questione è stata notificata alla Commissione.

Il beneficiario del presunto aiuto di Stato è la Royal Mail Group plc (RM), una società interamente controllata dallo Stato (attraverso una holding, la Royal Mail Holdings plc). La RM è il principale operatore postale del Regno Unito e fino alla fine del 2005 esercitava un monopolio legale sulla maggior parte dei servizi di base di recapito lettere. La rete degli uffici postali è gestita dalla POL, una controllata della RM. La RM disponeva

inoltre di un reparto distinto responsabile del recapito pacchi, la Parcelforce. La Parcelforce ha accumulato perdite a partire dal 1991 e, ad eccezione del modesto utile d'esercizio realizzato nel 1995/1996 e nonostante le numerose ristrutturazioni, ha continuato a registrare perdite fino al 2005, l'anno in cui è tornata ad essere redditizia.

Il prestito del 2001

Nel febbraio del 2001 le autorità del Regno Unito hanno concesso alla RM un prestito di 500 milioni di GBP per finanziare acquisizioni all'estero nei settori recapito posta e recapito pacchi. Si tratta di un prestito rimborsabile tra il 2021 e il 2025, con un tasso di interesse medio pari a circa il 5,8 %. Le autorità del Regno Unito hanno dichiarato nella corrispondenza con la Commissione che il prestito si basava su condizioni commerciali e che si erano avvalse dell'aiuto di consulenti per fornire garanzie in tal senso. Inoltre, esse hanno aggiunto che il prestito non era destinato a finanziare un'eventuale ristrutturazione della Parcelforce, che le relative condizioni non erano associate a tale ristrutturazione e che esso era stato erogato esclusivamente per finanziare acquisizioni estere.

Gli strumenti di prestito

Nel 2003 le autorità del Regno Unito hanno messo a disposizione della RM diversi strumenti di prestito per finanziare il suo «piano di rinnovamento», tra cui un prestito di 544 milioni di GBP a valere sul *National Loans Fund* (NLF), garantito dal saldo di cassa accumulato della RM e dall'acquisto, da parte delle autorità britanniche, di due obbligazioni emesse dalla RM (una di 300 GBP e l'altra di 200 milioni di GBP). Le autorità del Regno Unito hanno nuovamente dichiarato nella corrispondenza con la Commissione che tali strumenti di prestito si basavano su condizioni commerciali e che esse si erano avvalse dell'aiuto di consulenti per fornire garanzie in tal senso. Ad ottobre del 2006 tali strumenti di prestito risultavano inutilizzati e il prestito di 200 milioni di GBP era ormai giunto a scadenza. La RM aveva tuttavia pagato delle commissioni di impegno. Nel maggio del 2006 le autorità del Regno Unito hanno annunciato la loro intenzione di prorogare i rimanenti strumenti di prestito e di portarli da 844 a 900 milioni di GBP.

Il conto pensioni a garanzia

Nel 2006 le autorità britanniche hanno deciso di istituire un «conto a garanzia» mediante il saldo di cassa delle riserve della RM sul quale le autorità del Regno Unito esercitavano uno speciale controllo ai sensi della sezione 72 del *Postal Services Act 2000*. Il conto poteva essere utilizzato dal *Royal Mail Pension Plan* (RMPP) in determinate circostanze qualora la RM non fosse stata in grado di far fronte ai suoi impegni. Va ricordato che i vari piani di pensionamento della RM (tra questi il RMPP era di gran lunga il più consistente), registravano un deficit complessivo di 5,6 miliardi di GBP nei conti del 2005/6. Il conto consente alla RM di concordare con i fiduciari del RMPP un periodo più lungo per far fronte al deficit, riducendo in tal modo i propri contributi pensionistici negli anni successivi. Le autorità del Regno Unito ritengono che l'utilizzo delle riserve per questo scopo sia nell'interesse commerciale della RM e che consentendo a quest'ultima di portare a termine il suo piano strategico esse determineranno un aumento del valore della

quota in loro possesso. Alla Commissione risulta che la misura in questione sia oggetto di impegni concreti e che essa abbia già prodotto delle conseguenze. La Commissione considera pertanto la misura come eseguita.

Il prestito azionisti da 300 milioni di GBP

L'8 febbraio 2007 le autorità britanniche hanno fatto un annuncio riguardante il conto pensioni, lo strumento di prestito da 900 milioni di GBP e un nuovo prestito da 300 milioni di GBP a favore della Royal Mail.

VALUTAZIONE DELLE MISURE

Esistenza di un aiuto

Il prestito del 2001 è rimborsabile tra il 2021 e il 2025 con un tasso di interesse medio di gran lunga inferiore al tasso di riferimento (7,06 %) applicabile al Regno Unito al momento in cui le autorità britanniche comunicarono alla Commissione di averlo concesso. Le autorità britanniche hanno fornito alcune prove che dimostrano che all'epoca i tassi di interesse per quel tipo di prestiti a lungo termine potevano essere inferiori al tasso di riferimento (basato su tassi quinquennali) senza violare il principio dell'investitore operante in economia di mercato. Tuttavia, tali prove indicherebbero anche che una parte del prestito è stata concessa nel 1999 e nel 2000. Oltre a contraddire le informazioni precedenti, esse riguardano un periodo in cui il tasso di riferimento era addirittura superiore (7,64 % nel 2000).

Gli strumenti di prestito concessi nel 2003 non sono stati utilizzati. Tuttavia, ciò non basta per concludere che essi non fornivano alcun vantaggio, poiché la loro disponibilità rappresentava un «valore di opzione» per la società. Nel 2003 non si poteva sapere che non sarebbero stati utilizzati. Gli strumenti di prestito del 2003 ancora esistenti nell'ottobre del 2006 devono essere prorogati, sulla base di nuove condizioni. Le autorità del Regno Unito hanno informato la Commissione il 31 ottobre che le condizioni erano ancora in corso di negoziazione. Stando alle informazioni di cui dispone la Commissione, non si può escludere la presenza di un elemento di aiuto.

Uno degli effetti del conto pensioni a garanzia (che è chiaramente selettivo nei confronti della RM) consiste nel ridurre i contributi pensionistici che la RM deve versare a favore del RMPP per far fronte al suo attuale deficit. Ciò indica che la misura potrebbe conferire un vantaggio alla RM e configurarsi pertanto come aiuto di Stato. Le autorità del Regno Unito hanno dichiarato che la misura può essere giustificata come intervento di un investitore operante in economia di mercato, poiché consente alla RM di modernizzare le proprie attività attraverso l'attuale piano strategico. Tuttavia, la Commissione nutre alcuni dubbi riguardo a tale affermazione, non essendo suffragata da proiezioni o analisi finanziarie, e non dispone di elementi sufficienti per confutare l'ipotesi dell'esistenza di un aiuto.

Le condizioni del prestito da 300 milioni di GBP non sono state comunicate alla Commissione. Poiché il prestito fa parte del pacchetto di misure che secondo la Commissione potrebbero configurarsi come un aiuto di Stato, non è stato possibile valutare in maniera indipendente tali condizioni.

Compatibilità dell'aiuto

Nel caso delle misure in oggetto, la base giuridica dell'articolo 86, paragrafo 2, non appare applicabile. Le autorità del Regno Unito hanno esplicitamente associato il prestito del 2001 e gli strumenti di prestito a progetti diversi dai servizi di interesse economico generale, ossia ad acquisizioni estere della RM e al piano di rinnovamento adottato nel 2003. Analogamente, anche il conto pensioni a garanzia e il prestito azionisti da 300 milioni di GBP non erano collegati ad alcun servizio di interesse economico generale fornito dalla RM.

L'unica base utile per stabilire la compatibilità delle misure in oggetto, qualora presentino un elemento di aiuto di Stato, sarebbe data in questa fase dall'articolo 87, paragrafo 3, lettera c), del trattato. Tuttavia, le misure non ottempererebbero alcuna delle norme riguardanti l'applicazione di tale disposizione promulgate a tutt'oggi dalla Commissione. Pertanto, qualora si dovesse configurare un elemento di aiuto di Stato, la Commissione dubita che tali misure siano compatibili con il mercato comune.

Conformemente all'articolo 14 del regolamento (CE) n. 659/1999, tutti gli aiuti illegittimi possono formare oggetto di recupero presso il beneficiario.

TESTO DELLA LETTERA

«The Commission wishes to inform the United Kingdom 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 88(2) of the EC Treaty. The Commission decided not to raise any objections to certain other measures, as described in this letter.

1. PROCEDURAL ASPECTS

- (1) On 3 December 2002, Deutsche Post (DP) lodged a complaint against alleged cross-subsidies granted to the parcel activities of Royal Mail Group (RM).
 - (2) In response to Commission requests for information, the UK authorities provided information relevant to the matters raised in the complaint by letters of 25 February 2003 and 13 February 2004, and by email dated 17 December 2003. This information included certain other Government measures in relation to Royal Mail.
 - (3) On 27 May 2003, the Commission approved a series of measures in favour of Post Office Limited ("POL") which is a subsidiary of RM (case N 784/02) ⁽¹⁾. Under these
 - (1) — an annual compensation of GBP 150 million granted to POL for the net public service cost of rural counter coverage ("rural network support"),
 - an aid devoted to back POL's debt to Royal Mail Group plc which had financed POL's balance-sheet deficits up to 31 March 2002 ("debt payment funding"),
 - a rolling working capital loan to POL for over-the-counter cash payments meant to fund the basic postal account.
 These measures complement earlier measures the Commission approved in 2002. On 12 March 2002 the Commission approved the funding of a basic postal account to credit social benefits and from which cash can be withdrawn at post office counters for those benefits holders who do not want to open an account with a bank. On 18 September 2002 the Commission approved minimum funding necessary for POL to close 3 000 urban counters no longer required under the 2000 UK Postal Services Act (2000).
- measures, compensation was granted to POL, financed through a reserve constituted from surplus cash generated by RM. On 22 February 2006 the Commission raised no objection to continuation of one of these measures (rural network support) for a further period (case N 166/05).
- (4) On 8 October 2003, DP lodged an action for annulment (T-343/03) against the N 784/02 Commission Decision, arguing that this decision had implicitly rejected its CP 206/02 complaint. On 16 November 2005, the Court of First Instance rejected the action of DP saying that the N 784/02 Decision did not imply the rejection of the complaint and that the Commission was carrying on investigations (as demonstrated by the correspondence presented before the Court).
 - (5) On 10 August 2006, DP sent a letter which invited the Commission to take a position on its complaint of 2002 within the period of two months, on the basis of Article 232 of the Treaty. The same letter contained information concerning a series of alleged new State aid measures. These measures are distinct from those which were the subject of the complaint of 2002 and the complaint against them was therefore treated as a separate complaint which was attributed the reference CP 221/06, subsequently NN 83/06. The alleged measures were as follows:
 - a transfer of GBP 850 million to a special account dedicated to finance RM's pensions,
 - decision of Department of Trade and Industry to increase the amount of a loan granted to RM from GBP 844 million to GBP 900 million,
 - violation of DG Comp's N 166/05 Decision concerning support for POL's rural network, since GBP 150 million was transferred to POL directly from the State budget and not, as approved by the Decision, from a special, ring-fenced reserve.
 - (6) In response to Commission requests for information, the UK authorities provided information relevant to the matters raised in the two complaints by letters of 6 October and 31 October 2006. By letter of 5 December 2006 they supplemented this information with respect to one of the other measures mentioned at paragraph (3) above.
 - (7) By letter of 27 October 2006, the Mail Competition Forum (MCF), a body representing entrants to the postal market in the UK, submitted a complaint about the special account dedicated to finance RM's pensions also covered by DP's second complaint. The complaint of MCF was attributed the reference CP 164/06, subsequently NN 82/06. A non-confidential version of the complaint was sent to the UK authorities on 20 November 2006. The UK authorities supplied some comments on the complaint by letter of 19 December 2006.
 - (8) By letter of 7 December 2006 the Commission informed DP that it did not see sufficient grounds for continuing the investigation concerning complaint CP 206/02, and that if it did not hear from DP within 20 working days, the complaint would be considered withdrawn. No response was received within the deadline. That complaint is therefore considered withdrawn and the specific allegations made in it are not treated in this decision.

- (9) On 7 December 2006 the United Kingdom notified the proposed extension of another of the measures in favour of POL (debt payment funding) covered by N 784/02 which was otherwise due to expire in 2007. The Commission is treating this notification (N 822/06) in a separate decision.
- (10) On 8 February 2007 the UK authorities communicated to the Commission the terms of an announcement concerning the pensions measure, the GBP 900 million loan facility and also a new loan of GBP 300 million to Royal Mail.

2. DESCRIPTION OF THE MEASURES

2.1. The beneficiary of the alleged State aid

- (11) The beneficiary of the alleged State aid is Royal Mail Group plc (RM) which (through a holding company, Royal Mail Holdings plc) is a 100 % State-owned company. RM is the UK's main postal operator and had a legal monopoly over most basic letter services until the end of 2005. The post office network is operated by POL, which is a subsidiary of RM.
- (12) Before 2001, the postal activities in the UK were carried out by The Post Office Corporation, a statutory body created by the Post Office Act 1969. The assets and liabilities of The Post Office Corporation were transferred to Consignia Holdings (now renamed Royal Mail Holdings plc) and to its subsidiary, Consignia plc (now RM) on 26 March 2001, under the terms of the Postal Services Act 2000.
- (13) RM has a separate parcels business division, Parcelforce, which was cited as the particular beneficiary in DP's complaint of 2002. Parcelforce has its own separate hub and spoke infrastructure. In 2003 a part of parcels activity (including the provision of a universal service for parcels handed in at post offices) was transferred from Parcelforce to RM and is now operated through RM's infrastructure. Today Parcelforce is focused only on time critical parcels.

2.2. Financial regime of the beneficiary and relationship with the State

- (14) Under the regime in existence before the incorporation and transfers of 2001, there was no requirement for The Post Office Corporation to pay any dividends to the UK authorities and it did not do so. It was however obliged to invest a proportion of the profits it generated each year in Government securities or National Loan Fund deposits. These investments, classed as current assets and often referred to as the "gilts", remained with RM following the 2001 transfers and amounted to GBP 1,8 billion at 31 March 2002. Following directions of the UK authorities under section 72 of the Post Office Act 2000 dated 30 January 2003, RM placed these assets in a special reserve ("the mails reserve") to be used to finance specific measures as directed.
- (15) Following the incorporation and transfers of 2001, the possibility exists for RM Holdings plc to pay a dividend to its shareholder the UK Government. It has not however done so having made losses for most of the subsequent years.

- (16) Beginning in 2001, the UK authorities have made certain loans or loan facilities available to RM. These are described in section 2.4 below.
- (17) Through directions dated 30 January 2003, 25 May 2006 and 11 July 2006, the UK authorities directed RM to use the mails reserve to fund measures in favour of POL. The Commission had raised no objection to these measures by decisions of 27 May 2003 ⁽²⁾ (case N 784/02) and 22 February 2006 (N 166/05). By means of an agreement dated 9 August 2006 and through directions dated the same day and 28 September 2006, the UK authorities made arrangements to end the use of the mails reserve to fund these measures and to fund them instead directly from the State budget. The UK authorities informed the Commission of this change by means of a letter dated 6 October 2006.
- (18) Parcelforce had accumulated losses since 1991. Before 1996 Parcelforce underwent a restructuring with the effect of containing its losses and Parcelforce made a small trading profit in 1995/1996. Since that date, despite numerous restructuring efforts, including the closure of five sort-centres, the elimination of some 5 000 jobs and the closure of 50 out of 102 depots in 2002, Parcelforce generated further losses until the implementation of a far-reaching restructuring plan starting in 2003. After a successful implementation of this plan, Parcelforce became profitable again in 2005.

2.3. State financing measures in favour of RM

2.3.1. The 2001 loan

- (19) In February 2001, the UK authorities made a loan of GBP 500 million to RM to finance overseas acquisitions for the mails and parcels business. The loan is repayable between 2021 and 2025 and carries an average interest rate of around 5,8 %. The UK authorities have stated in correspondence with the Commission that this loan was on commercial terms, and that they followed advice from consultants designed to ensure that this was so. In addition, they have stated that the loan was not for any Parcelforce restructuring, that its terms were not linked to such restructuring, and that it was made solely to finance overseas acquisitions. The loan was secured on RM's shareholding in General Logistics Systems International Holdings BV and certain other RM assets. The loan was not notified to the Commission.

2.3.2. The measures in favour of POL

- (20) By letter dated 3 December 2002 the UK authorities notified the measures in favour of POL referred to at paragraph (4) above. These measures were approved by the Commission in May 2003. The decision noted the funding mechanism from the mails reserve.

⁽²⁾ It should be noted that this decision stated the measures not to be State aid given the jurisprudence existent at the time, but in the alternative to be compatible with the common market if they were considered to be aid. When one measure (rural network support funding) was reassessed in case N 166/05 in the light of the subsequent jurisprudence, it was considered to be State aid.

(21) By letter of 18 March 2005 the UK authorities notified the extension of one of these measures, Rural Network Support, which had been authorised for three years up to 31 March 2006. This extension was approved by the Commission on 22 February 2006. By letter of 6 October 2006 the UK authorities informed the Commission that they were now funding the two continuing measures, namely Rural Network Support and Debt Funding Mechanism, directly from the State budget and indeed had begun to make payments on that basis. In that letter the UK authorities noted that the mails reserve represented State resources and that therefore the UK believed the change in funding arrangements had any bearing on the previous clearance decisions. In the case of one payment, the State made a capital injection to RM for an amount (GBP 145 million) that RM had loaned to POL.

2.3.3. *The loan facilities*

(22) In 2003 the UK authorities made available to RM various loan facilities to finance its "renewal plan" (including the restructuring of Parcelforce described at paragraph (19) above). These facilities, described by the UK authorities as "a commercial package" were negotiated between RM and the Government and consisted of a loan facility of GBP 544 million from the National Loans Fund (NLF) secured on RM's accumulated cash balances (in particular the funds allocated to the mails reserve) and the acquisition by the authorities of two bonds issued by RM (one of GBP 300 million and one of GBP 200 million). Again, the UK authorities have stated in correspondence with the Commission that these loan facilities were on commercial terms, and that they followed advice from consultants designed to ensure that this was so. They also informed the Commission that as of October 2006 these loan facilities had not been drawn down, apart from a GBP 50 million testing of the draw down process which was repaid in 7 days, and that the GBP 200 million facility had by then expired. Commitment fees of some GBP [...] (*) had nonetheless been paid by RM. These loan facilities were not notified to the Commission.

(23) In May 2006 the UK authorities announced their intention to extend the remaining loan facilities and to increase their level from GBP 844 million to GBP 900 million. The UK authorities indicated on 31 October 2006 that the precise terms of this extension were still being finalised but the intention was that it would be on commercial terms and that the lending would not constitute State aid. They did not therefore intend to notify the extended loan facilities to the Commission. On 8 February 2007 the UK authorities announced that the terms of the extended facilities had been agreed.

2.3.4. *The pensions escrow account*

(24) In 2006 the UK authorities decided to release GBP 850 million of the cash balances remaining in the mails reserve within RM to set up an "escrow account", which could be drawn on by the Royal Mail Pension Plan (RMPP) in certain circumstances if RM were to fail as a business. The background to this measure was that the various RM pension schemes, of which the RMPP is by far the largest,

showed a total deficit (excess of projected liabilities over assets, on certain prudential assumptions) of GBP 5,6 billion in its 2005/6 accounts, where for the first time this deficit was included in RM's balance sheet. The RMPP, like other UK occupational pension schemes, is a funded scheme which is required to hold assets in respect of its liabilities. According to the UK authorities, RM would not be able to pay off this deficit quickly and modernise the business at the same time, given projected cash flows. The account therefore allows RM to agree with the trustees of the RMPP a longer period for addressing the deficit thereby reducing its pension contributions in the next years. The UK authorities have stated that they believe the use of the mails reserve for this purpose is in RM's best commercial interests, and that by enabling RM to complete its strategic plan they will bring about an increase in the value of the UK authorities' shareholding. Without the escrow account and the extended loan facilities, the UK authorities claim there is a possibility that shareholder value would be destroyed not enhanced, and therefore that they are acting in a commercial manner and notification is not necessary.

(25) The Commission understands that the UK authorities have fully committed themselves to this measure including in statements to Parliament. They have informed the Commission that the measures in favour of POL are being financed from the State budget because the mails reserve has been allocated for this other purpose. The intention to implement the escrow account is referred to both in the accounts of the Department of Trade and Industry and in the recital to a legal act directing RM under s.72 of the Postal Services Act which ends the use of the mails reserve to fund the POL measures. The Commission therefore considers that this measure has been put into effect. It has therefore placed this measure on the register of non-notified aid, under the reference NN 82/06 (in relation to the complaint by the MCF) and NN 83/06 (in relation to the complaint by DP).

2.3.5. *The new GBP 300 million shareholder loan*

(26) On 8 February 2007 the UK authorities announced their agreement to provide RM with a GBP 300 million shareholder loan. This loan has not been notified to the Commission, nor have the UK authorities indicated their intention to do so. It is clear from the terms of the announcement that this loan is part of a package of measures with the pensions escrow account and loan facility.

3. ANALYSIS

3.1. **Qualification of the measures as State aid**

(27) Article 87(1) of the EC Treaty states:

Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(*) Business secret.

In order for aid in the sense of Article 87(1) to be present, there needs to be an aid measure imputable to the State which is granted by State resources, affects trade between Member States and distort competition in the common markets, and confers a selective advantage to undertakings.

- (28) The business of letters and parcels delivery is an international one, and the Commission believes that a selective advantage in favour of RM or Parcelforce would distort competition and affect trade between Member States.

3.1.1. The 2001 loan

- (29) The 2001 loan was granted from State funds, and was selective in that it was granted only to RM.
- (30) In order to determine whether the loan provided an advantage to RM, it is necessary to examine its terms so as to assess whether a private lender, acting in a market economy, would have been prepared to lend on the same terms. For these purposes the Commission has equipped itself with reference interest rates⁽³⁾ by which the terms of loans may be assessed. These reference rates are based on the five-year interbank swap rate, plus a premium of 0,75 percentage points. As it has made clear in its 1993 Communication on the Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, "where the public authority controls an individual public undertaking ... the Commission will take account of the nature of the public authorities' holding in comparing their behaviour with the benchmark of the equivalent market economy investor"⁽⁴⁾, both for calls for funds to financially restructure a company and to finance specific projects. In the case of a company which "has underperformed", the owner called upon to provide the extra finance to such undertaking will normally examine "more sceptically" a call for finance. Where the call for finance "is necessary to protect the value of the whole investment the public authority like a private investor can be expected to take account of this wider context when examining whether the commitment of new funds is commercially justified" and where a decision is made "to abandon a line of activity because of its lack of medium/long term commercial viability, a public group, like a private group, can be expected to decide the timing and scale of its run down in the light of the impact on the overall credibility and structure of the group".
- (31) As noted above, the 2001 loan is repayable between 2021 and 2025 and carries an average interest rate of around 5,8 %. This is significantly below the reference rate applicable to the UK at the time the UK previously informed the Commission that the loan was granted, which was 7,06 %. The UK authorities have provided certain evidence that at that time the yield curve in the UK was downward sloping and that therefore the interest rates for such a long term loan could be below the reference rate (which is based on five year rates) without contravening the market economy investor principle. However, this evidence also appears to indicate that part of the loan was granted

in 1999 and 2000. Not only does this contradict earlier information, but it involves a period when the reference rate was even higher (7,64 % in 2000). The Commission has also noted that, at least in 2001, the decline in Royal Mail's financial performance was beginning. This would normally be reflected in the terms of any loan. For this reason, when assessing a loan to a company in financial difficulties, the Commission may use as a point of comparison a rate higher than the reference rate.

- (32) The Commission also notes that the purpose of the loan was not linked to restructuring, and that it was made solely to finance overseas acquisitions. The UK authorities have not argued that the loan was necessary to protect the value of the whole investment in RM.
- (33) The Commission therefore has doubts concerning the aid character of this loan and cannot exclude *a priori* that aid is involved. The Commission wishes to examine, within the context of the Article 88(2) procedure, whether the 2001 loan provided an advantage to RM.

3.1.2. The measures in favour of POL

- (34) The Commission has already assessed the aid character of the measures in favour of POL in cases reference N 784/02 and N 166/05. In the case of N 784/02 it should be noted that the Commission considered that the measures did not constitute State aid in the sense of Article 87(1), given the absence of overcompensation for the provision of a service of general economic interest, in accordance with the Community jurisprudence at the time. In the alternative, were they to be considered State aid, they were compatible under Article 86(2) of the Treaty.
- (35) As it has already stated in case N 166/05 in respect of one measure, the Commission believes that in the light of subsequent jurisprudence⁽⁵⁾ these measures do constitute State aid because they do not meet the four criteria under which compensation for provision of services of general economic interest falls outside the definition in Article 87(1) of the Treaty. These conditions are that, first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which 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 with means of transport, would have incurred. The Commission considers that the fourth condition is not met by the measures in favour of POL.

⁽³⁾ Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3).

⁽⁴⁾ OJ C 307, 13.11.1993, p. 3, paragraph 30.

⁽⁵⁾ Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, Case C-280-00, [2003] ECR I-7747.

- (36) The qualification of these measures as State aid is not at all changed by the information provided by the UK in its letter of 6 October, that the two continuing measures, namely Rural Network Support and Debt Funding Mechanism, would now be funded directly from the State budget.
- (37) These measures therefore constitute State aid. In so far as they respect the terms on which they have already been authorised by the Commission, they constitute existing aid in the sense of Article 1(b)(ii) of Council Regulation (EC) No 659/1999.

3.1.3. *The loan facilities*

- (38) The UK authorities have informed the Commission that as at October 2006 the loan facilities granted in 2003 had not been drawn down. However, it cannot be concluded from this point alone that the loan facilities provided no advantage, since the availability of the loan facilities has an "option value" to the company. It could not have been known in 2003 that they would not be drawn down. The terms of the loan facilities therefore need to be assessed in the same way as the 2001 loan. The 1993 Commission communication mentioned and quoted at paragraph (31) above is also relevant to this assessment. It can be noted that these loan facilities were linked to RM's "renewal plan".
- (39) The GBP 544 million NLF loan was granted at "[...] basis points above Libor or relevant gilt". It should be noted that the reference rate is set at 75 points above an interbank swap rate. The UK authorities have justified the low margin by reference to the security provided, namely the cash reserves of RM. However, the Commission notes that these reserves constitute State resources over which the UK authorities had control through specific legislation. The Commission therefore questions whether their use as security could necessarily dispel its doubts as to the aid character of the measure. It notes that if the loan had been drawn down a saving of [...] basis points would outweigh the value of the commitment fees which have been paid by RM.
- (40) The bonds of GBP 300 million and of GBP 200 million were issued at rates of [...] and [...] basis points above the "relevant gilt". The larger bond was secured by a floating charge over all assets of RM while the smaller one had lower security. The margin of [...] basis points above a rate based on Government securities (which are typically below interbank rates) implies the GBP 300 million loan may have been at a rate below the Commission's reference rate.
- (41) In order to assess whether the terms of these loan facilities contained an aid element, one test to be applied would be whether the commitment fees paid by RM covered the value of the option. If the loan facilities themselves contain an aid element (ie if the available loan was below a market economy investor rate) then it would be necessary to assess what account should be taken of this in assessing the value of the option.

- (42) The UK authorities have informed the Commission, in response to questions, that the 2003 loan facilities still existing in October 2006 (namely the GBP 544 million National Loan Fund loan and the GBP 300 million bond) are to be extended, on revised terms. The UK authorities informed the Commission on 31 October that the terms were still being negotiated but that they were taking advice from consultants to ensure that the terms were commercial.
- (43) On the basis of the information available to the Commission it cannot be ruled out that an aid element is involved.
- (44) In the light of all the above information the Commission is unable to allay its doubts that the loan facilities made available to RM may contain State aid. It therefore invites the UK to provide full details to the Commission within the context of the Article 88(2) procedure so that it can be assessed whether the past and proposed extended facilities provide any aid element.

3.1.4. *The pensions escrow account*

- (45) It is established case law that measures of State intervention need to be assessed under Article 87(1) not by reference to their causes or their aims but in relation to their effects⁽⁶⁾. The UK authorities have made clear that one clear effect of the escrow account, which is clearly selective towards RM, is to reduce the pensions contributions that RM has to make to the RMPP to address its current deficit. This is an indication that the measure may provide an advantage to RM and therefore be State aid.
- (46) As already noted the UK authorities have argued that the measure can be justified as the intervention of a market economy investor, which would imply that it does not provide any advantage and is therefore not State aid, because it allows RM to modernise its business through its current strategic plan. However, the Commission has doubts about this argument, which has not been backed up by projections or by financial analysis, and is not in a position to allay its doubts that aid may be involved. It therefore wishes to open the Article 88(2) procedure on this point.
- (47) In examining this question the Commission will be considering three aspects, given the particular nature of the funds being allocated to the escrow account. Given that the reserve funds within the reserve are already held within Royal Mail and on its balance sheet, one issue is whether the creation of the escrow account can be regarded as a commercial decision by RM in spite of the involvement of the UK authorities, which arises through the particular legal regime applicable. A second issue, given the particular powers taken by the UK authorities over these reserves, is whether a shareholder acting commercially would agree to this use of shareholders' equity. A third issue, given that the use of the reserves for the pensions measure requires the authorities to fund the POL measures from the State budget, is whether a shareholder would agree to bring new equity to fund an escrow account of this type.

⁽⁶⁾ Judgment of the Court of 2 July 1974, Italian Republic v Commission of the European Communities — Family allowances in the textile industry, Case 173-73, [1974] ECR 709.

3.1.5. *The new GBP 300 million shareholder loan*

- (48) The terms of the loan have not been communicated to the Commission. The Commission has therefore been unable to assess whether its terms include aid. Given the fact that the loan is part of package of measures where the Commission has not allayed its doubts that State aid may be involved, the terms of the loan could not in any case be assessed independently. The Commission therefore wishes to assess the terms of this loan within the 88(2) procedure it is opening.

3.2. **Assessment of compatibility of the measures if State aid is present**

- (49) RM carries out certain services of general economic interest. Aid destined to meet the extra costs of providing such services could, under appropriate conditions, be authorised on the basis of Article 86(2) of the EC Treaty. Indeed, the measures in favour of POL referred to in section 3.1.3 above were authorised on this basis. The Commission believes that this authorisation is not put into question by the change of funding arrangements under which the measures are financed direct from the State budget and therefore raises no objection to this change.
- (50) However, in the case of the other measures referred to above for which the Commission has not been able to allay its doubts that State aid may be involved, namely the 2001 loan, the loan facilities and the pensions escrow account, the legal basis of Article 86(2) does not seem to be available. The 2001 loan and loan facilities have been explicitly linked by the UK authorities to other projects, namely the overseas acquisitions of RM and the renewal plan adopted in 2003. The pensions escrow account and GBP 300 million shareholder loan have similarly not been linked to any service of general economic interest performed by RM.
- (51) The only basis for compatibility for these measures, if they contain State aid, would at this stage appear to be Article 87(3)(c) of the Treaty. However, the measures do not appear to conform with any of the rules concerning the application of that sub-paragraph that the Commission has promulgated to date. If therefore State aid is involved, the Commission doubts whether these measures are compatible with the common market.

4. **DECISION**

- (52) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in

Article 88(2) of the EC Treaty, requests the United Kingdom to submit its comments and to provide all such information as may help to assess the 2001 loan, the loan facilities and the pensions escrow account within one month of the date of receipt of this letter.

- (53) In particular, the Commission requests the UK to provide:
- clarification of the details and timing of the 2001 loan and any further considerations concerning its conformity to the market economy investor principle,
 - clarification of the details of the loan facilities issued in 2003, any further considerations concerning their conformity to the market economy investor principle including concerning the market conformity of the commitment fees paid, and full details of the extended loan facility negotiated with Royal Mail,
 - full details of the pensions escrow account, including the terms on which it may be called upon by the RMPP, the legal instruments establishing it, the effect of its creation on the pensions contributions to be paid by RM, and any further considerations concerning its assessment under Article 87(1) of the Treaty,
 - full details of the GBP 300 million shareholder loan announced on 8 February 2007.
- (54) The Commission raises no objection to the change of funding arrangements for the measures in favour of POL of which the United Kingdom informed the Commission on 6 October 2006.
- (55) The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.
- (56) The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (57) The Commission warns the United Kingdom 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.»