



UPS France Response To The Public Consultation - Draft decision on La Poste's accounting rules and regulatory accounting compensation

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Dear Ms. Anne Yvrande-Billon,

On 15 April 2022, the Autorité de Régulation des Communications Electroniques, des Postes et de la Distribution de la Presse (**ARCEP**) launched a public consultation on ARCEP's draft decision on La Poste's accounting rules and regulatory accounting compensation (the **Public Consultation document**).

The purpose of ARCEP's decision is to change La Poste's accounting system as of the 2021 financial year by changing how compensation is granted to La Poste for carrying out the Universal Service Obligation (**USO**).

I. The revision of compensation granted to La Poste under "R1" and "R3"

First, according to Section 2.1 of the Public Consultation document in July 2021 the French Prime Minister announced that La Poste will receive USO compensation for the 2021 - 2025 period for an amount of EUR 500-520 million on an annual basis (although it may vary slightly in view of the quality of La Poste's services).

Second, it appears from Section 2.1. of the Public Consultation document that "*following the reduction in the VAT costs [of La Poste]*"¹ the State will grant direct funding for an undefined amount for the 2021-2022 period in order to maintain the same financing level of the USO.

¹ The French text states "*a la suite de la diminution de la cotisation [de La Poste] sur la valeur ajoutée des entreprises*".



While it is unclear how a reduction of La Poste's value added tax costs may justify the grant of additional direct funding to La Poste, it appears from a previous Commission decision of 10 April 2018, authorising State support to La Poste, that the intended meaning of that statement is the following: Since the support that the French State is granting to La Poste (through a value added tax rebate) has diminished in value, the State will make up for the lack of State support through granting an additional direct grant.

Indeed, in its decision of 6 April 2018 the Commission authorised that the French State may grant La Poste State aid to cover the costs of regional development (*"l'aménagement du territoire"*)² through a rebate of up to 95% on its value added tax (referred to as *"abattement fiscal"*) corresponding to a value of maximum EUR 185 million per year during the 2020 – 2022 period.³

Given that the value added tax (**VAT**) is calculated in percent of La Poste's annual revenues, the result of applying the value added tax rebate would automatically be lower in absolute figures if La Poste's revenues would decrease from one year to another. This appears to be what happened in the case of La Poste given that the Public Consultation document states that La Poste's VAT costs were reduced during 2021 - 2022 with the result that the value of the VAT rebate also decreased. In other words, although the percentage of the VAT rebate remained the same (*i.e.*, up to 95%), the *value* of the VAT rebate in absolute figures (and thus the State support) decreased and hence ARCEP proposes to compensate for that through a direct grant of an undefined amount to La Poste.

² Aide d'Etat SA. 49469 (2018/N) – France Compensation de la mission d'aménagement du territoire en faveur de La Poste pour la période 2018-2022. Paragraph 7 of this decision defines *"contribution to regional development"* as La Poste's *"contribution, through its network of contact points, to regional planning and development, in addition to its universal postal service obligations"*. In French: *"contribution à l'aménagement du territoire"* is defined as *"contribuer, par son réseau de points de contact, à l'aménagement et au développement du territoire, en complément de ses obligations de service universel postal"*.

³ *Ibid.*, paragraph 14 states that *"La Poste bénéficie d'abattements de fiscalité locale qui s'appliquent sur les bases des taxes foncières et sur les bases des contributions économiques territoriales dues par La Poste"*. ARCEP assesses the amount annually on the basis of La Poste's costs incurred for the provision of the relevant services the methodology set out in *Décret N° 2011-849 du 18 juillet 2011*.



Thus, in sum, ARCEP is suggesting that La Poste would continue to receive (i) State aid in the form of a VAT rebate for up to 95% of the VAT liability and maximum EUR 185 million annually; (ii) compensation for the USO of EUR 500 - 520 million annually; and (iii) a direct grant for an undefined amount to compensate for the partial loss of State support granted through the VAT rebate.

The fact that ARCEP does not specify the amount of the funding to be granted to compensate for the reduced value of the VAT rebate and that ARCEP at the same time proposes to grant additional direct funding means that La Poste may end up receiving more aid than what has been authorised in the 6 April 2018 Commission decision (*i.e.*, more than 185 million on an annual basis) and thus be overcompensated. Overcompensation constitutes unlawful and incompatible State aid pursuant to Article 107 TFEU. Thus, ARCEP's proposed amendment is therefore illegal. Therefore, ARCEP must at least disclose the amount of State aid already granted to La Poste through the VAT rebate as well as the amount of the future direct grant (to compensate for the partial loss of the VAT rebate) in order to prove that La Poste is not being overcompensated.

In addition, while the 6 April 2018 Commission decision authorised the grant of aid through a VAT rebate, it follows from Article 108 TFEU that in order to change the form of the aid (from a VAT rebate into a direct cash grant) the French State must notify the Commission of that change and await its approval. Indeed, it is common knowledge that it is more advantageous to receive a direct grant as opposed to a tax rebate not only because a tax rebate always remain uncertain (since it is dependent on the amount due in taxes) but also because a direct grant is received immediately as opposed to tax rebates which are effectively only received once the tax falls due.

II. The grant of new compensation to La Poste

In Section 2.2 of the Public Consultation document ARCEP proposes how La Poste must allocate *non-attributable* costs linked to “*structure, adaptation and public service obligations*”. In particular, ARCEP proposes that these non-attributable costs must be allocated in the following way:

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- (i) “non-attributable USO accessibility costs” must be allocated to the USO account;
- (ii) non-attributable costs linked to La Poste’s “Head of the Group” (which is not defined) must be divided between the accounts of La Poste (which appears to be the company wholly owned by the holding company, Groupe La Poste) and the accounts of the holding company, Groupe La Poste;
- (iii) redundancy or pension costs incurred by the Service-Courrier-Colis (SCC which is a ‘branch’ of La Poste) must be allocated to the USO account in proportion to the extent to which SCC carries out USO and non-USO services, meaning that if SCC’s activities is split 50:50 between USO and non-USO, the costs must be allocated in the same proportion to the USO and non-USO activities.
- (iv) costs of “other employees” of Grand Public et Numérique (which is a ‘branch’ of the Groupe La Poste) and the “Head of the Group” (which is not defined) must be allocated to the USO account in proportion to the extent to which the Grand Public et Numerique and the “Head of the Group” carries out USO activities.

However, there are several issues with ARCEP’s proposition.

Re: (i) non -attributable USO accessibility costs

As regards non-attributable USO accessibility costs, it appears from the 6 April 2018 Commission Decision that accessibility to the USO means that La Poste, as the USO provider, must ensure that 99% of the French population and 95% of the population of each French region have access to one contact point that is less than 10 km away and that for each 20 000 inhabitants in municipalities with more than 10 000 inhabitants, there is access to at least one contact point: *“les points de contact donnant accès au public aux prestations de services universel doivent permettre qu’au moins 99% de la population nationale et 95% de la population de chaque département soit à moins de 10 kilomètres d’un point de contact et que toutes les communes de*

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plus de 10 000 habitants disposent d'au moins un point de contact par tranche de 20 000 habitants".⁴

The problem is that ARCEP suggests that “*non-attributable USO accessibility costs*” must be allocated to the USO account. Indeed, ‘non-attributable costs’ are per definition *common* costs incurred *both* for providing USO and non-USO but which cannot be attributed directly to the USO or non-USO services based on their origin. Therefore, there is an inherent contradiction in stating that non-attributable costs (which covers both USO and non-USO) are USO costs. Assuming that the relevant accessibility costs are genuinely non-attributable common costs, covering both USO and non-USO costs, it would violate the Postal Directive and the State aid rules to require that La Poste allocates the non-attributable costs only to the USO account. Indeed, if that proposal is implemented it would mean that La Poste is entitled to allocate non-USO costs to the USO account and thus allow La Poste to inflate its USO costs. This would lead to La Poste being over compensated which violate Article 107(1) TFEU.

Re (ii) non-attributable costs linked to La Poste’s “Head of the Group”

ARCEP suggests that non-attributable costs relating to the “Head of the Group” – which while being an undefined term is assumed to refer to the holding company Groupe La Poste - should be allocated to (i) La Poste’s USO and non-USO accounts; and (ii) the accounts of the holding company, Groupe La Poste, in proportion to the extent to which either of these companies carries out USO services.

This approach appears to be illegal.

To begin with, non-attributable common costs of one group company (in this case the holding company of Groupe La Poste) may not be attributed to *another company* within the group (in this case its subsidiary La Poste). If the costs emanate from the holding company they must be allocated to (the USO or non-USO) accounts of the holding company. Any other approach is illegal.

⁴ Aide d'Etat SA. 49469 (2018/N) – France Compensation de la mission d'aménagement du territoire en faveur de La Poste pour la période 2018-2022, para. 9. See also Décret N° 2007 – 29 du 5 janvier 2007.



Even if we were to accept that common non-attributable costs of the holding company may be attributed to another company within the group (*quod non*), such costs must be allocated to the USO and non-USO accounts based on the principles established in Article 14.3(b) of the Postal Directive and can thus not be allocated to only one of the two accounts.

Pursuant to Article 14.3(b) common costs must be allocated by following four steps.

First, Article 14.3(b)(i) non-attributable common costs must be allocated on the basis of a direct analysis of the *origin of the costs*. *Second*, if this is not possible, Article 14.3(b)(ii) requires common costs to be allocated on the basis of direct or indirect link to cost category of USO or non-USO. *Third*, if there is no direct or indirect link to a USO or non-USO cost category, Article 14.3(b)(iii) provides that the costs must be allocated on the basis of a *general allocator* computed by using the ratio of all expenses directly or indirectly assigned or allocated to USO and non-USO services. Fourth, Article 14.3(b)(iv) provides that non-attributable common costs that cannot be allocated based on the origin, link to a cost category or based on a general allocator and which are therefore “necessary” for providing both the USO and non-USO services must be allocated *appropriately* between USO and the non-USO accounts.

While ARCEP seems to have followed the third step there is no information to justify that the first and second steps were impossible to follow and there is, in any case, no information to justify how the general allocator has been calculated. Thus ARCEP’s proposal appears to be illegal.

Re (iii) redundancy or pension costs incurred by the SCC

ARCEP proposes that La Poste allocates to the USO account the share of SCC’s non-attributable redundancy or pension common costs which corresponds to the extent to which SCC carries out the USO. However, if SCC’s costs are genuine redundancy or pension costs it is questionable whether they may be allocated to the USO since both types of costs are not eligible USO costs.

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Re (iv) costs of “other employees” of Grand Public et Numerique and the “Head of the Group”

ARCEP proposes that La Poste must allocate to the USO account the share of the costs incurred for “other employees” of Grand Public et Numérique and the “Head of the Group” that corresponds to the extent to which Grand Public Numérique and the Head of the Group carries out the USO. The problem is that there is no definition of what “other employees” are or what the costs for the Head of the Group are. Thus, to the extent that the proposed cost allocation is completely transparent, it appears to be illegal.

III. The exceptional results linked to depreciation and the reversal of depreciation

ARCEP proposes that according to the currently applicable accounting principles, depreciation is considered like all other ‘exceptional attributable results’ which means that the “movements” linked to depreciation tests are integrated in the indirect costs of regional and national development which, in turn, are allocated pro rata to direct and indirect establishment costs.

Further ARCEP proposes that to the extent that the provisional budget and recuperated funds, stemming from the depreciation tests are “exceptional elements” which do not correspond to recurrent events, the provisional budgets and recuperated funds linked to the depreciation tests based on future results must be considered as “exceptional non-attributable results”. Thus ARCEP proposes to add a new cost category under R3 for which La Poste may be compensated with State funding.

Given that it is completely unclear what is considered to constitute “exceptional attributable results” and “exceptional non-attributable results”, such a proposal may allow La Poste one other entirely in-transparent way of allocating costs and thus for receiving illegal compensation. Indeed, there is absolutely nothing in the proposal that justifies the additional cost group for which State aid may be granted to La Poste.

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