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Judgment by the General Court of the European Union Declares State Aid to the Ex Monopolist Post Danmark Illegal

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[Yannis Ioannidis]

In May 2021, Gibson Dunn attorneys won a landmark case before the General Court of the European Union (case T-561/18, *ITD and Danske Fragtmænd v European Commission*).

Gibson Dunn represented ITD (a Danish trade association of international companies operating parcel and logistics services) and Danske Fragtmænd (a company operating in this sector in Denmark) in a case concerning state subsidies in the Danish post and courier market. The EU General Court partially annulled a European Commission decision of 28 May 2018 authorising certain aid measures granted by the Danish and Swedish States to Post Danmark, the Danish postal incumbent and former monopolist owned by PostNord AB, a holding company in turn owned by the Danish and Swedish States. In its decision the Commission had rejected claims that a capital injection from Post Danmark's parent company and a tax exemption in favour of Post Danmark involved unlawful State aid, but the General Court overturned this decision.

With the rapid decline in letter volumes across the EU, ex monopolists in the postal sector have been struggling to remain viable and have become more actively engaged in the booming parcel freight transport market based on e-commerce transactions. The problem is that ex monopolists still receive funding from their owners, i.e., the State, and while that funding may lawfully be granted for providing a universal letter service in remote areas, it is not justified to use it to gain a competitive advantage in markets such as parcel transport. The EU courts have therefore intensified its scrutiny of Member States which transfer funding to their State owned ex monopolists in various sectors, including in the postal sector. While Member States are allowed to invest in their own companies, capital contributions to loss making entities with no prospect of a reasonable return constitute prohibited State aid. Similarly tax exemptions granted selectively to State owned companies are illegal.

Post Danmark, the ex monopolist for letter services in Denmark, has experienced a 80% decline in letter volumes and has been unable to generate a profit even in the parcel transport market. The company has been incurring catastrophic losses for a decade (or more).

On 5 May 2021, the General Court of the European Union annulled the Commission's finding that a capital injection to Post Danmark of EUR 135 million in 2017 did not involve State aid as well as a finding that a VAT exemption (with an annual value of approx. EUR 37 million) benefitting Post Danmark for at least 10 years did not constitute State aid. The Danish State and PostNord AB (the Danish-Swedish owned parent company of Post Danmark) intervened in the case to support the European Commission while two freight transport companies, Jørgen Jensen Distribution and Dansk Distribution, intervened in support of ITD and Danske Fragtmænd.

This judgment is the latest in a series by EU Courts setting out requirements regarding

Member States' capital injections in loss making State owned companies in the EU. Specifically, the General Court makes clear that State aid granted in the form of capital injections must be capable of producing a reasonable rate of return in order to avoid being classified as prohibited State aid.

Indeed, while the European Commission had concluded that the capital injection of EUR 135 million granted to loss making Post Danmark would make it possible to restore Post Danmark's viability, the General Court found that the Commission had no basis for coming to this conclusion. There was no evidence that the company could be brought back to profitability nor that it would have prospects of generating a reasonable return. In the same vein, while the Commission had accepted their arguments that Denmark and Sweden were not involved in the capital injection (as it had been contributed by the parent company to Post Danmark) and were merely 'passive spectators' to this payment, the General Court held that the Commission cannot just rely on States' own arguments whilst ignoring conflicting information submitted by the complainants. Instead the Commission must diligently investigate the matter especially in view of the Commission's obligation to conduct an impartial examination of the complaint.

The judgment also finds that the VAT exemption (with an annual value of approx. EUR 37 million) benefiting Post Danmark, which allowed e-commerce companies not to charge their customers VAT if they used Post Danmark as their freight company, also benefits Post Danmark and thus involves illegal State aid. The General Court specifically pointed out that this VAT exemption is not covered by the existing permissible VAT exemption covering the provision of Universal Service Obligations based on the VAT Directive 2006/112/EC of 28 November 2006.

As a result of the judgment, the Commission must now reopen the case and will probably be forced to consider that the capital injection of EUR 135 million and the VAT exemption involve incompatible, and therefore unlawful, State aid that must be recovered from Post Danmark. In view of its catastrophic financial situation, this may mean that Post Danmark will unable to survive, at least in its current form.

The following Gibson Dunn lawyers assisted in preparing this client update: Lena Sandberg, Yannis Ioannidis and Pilar Pérez-D'Ocon.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any member of the firm's Antitrust and Competition practice group:

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