DECISIONS

COMMISSION DECISION (EU) 2019/115

of 10 July 2018

on the measures SA.37977 (2016/C) (ex 2016/NN) implemented by Spain for Sociedad Estatal de Correos y Telégrafos, S.A.

(notified under document C(2018) 4233)

(Only the Spanish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a),

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 9 December 2013 and 10 April 2014, the Commission received two anonymous complaints against the Spanish State as regards the alleged granting of unlawful and incompatible aid to Sociedad Estatal Correos y Telégrafos, S.A. (hereinafter 'Correos'). Both complaints raised the following issues concerning Correos: (i) alleged overcompensation granted to Correos for the delivery of the USO since 1998, (ii) alleged incompatible tax exemptions granted to Correos, and (iii) alleged unpaid social security contributions for civil servants employed by Correos.

(2) On 14 February 2014, 26 February 2014 and 15 July 2014, the Commission forwarded the non-confidential versions of the two complaints to the Spanish authorities.

(3) On 11 April 2014 and 18 September 2014, the Spanish authorities responded to those complaints.

(4) On 10 July 2014, 22 October 2014 and 4 December 2015 the Commission requested further information from the Spanish authorities.

(5) The Spanish authorities responded to those requests on 7 August 2014, 19 December 2014, 19 January 2015 and 21 December 2015 respectively.

(6) By letter dated 11 February 2016, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of several measures granted to Correos. The Commission decision to initiate the procedure (hereinafter 'the 2016 Opening Decision') was published in the *Official Journal of the European Union* ([2]).

(7) The Commission received first comments from Spain on the opening decision by letter dated 21 April 2016.

(8) The Commission received comments from Correos on the opening decision by letter dated 11 May 2016.

(9) The Commission received comments from a third party by letter dated 12 May 2016.

([1]) OJ C 129, 12.4.2016, p. 10.
([2]) Cf. footnote 1.

(10) The Commission forwarded the comments received to Spain on 8 June 2016.

(11) Spain provided its comments on the comments from third parties by letter dated 6 July 2016.

(12) In the course of the proceedings the Commission received additional comments from Spain on 24 October 2017 and 23 May 2018.

(13) The Commission received additional observations from a former competitor of Correos, Unipost by letter dated 20 March 2018.

2. **DETAILED DESCRIPTION OF THE AID**

2.1. *THE SPANISH POSTAL MARKET*

(14) Prior to Spain's accession to the European Economic Community (EEC) in 1986, postal services in Spain were operated by the General Administration. The Decree 1113/1960 of 9 May 1960 on the Postal Order, implemented by the Postal Services Regulation, adopted by means of Decree No 1653/1964 of 14 May 1964, defined the postal service and entrusted its provision to the Directorate-General of 'Correos y Telégrafos'. The adoption of the Postal Order and its implementing regulation marked the start of the liberalisation of the Spanish postal market. Whereas 'Correos y Telégrafos' monopoly was restricted to interurban and international letters and postcards, urban mail and parcel services were fully liberalised. In the 1970s the first large private operators entered the Spanish postal market.

(15) Following Spain's accession to the EEC, there was a gradual liberalisation of postal services between 1998 and 2010 based on the European Union Postal Directives. More specifically, Directive 97/67/EC of the European Parliament and of the Council ([3]) was transposed into national law in 1998 by means of Law 24/1998 of 13 July 1998 on the Universal Postal Service and the Liberalisation of Postal Services (the 1998 Postal Law), which for the first time entrusted Correos with the universal service obligation ([4]) ('USO'). The law provided for a reduced list of USO services ([5]) which were reserved for Correos as USO provider ('the reserved area'), whereas all other postal services were liberalised ('non-reserved area').

(16) The liberalisation of postal services in Spain continued with the transposition into Spanish Law of Directive 2002/39/EC of the European Parliament and of the Council ([6]), by Law 53/2002 of 30 December 2002 on Tax, Administrative and Social Measures, which amended the aforementioned 1998 Postal Law and further reduced the scope of the reserved area.

(17) In 2010 the postal sector was fully liberalised by Law 43/2010 of 30 December 2010 on the universal postal service, users' rights and the postal market (the 2010 Postal Law) which transposed Directive 2008/6/EC of the European Parliament and of the Council ([7]) into Spanish Law. The 2010 Postal Law redefined the scope of the USO (e.g. the money order service was excluded from the USO) and abolished the reserved area.

2.2. *THE BENEFICIARY*

2.2.1. CORREOS

(18) Correos is a wholly State-owned company which is the parent company of the Grupo Correos, with Sociedad Estatal ('SEPI') as the sole shareholder. SEPI is a holding company for the State's participations in undertakings.

([3]) 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).

([4]) Additional Provision and Article 15(2) of the 1998 Postal Law lists the following services included within the scope of the universal postal service: (1) money order services; (2) the regular provision of national and international postal services for postal items that incorporate an address indicated by the sender on the item itself or on its packaging. These might be: (a) Letters and postcards containing written communications, up to 2 kg; (b) Parcels, with or without economic value, up to 10 kg.

([5]) Article 18 of the 1998 Postal Law defines reserved area as the following: money order services; the clearance, sorting, transport and distribution of inter-city items, certified or not, and of letters and postcards, up to 100 grams (from 1 January 2006, the weight limit was set at 50 grams); the cross-border postal services (sent to or received from another State), including letters and postcards sent and received, with the above limitations in terms of price, weight and date; the receipt of applications, letters and communications that citizens addressed to the bodies of the public administration.

([6]) Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21).

([7]) Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3).

(19) Correos offers postal services, including universal services, courier services and other services (e.g. services related to postal services and associated activities, including money transfer operations, philately, etc.). In 2016, Correos had a turnover of approximately EUR 1 761 million, sent 2 774 million postal items (including parcels) and employed 49 785 workers.

(20) Correos is the largest provider of postal services in Spain, with 8 787 postal points of contact in 2016. It is the market leader in the Spanish postal sector with the biggest market share of the Spanish postal services market, except in parcel services. Until 2017, Unipost S.A. was the main competitor of Correos in the Spanish postal market, however the company underwent financial difficulties and entered into liquidation on 19 February 2018. Other European postal operators (i.e. Deutsche Post, TNT, La Poste, UPS, CTT Correios Portugal and Royal Mail) hold significant market shares in parcel services.

2.2.2. THE LEGAL FRAMEWORK APPLICABLE TO CORREOS

(21) In Spain, the State has directly administered the postal service since 1716. Correos was part of the Public Administration, being embedded within different Ministries like the Ministry of Interior and subsequently the Ministry of Transport and Communications.

(22) The Autonomous Body 'Correos y Telégrafos' was created by the State General Budget Law 31/1990 of 27 December 1990. The autonomous body 'Correos y Telégrafos' was set up in 1992, attached to the Ministry of Transport, Tourism and Communications.

(23) 'Correos y Telégrafos' became a Public Business Entity attached to the Ministry of Fomento under Law 6/1997 of 14 April 1997 on the Organisation and Funtioning of the State General Administration.

(24) Law 14/2000 of 29 December 2000, on Fiscal, Administrative and Social Measures, adopted the legal framework for the 'Sociedad Estatal Correos y Telégrafos, S.A.', the Company being set up in June 2001. On 5 June 2012 all the companies belonging to the Correos Group (i.e. Correos and its subsidiaries Correos Express, Nexea and Correos Telecom) were incorporated into the SEPI holding, which became their sole shareholder.

2.3. *DESCRIPTION OF PUBLIC MEASURES IN FAVOUR OF CORREOS*

2.3.1. THE USO COMPENSATIONS GRANTED TO CORREOS

(25) In 1998, Correos was entrusted with the USO by the 1998 Postal Law. As compensation for delivering the USO, Correos received public funding from 1998 to 2010. Subsequently, the 2010 Postal Law entrusted Correos with the provision of the USO for a period of 15 years starting on 1 January 2011.

2.3.1.1. ***The USO compensations granted under the 1998 Postal Law***

(26) From 11 March 2000, the 1998 Postal Law was complemented with a 'Plan de Prestación' ('the 2000 Plan de Prestación') that sets out the compensation mechanism to estimate Correos' net cost incurred in relation to the fulfilment of its obligation as universal service provider ('USP') and quality criteria for the provision of the USO.

(27) From 2000 to 2010, the USO compensation to Correos was granted on the basis of a methodology developed by the Spanish authorities (the 'Spanish methodology'), which is detailed in the 2000 Plan de Prestación. Moreover, the 2000 Plan de Prestación establishes that Correos should implement analytical accounting with separation of accounts as provided in Article 29 of the 1998 Postal Law.

(28) The Spanish methodology to estimate the net cost of the unfair burden of the USO, consisted of the following steps:

(a) STEP 1: Determining the unit revenue and costs of every product/service and every cost centre according to the cost accounting information of Correos. For any given product/service, those cost centres where the unit costs are higher than the unit revenue stand as loss-making. The other cost centres, where unit revenue is higher than unit costs, stand as profit-making.

(b) STEP 2: For each reserved Service (RSi) assessing which cost centres are loss-making/profit-making for the delivery of that service and calculating the aggregate loss/profit for the delivery of that service (Loss/Profit RSi). The net cost for the reserved Services is calculated as the difference between the sum of Loss RSi and the sum of Profit RSi.

(c) STEP 3: For each non-reserved service (NRSi) assessing which cost centres are loss-making for the delivery of that service and calculating the aggregate loss of these centres for the delivery of that service (Loss NRSi). The net cost for the non-reserved services is calculated as the sum of Loss NRSi

(d) STEP 4: The USO compensation covers the net cost of the reserved and non-reserved Services calculated according to Steps 2 and 3.

(29) Table 1 shows the compensations that were granted to Correos for the delivery of the USO during the 2004-2010 period and that were calculated using the Spanish methodology:

Table 1

USO compensations granted to Correos

(EUR Million)

	2004	2005	2006	2007	2008	2009	2010
Net cost RSi	46,171	40,435	39,558	80,823	101,783	176,559	152,521
Net cost NRSi	44,859	47,294	55,199	39,441	40,863	45,919	43,812
USO compensation	91,030	87,729	94,757	120,264	142,646	222,478	196,333

2.3.1.2. ***The USO compensations under the 2010 Postal Law***

(30) The 1998 Postal Law was superseded by the 2010 Postal Law, which entered into force on 1 January 2011. The 2010 Postal Law entrusted Correos with the provision of the USO for a period of 15 years starting on the entry into force of the Law (i.e. until 1 January 2026).

(31) Article 27 and 28 of 2010 Postal Law provides that the USO provider is allowed to receive compensation up to the net cost incurred in discharging its obligations. The net cost should be calculated according to the net avoided cost method (hereinafter 'NAC methodology') as the difference between the net cost for the USP of operating with the USO and the net cost of the USP operating without the USO. The calculation shall take into account all other relevant elements, including any intangible and market benefits which accrue to a postal service provider designated to provide the universal service, the entitlement to a reasonable profit and incentives for cost efficiency in light of Annex 1 of Directive 2008/6/EC.

(32) As provided in Article 22(3) and Article 27(2)(b) of the 2010 Postal Law, the NAC methodology described in recital 31 should be developed in a new '*Plan de Prestación*'. However, up to this date, such a new *Plan de Prestación* has not yet been adopted. Therefore, since 2011 there has been no methodology in place to estimate the net cost of the USO.

(33) At this stage, according to the Spanish authorities, Correos has not formally received any USO compensation since 2011 although it has benefited from advance payments on a provisional basis for the years 2011-2017. The actual net cost corresponding to those years remains to be calculated once the new *Plan de Prestación* is adopted and the NAC methodology defined. The Commission will assess the USO compensations under the 2010 Postal Law in another decision.

2.3.2. TAX EXEMPTIONS GRANTED TO CORREOS

(34) According to Article 19(1)(b) of the 1998 Postal Law, the USP would benefit from 'the exemption from all levying taxes on its services in the reserved area, except for the corporate tax'. Article 22(2) of the 2010 Postal Law maintained this tax exemption and extended it to the entire USO.

(35) According to the Spanish authorities, the only tax that could possibly fall within the scope of this exemption on top of VAT would be the Tax on Economic Activities (*Impuesto de Actividades Económicas*, hereinafter 'IAE') since it is a tax levied upon the performance of an economic activity and is linked to the provision of the USO. Other taxes like the property transfer tax, construction tax, tax on the increase in the value of urban land and tax on motor vehicles do not fall within the scope of the exemption since they are not linked to the economic activity of the provision of the USO.

(36) The Spanish authorities have explained that Correos has been partially exempted from the IAE tax as it only pays 50 % of the normal tax amount.

(37) As regards the Real Estate Tax (*Impuesto sobre Bienes Inmuebles*, hereinafter 'IBI'), the Spanish authorities explained that it is a tax that is not levied upon the provision of the USO or other postal services, but is levied on the value of real estate. Therefore, it would be outside of the scope of the two Postal Laws. However, between 2008 and 2013 Correos lodged several claims based on its interpretation of Article 19(1)(b) of the 1998 Postal Law, and Article 22(2) of the 2010 Postal Law, in which it stated that it should be exempted from the IBI for a series of offices in different municipalities. Following Correos' request for IBI exemption, several local administrations and courts ruled in favour of Correos thereby granting it a refund of taxes previously paid.

2.3.2.1. ***The Tax exemption on Real Estate Tax (IBI)***

(38) The IBI is a local tax in the Spanish tax system which is regulated by Royal Legislative Decree 2/2004 of 5 March 2004. According to Article 60 of that Royal Legislative Decree, this tax 'is an objective direct tax imposed on the value of property under the terms laid down in this Royal Legislative Decree'. The taxable event of the IBI is entitlement to any of the rights laid down in Article 61 of Royal Legislative Decree 2/2004 over rural and urban properties and over property with special characteristics. The IBI is not imposed on any activity, but on the value of property.

(39) Between 2008 and 2013, based on its interpretation of Article 19(1)(b) of the 1998 Postal Law, and Article 22(2) of the 2010 Postal Law, Correos introduced several claims in which it stated that it should be exempted from the IBI under the Postal Laws for a series of offices in different municipalities. Following Correos' request for IBI exemption, several Administrations and local courts ruled in favour of Correos. According to the Spanish authorities, the tax refunds effectively granted to Correos amount to EUR 752 840,50.

(40) These courts' interpretations of both the 1998 and the 2010 Postal Laws that allowed the USP to be exempted from the IBI were rejected by the Spanish Supreme Court in 2013 following a cassation appeal from the local authorities of the province of Huesca. The Supreme Court considered in its judgment that Article 22(2) of the 2010 Postal Law should be interpreted restrictively. According to the Supreme Court, the tax exemptions laid down in that Article can only be applied to taxes imposed on activities directly linked to the provision of the USO, and, therefore, could not apply to the IBI, which is a direct tax imposed on the value of property.

(41) The IBI exemptions granted to Correos between 2008 and 2013 were never recovered. Indeed, under the Spanish national law system the cassation appeal in favour of law ('recurso de casación en interés de ley') has an extraordinary and subsidiary character which aims exclusively to unifying legal doctrine and, therefore, cannot have an effect on the matter referred to in the appeal (i.e. for the case at hand, it does not have the power to annul the rulings and decisions on the tax exemptions).

2.3.2.2. ***The exemption from the Tax on Economic Activities (IAE)***

(42) The IAE was laid down in Law 39/1988 of 28 December 1988, substituted by Royal Legislative Decree 2/2004 of 5 March 2004. It follows from Article 78 of this Royal Legislative Decree that undertakings that carry out economic, business, professional or artistic activities should be subject to the tax.

(43) According to Article 78 of Royal Legislative Decree 2/2004, IAE 'is an objective direct tax for which the taxable event is the performance, in the national territory, of economic, business, professional or artistic activities, whether or not performed in a specific place and whether or not specified in the tax rates'.

(44) The IAE Tariffs were laid down in Royal Legislative Decree 1175/1990 of 28 of September. They classify the postal activity under Group 847 'Postal services and telecommunications' from 1999 onwards. This group includes the provision of postal services consisting of the collection, admission, classification, treatment, transportation, distribution and delivery of items of mail in all its forms. However, note 3 to Tariff Group 847 states that the Public Business Entity of Correos is entitled to pay only 50 % of the tax amount laid down for this group. According to the Spanish authorities, this means that Correos has benefited from an exemption of EUR 8 113,66 per year since 2004. The Spanish authorities have confirmed that Correos continues to benefit from the partial tax exemption laid down in note 3 to Tariff Group 847.

2.3.3. THE THREE CAPITAL INCREASES GRANTED IN 2004, 2005 AND 2006

(45) During the period under analysis, Correos benefited from three capital increases amounting in total EUR 48 081 000:

(a) a capital increase of EUR 16 027 000 granted on 13 December 2004;

(b) a capital increase of EUR 16 027 000 granted on 25 November 2005;

(c) a capital increase of EUR 16 027 000 granted on 24 November 2006.

(46) According to the Spanish authorities, those capital increases were part of Correos' strategic business plan for the period 2004-2006 in order to compensate for the slowing down of the postal market. The basic strategic lines of such business plan were:

(a) ensuring the future sustainability of the postal business on the basis of efficiency;

(b) strengthening growth businesses in the medium term by promoting financial services and parcels as Correos' main focuses objectives for growth;

(c) enlarging the portfolio of future growth options by developing the management of databases, the 'mailroom' and the e-business;

(d) modernising Correos' capacities and adapting the management model to the current market context, promoting diversification.

2.3.4. THE COMPENSATION GRANTED TO CORREOS FOR THE DISTRIBUTION OF ELECTORAL MATERIAL

(47) Organic Law 5/1985 of 19 June 1985 on the General Electoral System ('LOREG'), and its implementing legislation, regulate the electoral procedure in Spain, recognising the right to vote either in person or via postal ballot.

(48) Article 22 of the 1998 Postal Law and Article 22(5) of the 2010 Postal Law provide that the State may impose certain obligations on the designated USP in the framework of electoral processes. The same Article 22(5) of the 2010 Postal Law provides that 'the imposition of additional public service obligations shall be compensated'.

(49) Pursuant to the First Additional Provision of the 2010 Postal Law, Correos is the designated USP and is entrusted with the obligation to provide several services in the context of the different Spanish elections (i.e. State, regional, European and municipal elections).

(50) Correos' public service obligations in relation to the organization of electoral processes in Spain concern the following:

(a) The handling of postal ballots (including the provision, acceptance, sending and delivery by certified and urgent mail) in the context of:

(1) Postal voting for electors resident in Spain;

(2) Postal voting for absentee resident voters;

(3) Postal voting for voters who are temporarily abroad;

(4) Postal voting for on-board personnel;

(5) Voting for on-board personnel from the armed forces or in exceptional situations linked to national defence; and

(6) Postal voting for prison inmates.

(b) The handling of postal election material sent out by political candidates: Admission and subsequent distribution of election propaganda items issued by political candidates for a symbolic price per item sent (EUR 0,006).

(c) The handling of other postal items sent by the Electoral Roll Office (such as voter registration cards, reference electoral rolls for local councils, etc.).

(d) The collection of electoral documentation at the election committee once counting is complete. This includes the collection, safekeeping and subsequent delivery of the envelope that contains the report and pertinent documentation for each committee, to the pertinent electoral board.

(51) The Spanish authorities explained that given the time constraints related to the electoral process, Correos is obliged to prioritize the activities in recital 50 in comparison with other postal activities. The high number of items that need to be distributed, their high concentration on a few days, and the requirement to deliver most documents in person (in case of certified mail, such as the postal ballots) entail significant additional efforts. As a result, Correos has to temporarily reinforce its staff and other resources (e.g. transport, security, etc.).

(52) Correos has received compensations (see table 2) for its different obligations in regard to the organisation of elections since 2004

Table 2

Amounts of compensation granted to Correos for organisation of elections

(EUR)

Year	Election scope	Compensation for distribution of election material
2004	National	27 182 926
2005	Regional	3 670 281
2006	Regional	4 528 376
2007	National/Regional	19 536 604
2008	National/Regional	19 609 632
2009	National/Regional	14 603 021
2010	Regional	4 620 588
2011	National/Regional	40 092 858
2012	Regional	14 268 978
	TOTAL	**148 113 264**

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(53) The Commission decided to initiate the formal investigation procedure because of its serious doubts regarding the compatibility of several measures granted to Correos since 2004:

(a) the USO compensations granted to Correos under the 1998 Postal Law,

(b) the IBI exemption and IAE partial exemption,

(c) the three capital increases granted in 2004, 2005 and 2006,

(d) and the compensation granted to Correos for the distribution of electoral material.

(54) The Commission notably expressed doubts on:

(a) the level of compensation received by Correos for the delivery of the USO between 2004 and 2010 that it considered prima facie State aid and the potentiality of an overcompensation of the operator,

(b) the compatibility or existing aid character of the IBI exemption and IAE partial exemption that it considered prima facie to both constitute State aid.

(c) the compliance of the capital injections granted in 2004, 2005 and 2006 with the market economy investor principle (hereinafter 'MEIP').

(d) the compatibility or existing aid character of the compensation granted to Correos for the distribution of electoral material that it considered prima facie State aid.

4. **COMMENTS FROM INTERESTED PARTIES**

(55) The Commission received comments from two interested parties, namely the alleged beneficiary of the aid measures Correos and another third party (hereinafter 'the anonymous third party') which requested that its identity is kept confidential.

4.1. *COMMENTS FROM CORREOS*

4.1.1. THE COMPENSATION FOR THE PROVISION OF THE USO DOES NOT CONSTITUTE INCOMPATIBLE STATE AID

(56) According to Correos, the USO compensation granted to the company for the period 2004-2010 does not constitute State aid. In particular, Correos considers that compensation does not constitute an advantage since it fulfills the four criteria laid down in Case C-280/00 ('the Altmark criteria') ([8]). Correos contests the conclusion reached in the opening decision that the USO compensation does not comply with the third and fourth Altmark criteria.

(57) As regards the third Altmark criterion, Correos argues that it requires that the compensation received for the provision of a public service should not exceed the net cost, which is the difference between costs and revenues plus a reasonable profit. Correos considers that the third Altmark criterion is inextricably linked to the compatibility analysis of the services of general economic interest, according to the Communication of the Commission ('2012 SGEI Framework') ([9]). In particular, Correos argues that the compensation that it received for the provision of the USO complies with the Net Avoided Cost (hereinafter 'NAC') methodology contained in paragraph 27 of the 2012 SGEI Framework and should thereby be considered to comply with the third Altmark criterion.

(58) Correos explains that the Spanish methodology used to determine the compensation of Correos is based on the report which was commissioned to the consultancy company National Economic Research Associates by the Commission (NERA report) ([10]). According to Correos, the compensation methodology contained in the NERA report is a valid implementation of the NAC methodology.

(59) Moreover, Correos considers that the fulfilment of the third Altmark criterion is covered by the principle of legitimate expectations. According to Correos, the Commission created legitimate expectations by means of publishing the NERA report, which recognized the NAC methodology as a valid method for calculating the compensation for the provision of the USO.

(60) According to Correos it is irrelevant for the compliance with the third Altmark criteria that the NAC methodology was not in place until the entry into force of the 2012 SGEI Framework.

(61) Correos also considers that the USO compensations granted to Correos comply with the fourth Altmark criteria. In the absence of a public procurement procedure, the level of compensation received would be adequate on the basis of an analysis of the costs, which a typical well-run undertaking within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the public service obligation.

([8]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* EU:C:2003:415.

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

([10]) Final report on costing and financing of universal service obligations in the postal sector in the European Union, November 1998, National Economic Research Associates (NERA). http://ec.europa.eu/internal_market/post/doc/studies/1998-nera_en.pdf

(62) According to Correos, the Frontier Economics Study submitted by Spain demonstrates that the costs incurred by Correos are below those incurred by a typical undertaking of the postal sector. Correos contests the doubts raised by the Commission as regards the conclusions reached in the Frontier Economics report:

(a) First, the Commission did not conclude in its State aid decisions that the USO providers in Greece and Italy were not cost inefficient and therefore the inclusion of these postal operators in the sample of companies considered by Frontier Econonomics to demonstrate the cost efficiency of Correos cannot be considered problematic.

(b) Second, the fact that the Frontier Economics Study was drafted a posteriori, would not be significant in light of the relevant jurisprudence and the practice of the Commission, which would have accepted to consider studies drafted a posteriori of the adoption of a measure in the past.

(c) Finally, the argument of the Commission that the cost calculation methodology used by Spain does not take any account of efficiency would also be contradicted by the fact that the method to calculate the net cost of the USO is based on the NERA report issued by the Commission. The method should therefore be necessarily considered in line with EU law.

(63) Correos also indicates that should the Commission conclude that the measure constitutes State aid, it should be considered compatible with the internal market pursuant to Article 106(2) of the Treaty.

(64) Correos reiterates that the compensation methodology used by the Spanish authorities and contained in the NERA report is a valid implementation of the NAC methodology and should be accepted by the Commission. Furthermore, Correos considers that it has not been overcompensated for the provision of the USO for the period 2004-2010 because the compensation was calculated following the NAC methodology without including any reasonable profit.

(65) Should the Commission conclude that the measure may involve incompatible State aid, Correos insists that the Commission should take into account the dividends paid to the State during the period 2004-2010 as a reduction of the compensation granted to Correos.

4.1.2. TAX EXEMPTIONS FROM REAL ESTATE TAX (IBI) AND TAX ON ECONOMIC ACTIVITIES (IAE)

(66) As regards the IBI tax exemption, Correos explains first that these measures should not be assessed in light of the 1998 Postal Law or the 2010 Postal Law, but with direct reference to the legislation governing each tax.

(67) Moreover, Correos considers that the measure does not constitute State aid because it is not imputable to the State. The tax exemption is not laid down in any legal provision. Few local Tax Administrations, as well as few local Courts applied the tax exemption to 94 Correos premises out of 13 000. The Spanish Supreme Court in its judgement of 7 October 2013 concluded that Article 22(2) of the 2010 Postal Law did not include the IBI tax exemption.

(68) Furthermore, Correos considers that the IBI tax exemption cannot be recovered since it is res judicata. Following the jurisprudence of the Union Courts ([11]), if the final judicial resolution has assessed the existence of State aid, the principle of res judicata should be respected. Correos considers that the judgement of the Spanish Supreme Court applies Union Law and refers to the existence of State aid. Therefore, the principle of res judicata should be respected and recovery should be prevented in the case at stake.

(69) In addition, Correos considers that the res judicata principle should be considered as a General Principle of Union Law and that this principle should be respected when there is impossibility of recovery due to the existence of a final judgement where the existence of aid has already been determined.

([11]) See Judgement of the Court of Justice of 16 March 2006, C-234/04, *Kapferer*, ECLI:EU:C:2006:178, paragraphs 20 and 21; Judgement of the Court of Justice of 6 October 2009, C40/08, *Asturcom Telecomunicaciones*, ECLI:EU:C: 2009:615; Judgement of the Court of Justice of 11 November 2015, C-505/14, *Klausner Holz Niedersachsen*, ECLI:EU:C:2015:742, paragraphs 36 and 45.

(70) As regards the IAE tax exemption, Correos argues that the partial tax exemption from IAE does not constitute State aid. In particular, Correos claims that the partial tax exemption is not selective since it is justified by the logic of the IAE tax system. According to Correos, the nature or intrinsic logic of the IAE is to tax economic activities with the aim to intervene in the production or distribution of goods and services. Correos is engaged in economic activities that consist in the production of goods and services, but it is also engaged in providing public services like the USO, which do not follow the economic purpose of the latter. This would therefore be the justification of the partial IAE tax exemption.

(71) Furthermore, Correos considers that the partial IAE tax exemption constitutes existing aid. The IAE tax exemption has been in place before the accession of Spain to the EEC. The so-called Licence Quota, which was a modality of the Tax on Activities and Commercial and Industrial Benefits, was adopted by Decree 3313/1966 of 29 December 1966. Law 39/1988 of 28 December 1988 would replace the Tax on Economic and Commercial and Industrial Benefits in its modality of the Licence Quota with the IAE. According to Correos, there have been no substantial modifications in the taxable event since 1966.

4.1.3. CAPITAL INJECTIONS IN 2004, 2005 AND 2006

(72) Correos alleges that the capital injections carried out in 2004, 2005 and 2006 are compliant with the MEIP and that they do not grant an advantage to Correos.

(73) According to Correos, the analysis of the investments undertaken due to the capital injections between 2004-2006 demonstrate that the Spanish State carried out the capital injections in its role as shareholder and that those investment could have been undertaken by any private investor.

(74) Correos argues that the capital injections respond to the need for Correos to make investments above the average level of investment of the company. The aim of the capital injections is stated in the report of Correos' appearance before the Congress of Deputies ('el Congreso de los Diputados') on 4 October 2005. The report makes a link between the capital injections and the need of carrying out new investments in the company. The aim of the capital injections was to carry out a modernization process within Correos, increasing the efficiency and quality of the services provided by the company.

(75) Correos argues that the profitability of the investment demonstrates that any private investor would have carried out a similar investment as the internal rate of return of the capital injections was above the cost of capital of Correos.

(76) Moreover, Correos argues that the compliance with the MEIP does not necessarily require a precise profitability assessment *ex-ante* when applied to the situation of the shareholder of a SGEI provider like the USO. Such shareholder would necessarily have to factor in the obligation to deliver the SGEI of the company in its considerations to make or not to make an investment.

(77) In such circumstances, it would be sufficient to show on the basis of objective and verifiable evidence that a private investor faced with the same public service obligation would have acted in the same way.

(78) According to Correos this is the conclusion reached by the Court of Justice in cases Chronopost I ([12]) and Chronopost II ([13]), where it was accepted that the internal rate of return calculated *ex post* was an appropriate means to determine whether the capital injection was MEIP conform.

4.1.4. COMPENSATIONS FOR THE DISTRIBUTION OF ELECTORAL MATERIAL

(79) Correos claims that the distribution of electoral material of political candidates in the context of the organization of elections should be considered to be part of the prerogatives of the State.

([12]) Judgement of the Court of Justice of 3 July 2003, joint cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost/UFEX and others*, ECLI:EU:C2003:388

([13]) Judgement of the Court of Justice of 1 July 2008, joint cases C-341-06 and C-342/06P, *Chronopost and La Poste/UFEX and others*, ECLI:EU:C2008:375

(80) In particular, Correos argues that the distribution of electoral material is an essential function of the State because it is part of the general electoral regime, it is related to the constitutional role of political parties, and because Correos' personnel, when carrying out this activity, is acting in its role of civil public servant.

(81) According to Correos, the distribution of electoral material by political candidates due to its aim, nature and regulation, is therefore inextricably linked to the exercise of public authority by the State. Therefore, it is not an economic activity and Correos should not be considered an undertaking within the meaning of Article 107(1) of the Treaty.

(82) Even if it were considered by the Commission that the distribution of electoral material of political candidates is an economic activity, Correos considers that it does not constitute a selective advantage granted to Correos. This activity is entrusted to Correos by the State because is the only postal operator capable of providing a service with the required characteristics and quality of the service. When it comes to the distribution of electoral material of political candidates, Correos is therefore not in a comparable legal and factual situation with any other undertaking of the postal sector.

(83) Even if it were concluded by the Commission that the measure constitutes State aid, Correos claims that the measure should be considered existing aid. The existence of a reduced tariff for political candidates to send electoral material has been in place since 1977 where the elections of 15 June 1977 took place. The elections of 15 June 1977 where organized by royal Decree 20/1997 of 18 March 1977, which established for the first time a special tariff for the distribution of electoral material.

(84) Correos explains that the exact amount of the reduced tariff (one peseta which is equivalent to EUR 0,006) was further regulated in a ministerial order of 1977. According to Correos, this reduced tariff has been in place since then. The Spanish Supreme Court in its judgement of 2 October 2006 ([14]) concluded that the reduced tariff in place for the distribution of electoral material relating to political candidates still in place was one peseta (EUR 0,006).

(85) Royal Decree 20/1977 was later on superseded by Organic Law 5/1985 of 19 June 1985 on the General Electoral System ('LOREG'), which contained the same wording relating to the reduced tariffs for the distribution of electoral material concerning political candidates.

(86) In the event that the Commission concludes that the measure constitutes State aid, Correos also considers that it should be declared compatible with the internal market.

(87) First, the measure at stake constitutes a genuine service of economic interest. Both Article of the 1998 Postal Law and Article 22(5) of the 2010 Postal Law recognize the provider of the USO might be entrusted with obligations related to the distribution of electoral material with the aim to safeguard the correct development of electoral processes. In addition, Article 22(5) of the 2010 recognises that such entrustment should be subject to compensation.

(88) Correos considers that the measure is compatible pursuant to the 2012 SGEI Decision ([15]). Correos explains that the 2012 SGEI Decision would be applicable since the average annual compensation granted to Correos would be below EUR 15 million.

4.2. *COMMENTS FROM THE ANONYMOUS THIRD PARTY*

(89) The anonymous third party agrees with the preliminary conclusions reached by the Commission in the opening decision as regards the following measures:

(a) Compensations for the provision of the USO granted to Correos.

(b) Tax exemptions from real estate tax (IBI) and tax on economic activities (IAE).

([14]) Judgement of the Spanish Supreme Court of 2 October 2006, Rec. 89/2004.
([15]) 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).

(c) Capital increases granted to Correos in 2004, 2005 and 2006.

(d) Compensation granted to Correos for the distribution of electoral material.

(90) The anonymous third party also agrees explicitly that the ongoing investigation should focus on the measures listed in recital 89.

(91) It however brings to the attention of the Commission several measures which have not been addressed by the Commission in the 2016 opening decision and which in its view would also need to be assessed.

(92) According to the anonymous third party ([16]):

— Correos would have received State aid between 1998 and 2003 amounting at least to EUR 794 million;

— Correos would have inherited free of charge a postal network of 9 054 customer service points that results from the provision of the USO and that grants Correos a competitive advantage for the delivery of parcel up to 20 kgs ([17]);

— Correos would have benefited from some intangible or exclusive rights such as the contracts signed between Correos and the Public Administration, the right to authenticate postal communications, the right to use the term 'Spain', the leasing of public domain as well as customs privileges;

— Correos would have benefited from compensations granted by the State in order to finance its publicity and communication campaigns;

— The fact that the Spanish authorities are present in the governing bodies of Correos would entail certain advantages and privileges for Correos. One of these advantages is that Correos has not been compelled to apply by Law so far the correct compensation methodology. Correos would have received compensation for the period 2011-2016 amounting to approx. EUR 1,3 billion, applying the compensation methodology which was contested by the Commission in the opening decision ([18]);

— Correos would not apply VAT rates to certain postal services that are subject to individual negotiated arrangements which would involve incompatible State aid;

— Correos would have carried capital increases in Correos Express, a subsidiary company of the Group Correos, in order to cover losses amounting to approximately EUR 233 million which would constitute State aid to Correos Express;

— Correos uses a predatory pricing policy that results from the State aid measures it receives.

5. **COMMENTS FROM SPAIN**

5.1. *COMMENT FROM SPAIN ON THE 2016 OPENING DECISION*

5.1.1. THE COMPENSATION FOR THE PROVISION OF THE USO GRANTED BY MEANS OF 1998 POSTAL LAW

(93) Spain considers that the measure does not constitute State aid pursuant to Article 107(1) of the Treaty. In particular, the Spanish authorities argue that the measure does not grant an economic advantage to Correos because the USO compensations comply with the criteria laid down in the Altmark judgement ([19]). The Spanish authorities also explain that the measure at hand was not notified because they considered that it complied with the criteria set out in the Altmark judgement.

([16]) The Commission notes that some of these issues do not appear to constitute State aid issues (e.g. alleged predatory pricing), that others do not seem to relate directly to Correos (e.g. alleged cross-subsidization of Correos express) and that the facts do not seem to be established regarding others (e.g. alleged compensation to finance Correos' publicity and communication campaigns).

([17]) The anonymous party also refers to the increase of the scope of the USO by the 2010 Postal Law to parcels up to 20 kg as an indication of Correos interest in expanding its business in order to compete, taking advantage of its position as USO, with the rest of the parcels service companies in the Spanish parcels service market.

([18]) The Commission will assess the USO compensations to Correos under the 2010 Postal Law in another decision (see recital 32).

([19]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ECLI:EU:C:2003:415.

(94) The Spanish authorities argue that the measure meets the third Altmark condition, which requires that the USO compensation does not exceed the net cost (i.e. the costs minus the relevant revenues plus a reasonable profit) of the public service obligation. Spain argues that it has implemented a valid compensation methodology which would correspond to the net avoided cost methodology prescribed by Directive 2008/6/EC. The Spanish authorities argue that the methodology that they used resulted from the NERA report, which was commissioned to the consultancy company National Economic Research Associates by the Commission. According to Spain, the compensation methodology contained in the NERA report is a valid implementation of the NAC methodology. The Commission errs in assuming that the overcompensation, including in the Altmark context, can only be calculated using the cost accounting methodology, leading to the conclusion that Correos in the period 2004-2010 exceeded what can be considered to be necessary to cover all or part of the costs incurred in the discharge of its USO.

(95) The Spanish authorities also argue that the measure complies with the fourth Altmark criterion. The fourth Altmark criterion requires that in the absence of a public procurement procedure, the level of compensation received be adequate provided the 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 public service obligation. According to the Spanish authorities, the comparison can only be done with undertakings of the same sector, in this case, the postal sector. Spain contests the doubts raised by the Commission regarding the conclusions reached in the Frontier Economics report which argued that the measure was compliant with the fourth Altmark criteria. According to Spain, the Commission did not demonstrate that the postal operators from Greece and Italy were inefficient in any Commission decision. In addition, Spain considers that it is not relevant for the compliance with the fourth Altmark criteria that the study was carried out *ex-post*. The Commission in previous decisions did not consider that an *ex-post* study would constitute an obstacle for accepting the fourth Altmark criterion. In particular, Spain refers to Commission decision of 21 October 2008 regarding Poste Italiane ([20]). In addition, according to Spain, settled case-law has accepted reports carried out *ex-post*. In particular, Spain refers to case Chronopost-La Poste ([21]), where the General Court accepted a report drafted *ex-post*.

(96) The Spanish authorities consider that should the measure be qualified as State aid, it should declared compatible with the internal market pursuant to 106(2) of the Treaty. In particular, Spain considers that the measure complies with the compatibility criteria of the 2012 SGEI Framework.

(97) The Spanish authorities contest the doubts raised by the Commission relating to the completeness of the entrustment act specifying the public service obligations and the methods of calculating the compensation. According to the Spanish authorities, the entrustment act might be constituted by one or various binding legal act. The Member State is free to choose the specific form of that entrustment act. In addition, it would not be necessary that it contains a specific reference to the term 'entrustment act'. In particular, the Spanish authorities consider that the measure complies with the requirement of paragraph 16 (e) of the 2012 SGEI Framework, whereby the entrustment act should contain the arrangements for avoiding and recovering any overcompensation. This was demonstrated by the fact that the excessive compensation granted in 2005 was subsequently recuperated in subsequent years.

(98) As regards the possibility of using the net avoided cost as methodology for calculating the compensation, the Spanish authorities argue that paragraph 69 of the 2012 SGEI Framework lays down no obligation to apply the net avoided cost methodology; it does not prohibit Member States from using this methodology. In addition, paragraph 184 of the Guide to the application of the Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest ([22]) clarifies that the aim of the non-applicability of the NAC methodology laid down in paragraph 69 of the 2012 SGEI Framework is not to impose an extra burden to Member State for those measures that existed before the obligation to use the NAC methodology. Therefore, the Spanish authorities consider that the NAC methodology, as implemented by Spain, is a valid one that legally can be used for calculating the compensation granted before 2012.

([20]) See Commission Decision 2009/554/EC of 21 October 2008 on a State aid scheme implemented by Italy to renumerate Poste Italiane for distributing postal savings certificates (C 49/06 (ex NN 65/06)) (OJ L 189, 21.7.2009, p. 3).
([21]) Case T-613/97, Ufex and Others v Commission, ECLI:EU:T:2006:150
([22]) Published by the Commission on 18 February 2013 (http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf)

(99) As explained in recital 94, the Spanish authorities consider that the Spanish methodology for calculating the compensation of the provision of the USO, and which was based on the NERA report, equates to the net avoided cost methodology. The Spanish authorities consider that it is irrelevant in this respect that the Spanish methodology does not contain efficiency incentives and intangible benefits since these two criteria did not exist at the time that Spain implemented the methodology. These criteria were introduced later on by Directive 2008/6/EC and the 2012 SGEI Framework.

(100) The Spanish authorities contest the methodology and the criteria applied by the Commission regarding the reasonable profit in the 2016 Opening Decision. The Spanish authorities argue that there should not be a reasonable profit benchmark applicable to all postal operators and that it should be assessed on a case-by-case basis. The reasonable profit benchmark applied by the Commission in the bpost Commission decision of 25 January 2012 ([23]) should not be set out as a reference for other postal operators. First, bpost case differs considerably from the situation of Correos, insofar as bpost case did not relate to the provision of the USO, but to other SGEIs. Second, the Commission has not applied consistently the reasonable profit benchmark set out in the bpost Decision since it has allowed higher benchmarks in other Commission decisions ([24]).

5.1.2. TAX EXEMPTION FROM REAL ESTATE TAX (IBI) AND TAX ON ECONOMIC ACTIVITIES (IAE)

(101) As regards the tax exemption from IBI, the Spanish authorities explain that the 1998 Postal Law and 2010 Postal did not exempt Correos from the IBI. However, certain Spanish courts, when interpreting the provisions of the 1998 Postal Law and 2010 Postal Law, considered that the IBI tax exemption was applicable to Correos. The Spanish authorities explain that the tax exemption was applied in very limited occasions. In fact, it was effectively applied in 94 Correos premises out of 13 000.

(102) The Spanish authorities consider that the tax exemptions cannot be imputable to the State because they stem from the Spanish Courts that ruled the refunding to Correos of IBI taxes previously paid by the company.

(103) As regards the tax exemption from IAE, the Spanish authorities consider that the IAE tax exemption should be considered existing aid. The IAE tax exemption would have been in place before the accession of Spain to the EEC. According to the Spanish authorities, the IAE tax exemption dates back to 1966 when the tax on Activities and Commercial and Industrial Benefits was adopted by Decree 3313/1966 of 29 December 1966. Law 39/1988 of 28 December 1988 replaced the Tax on Economic and Commercial and Industrial Benefits in its modality of the Licence Quota with the Tax on Economic Activities (IAE). According to Spain, this tax did not undergo substantial modifications since 1966 notwithstanding the fact that Correos enjoyed full exemption when it was an administrative body due to its nature.

5.1.3. CAPITAL INJECTIONS IN 2004, 2005 AND 2006

(104) The Spanish authorities consider that the capital injections carried out in 2004, 2005 and 2006 do not involve State aid because they comply with the MEIP.

(105) They emphasise that the capital injections were preceded by *ex ante* economic evaluations, comparable to those which any private investor would have carried out. The capital injections were foreseen in the multiannual action plans approved by the State acting as shareholder and included in the State General Budgets, which in turn reflected the company's strategic plans drawn up in order to expand its business in areas with better prospects and to improve its efficiency, in the context of a pronounced slowdown in the postal market.

([23]) Commission Decision 2012/321/EU of 25 January 2012, on the measure SA.14588(C20/09) implemented by Belgium in favour of De Post – La Poste (now bpost) (OJ L 170, 29.6.2012, p. 1).

([24]) See for instance Commission Decision of 28 March 2012 in case SA.33054 (2012/N) — Compensation for net costs incurred to keep a non-commercially viable network for the period 2012-2015 and the continuation of a working capital facility (OJ C 121, 26.4.2012, p. 1) and Commission Decision 2012/636/EU of 25 January 2012 Measures C36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG (OJ L 289, 19.10.2012, p. 1).

(106) Specifically, the strategic plans for the period 2001-2006 put in place actions to complete the process of modernising the undertaking, pursuing the following objectives:

(a) Ensuring the future sustainability of the postal business by improving efficiency, promoting the business lines with highest added value;

(b) Strengthening the businesses with best prospects of medium-term growth;

(c) Promoting technological development in database management, 'mailroom', etc.;

(d) Modernising Correos' management and organisational model and adapting it to the market context.

(107) According to the Spanish authorities, achieving those objectives called for the company to be equipped with additional resources in order to make the necessary investments. Having analysed the undertaking's strategy, the shareholder resolved to grant three capital increases totalling EUR 48,08 million, each of EUR 16,027 million, to be applied in the financial years 2004, 2005 and 2006. That increase in capital was seen as a key element in achieving the profitability ratios forecast in the company's action plans and reflected in the evaluations carried out by the sole shareholder. The capital increases were in fact dictated by the need to make investments which were 'incremental' or additional to those the company was making habitually.

(108) The Spanish authorities further argue that the evaluation was embodied in a framework of business prospects and results associated with the capital increase, drawn up with a horizon of five years, a reasonable period for assessing whether the business investment decisions were satisfactory. Those projections were reflected in the multiannual action plans (MAPs), which in turn were incorporated into the State General Budgets. The MAP approved in the 2004 financial year showed growth of 3,6 % in annual turnover and an improvement in net profits with average profits of around 5 % a year, all compared with a static scenario of no capital increase. Those results were obtained on the basis of an equal number of capital disbursements in 2004, 2005 and 2006, thereby enabling implementation of the lines of action envisaged in the strategic plans as far as investment was concerned.

(109) The forecasts included in the MAP and incorporated into the State General Budget would be fully comparable with those a market economy private investor would have made. They are the basis on which the State, in its capacity as shareholder, relied when it resolved to perform three increases in the company's share capital totalling EUR 48 081 000.

(110) Those forecasts, made *ex ante*, are shown in table 3.

Table 3

2004 MAP

	2005	2006	2007	2008
Net turnover (EUR thousand)	1 897 475	1 975 031	2 047 873	2 115 371
Turnover growth	3,4 %	4 %	3,6 %	3,2 %
Net profit or loss for the financial year (EUR thousand)	78 092	97 214	106 038	113 403
Forecast net profit	**4,1 %**	**4,9 %**	**5,1 %**	**5,3 %**

(111) The Spanish authorities explain that the MAPs are sound *ex ante* analyses of economic and financial projections. The forecasts they contain show levels of returns equivalent to those which a private investor would have required, with the effect that the decision to increase the share capital, to enable the company to make the investment necessary to achieve the forecast profits, is fully justified. Those margins of return would have led any private investor, according to the Spanish authorities, to make a similar decision.

(112) Spain indicates that it passed the resolution to increase the share capital and disburse EUR 16,027 million on 13 December 2004, based on the MAP for the 2004 financial year with the favourable financial projections shown in Table 1. Similarly, the shareholder passed the decisions relating to successive increases on 5 December 2005 and 29 December 2006 respectively, likewise on the basis of the corresponding MAPs. Spain also indicates that the actual evolution of the parameters used in the MAPs clearly improved on the financial projections, as can be seen in the table 4.

Table 4

Actual results

	2005	2006	2007	2008
Net turnover (EUR thousand)	1 940 000	2 014 400	2 106 600	2 141 000
Net profit or loss for the financial year	9,1 %	7 %	4,9 %	3,6 %
Net profit	**4,3 %**	**9,1 %**	**7 %**	**4,9 %**

(113) To supplement the foregoing, the Spanish authorities have also provided a private investor test carried out *ex-post* by Ernst & Young, which concludes that the Internal Rate of Return (hereinafter 'RR') of the capital increases examined was 9,29 %, and the market cost of capital of that investment was 7,87 % at the time of the investment.

(114) In this respect, the Spanish authorities consider that the remarks made by the Commission in the 2016 Opening Decision, based on the Commission v EDF case ([25]), on the need to carry out the profitability analysis before the investment in question, fail to take into account that an *ex ante* economic evaluation was carried out, the private investor test contained in the report serving as supplementary evidence for ratifying the validity of the MEIP used.

(115) The Spanish authorities dispute more fundamentally the relevance of the Commission v EDF ruling in the present case because EDF was operating under normal market conditions while Correos was entrusted with the USO. The Spanish authorities argue that when analysing the measures adopted in relation to a public undertaking operating in a sector with a USO, an *ex post* profitability analysis cannot be deemed to be invalid, because delivery of the general economic service is not governed by strictly commercial logic, and it is necessary in that case to take into account all the objective and verifiable data available.

(116) Following this logic, the Spanish authorities consider that a more relevant jurisprudence would be cases Chronopost I ([26]) and Chronopost II ([27]) where the Court of Justice of the European Union endorsed the analysis made by the Commission in Decision 98/365/EC ([28]) in the two judgments it delivered as a result of the corresponding appeals against that decision. In that decision, the Commission had assessed whether the behaviour of the French postal operator (La Poste) as a shareholder of SFMI-Chronopost, was justified in commercial terms in accordance with the criteria of a market economy private investor and had compared the IRR of the capital injections made by the State in favour of La Poste and its cost of equity on an *ex-post* basis.

(117) The Spanish authorities finally explain that should the Commission refuse that the capital injections fulfil the MEIP, they should be considered in the light of Article 106(2) of the Treaty because they represent resources dedicated to covering the public service, and were not under any circumstance operating aid, neither by reason of the destination of the funds nor by their nature.

([25]) Case C-124/10 P, Commission v EDF, ECLU:EU:C:2012:318.
([26]) Judgement of the Court of Justice of 3 July 2003, joint cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost/UFEX and others*, ECLI:EU:C2003:388.
([27]) Judgement of the Court of Justice of 1 July 2008, joint cases C-341-06 and C-342/06P, *Chronopost and La Poste/UFEX and others*, ECLI:EU:C2008:375.
([28]) Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SMFI-Chronopost (OJ L 164, 9.6.1998, p. 37).

5.1.4. THE DISTRIBUTION OF ELECTORAL MATERIAL CONCERNING POLITICAL CANDIDATES

(118) The Spanish authorities consider that the distribution of electoral material by Correos does not constitute State aid within the meaning of Article 107(1) of the Treaty. All activities carried out by Correos in the context of the organization of elections, and in particular the distribution of electoral propaganda concerning political candidates, are not economic activities since they constitute a prerogative of the State.

(119) In particular, as regards the distribution of electoral propaganda of political candidates, the Spanish authorities contest the conclusions reached in the opening decision that the measure is an economic activity. The Spanish authorities claim that the State has not introduced market tools to ensure that all voters receive electoral propaganda of political candidates. An electoral procedure is composed of a number of activities, all of them necessary and intertwined, which aim at ensuring the fundamental right of voting. Therefore, this activity should be considered to be a prerogative of the State.

(120) The Spanish authorities consider that should the measure constitute aid, it would be existing aid since it predates the accession of Spain to the European Economic Community in 1986. The compensation granted to electoral candidates for the distribution of electoral material has been in place since 1977 without undergoing any substantial modifications. Article 44(3) of Royal Decree-Law 20/1977 of 18 March 1977 relating to Electoral Provisions laid down that a Ministerial Order would set out the special postal tariffs to be applied to electoral material sent by political candidates. Ministerial Order of 3 March 1977 and Ministerial Order of 4 May 1977 set out the fixed tariff of one peseta for letters up to 50 grams, which has remained unaltered since then.

(121) Article 53 Organic Law 5/1985 of 19 June 1985 on the General Electoral System reiterated the obligation to fix by Ministerial Order the special tariff to be charged to political candidates for sending electoral material. Article 1 of the Ministerial Order of 13 October 1985 declared that the special tariffs of the Ministerial Order of 3 May 1977 were still applicable. Later on, Article 1 of Ministerial Order of 30 April 1986 established that the special tariffs laid down in Article 1 of the Ministerial Order of 30 October 1985 were still applicable, that is, the special tariffs of the Ministerial Order of 3 May 1977. Article 12 of Royal Decree 605/1999 of 6 of April 1999 and the 1998 and 2010 Postal Laws did not alter the special tariff applicable to political candidates, which is currently lay down in Article 59 of Organic Law 5/1985 of 19 June 1985 on the General Electoral System and which refers to the special tariffs laid down in the Ministerial Order of 3 March 1977.

(122) Furthermore, the Spanish authorities allege that should the measure be considered State aid it should be declared compatible with the internal market pursuant to Article 106(2) of the Treaty.

(123) Given the limitation period of 10 years contemplated in the opening decision (14 February 2004 - 14 February 2014), the Spanish authorities allege that the period under scrutiny should be 2004-2012 since in 2013 there were no elections.

(124) The entrustment of the service of general economic interest during the period 2004-2011 was laid down in Ministerial Orders, which included the content, scope and duration of the public service obligation. The entrustment of the service of general economic interest to Correos during the years 2011 and 2012 was laid down in an Agreement of the Council of Ministers for each election. These Agreements indicate the nature, content, scope and duration of the service of general economic interest. Moreover, the table 5 shows that, in any event, the total compensation which Correos received for delivering election material during the elections held from 2004 until 2012 did not exceed the costs incurred.

Table 5

Undercompensation of Correos for the delivery of the electoral material

(EUR)

Year	Election scope	Total costs	Revenue EUR 0,006 per item	Compensation for distribution of election material	Revenue + compensation total costs
2004	National	[…] (*)	[…]	27 182 926	[…]
2005	Regional	[…]	[…]	3 670 281	[…]

(EUR)

Year	Election scope	Total costs	Revenue EUR 0,006 per item	Compensation for distribution of election material	Revenue + compensation total costs
2006	Regional	[…]	[…]	4 528 376	[…]
2007	National/Regional	[…]	[…]	19 536 604	[…]
2008	National/Regional	[…]	[…]	19 609 632	[…]
2009	National/Regional	[…]	[…]	14 603 021	[…]
2010	Regional	[…]	[…]	4 620 588	[…]
2011	National/Regional	[…]	[…]	40 092 858	[…]
2012	Regional	[…]	[…]	14 268 978	[…]
2013	N/A	[…]	[…]		[…]
	TOTAL	**[…]**	**[…]**	**148 113 264**	**[…]**

(*) Confidential information.

5.2. *COMMENT FROM SPAIN ON THE COMMENTS FROM THIRD PARTIES*

(125) Firstly, the Spanish authorities point out that the complainant whose letter gave rise to these proceedings has not submitted observations on the 2016 Opening Decision. The Spanish authorities take note that the only third parties which submitted observations are Correos y Telégrafos, S.A. and an anonymous party representing the parcel delivery sector as can be deduced from the content of the comments made.

5.2.1. OBSERVATIONS ON THE COMMENTS SUBMITTED BY THE ANONYMOUS THIRD PARTY

(126) The Spanish authorities refer to their comments made on the 2016 Opening Decision on a number of issues for which the anonymous third party does not provide any specific additional argument.

(127) In addition, the Spanish authorities provide some additional comments on the following issues

5.2.1.1. ***Time extension of the investigation***

(128) The Spanish authorities consider that the request for the investigation to be extended to the time-barred period is inadmissible and inconsistent since, in accordance with settled Court of Justice case-law, the Commission only subjects measures that raise serious doubts of compatibility to the formal investigation procedure under Article 108(2) of the Treaty, provided that these measures were carried out outside the ten-year limitation period. The Spanish authorities also note that the anonymous interested party has recognized this legal point in its own comments which mention that 'It is clear that these amounts cannot be the subject of the investigation procedure, since the time limitation period for review has expired'.

(129) The Spanish authorities also consider that the request for the investigation to be extended to the period after 2010 is unjustified since the Spanish State confined itself to making advances from the State General Budget which will be adjusted once the net cost has been determined, after the new Plan de Prestación has been notified and the European Commission has given an opinion on it.

(130) The Spanish authorities consider that the third party implicitly recognises that the net cost cannot be determined until the new Plan de Prestación has been adopted since it refers in its comments to the notes to Correos' annual accounts for 2014 which state: 'A Resolution by the CNMC ([29]) on a calculation of the net cost of the UPS in 2011, 2012 and 2013 different from the calculation in the State General Budget might possibly have an impact on the amounts entered in the accounts. It would not be possible to calculate this final impact until the entry into force of the new Plan de Prestación, which will establish the methodology and components for calculating the net cost'.

5.2.1.2. ***Alleged advantages related to the VAT exemption***

(131) As regards the VAT exemption, the Spanish authorities explain that it is laid down in Spanish legislation in full conformity with the provisions of the EU Directive regulating this matter. The Spanish authorities also explain that the condition of imputability is not met if a national measure transposes a Community act that is not subject to any margin of discretion, as ruled in the Court of Justice judgment of 23 April 2009 in Case C-460/07 (Puffer) ([30]).

5.2.1.3. ***Alleged compensations granted by the State in order to finance its publicity and communication campaigns***

(132) The Spanish authorities deny that Correos may have benefited from aid to finance its publicity and communication campaigns.

(133) In particular, the Spanish authorities clarify that the related Institutional Publicity and Communication Plans mentioned by the anonymous third party as an indication of such support includes all the activities carried out by the bodies of the General State Administration as well as public undertakings, in this field for statistical purposes but that the Correos publicity costs mentioned in these plans have always been covered by the company resources.

(134) The Spanish authorities explain that, as indicated in the Plan itself, the Institutional Publicity and Communication Commission, an administrative collegiate body, includes in the Plan all the institutional campaigns to be conducted by the State General Administration and related bodies. Like any other public undertaking, Correos y Telégrafos, S.A. draws up its own publicity plans financed from its own resources, and includes them within that Plan merely for statistical purposes.

5.2.2. OBSERVATIONS ON THE COMMENTS SUBMITTED BY CORREOS

(135) The Spanish authorities agree with the observations made by Correos y Telégrafos, S.A.

(136) The Spanish authorities react to the request made by Correos in its written observations that the dividends distributed should be assigned to a reduction in the excess compensation indicated in the 2016 Opening Decision by reiterating that so far no proof has been provided on the existence of such overcompensation.

(137) However, Spain also reiterates its comments stressing the need to take account of the payment of dividends for the purposes of reducing any potential aid that might be identified at the end of the formal investigation procedure. These extraordinary and non-recurring dividends granted by Correos to the State should, according to the Spanish authorities, be taken into account for the purposes of calculating the public resources made available to Correos, in accordance with the Statsbaner decision of the Commission ([31]).

([29]) Comisión Nacional de los Mercados y la Competencia: the CNMC will adopt resolutions once the net cost of the universal postal service and the unfair burden has been established for these different years.
([30]) C-460/07, Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz, ECLI:EU:C:2009:254
([31]) Commission Decision 2011/3/EU of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case 41/08 (ex NN 35/08)) (OJ L 7, 11.1.2011, p. 1).

5.3. *ADDITIONAL COMMENTS FROM SPAIN*

5.3.1. ALTERNATIVE APPROACHES FOR THE CALCULATION OF AN OVERCOMPENSATION OF THE USO OVER 2004-2010

(138) While reiterating that the USO compensations granted over 2004-2010 to Correos do not entail State aid and if they do such aid should be considered compatible, the Spanish authorities consider that even accepting the Commission approach in the 2016 Opening Decision to use the cost allocation methodology ([32]), a potential overcompensation could only be calculated following the premises below:

(139) First, the reserved area and non-reserved area should be treated separately: the Reserved area corresponds to USO postal services delivered under a monopoly; the Non-reserved area comprised the USO postal services Furthermore, the compensation in the reserved area followed a method whose results fully matched the cost allocation one, whereas the Non-reserved area applied a NAC approach, the compensation being calculated and determined separately for each area. Thus, these areas should be considered as two distinct SGEIs subject to separate assessments and to different compensation methodologies. Under the Spanish methodology, the compensation for the reserved area corresponds to its accounting net cost (overall costs minus revenues), whereas the compensation for the non-reserved is calculated under a NAC approach covering the results of the losses of the loss-making segments of the non-reserved area under the assumption that any private operator would discontinue them in the absence of public service obligations.

(140) According to this reasoning, out of a total of approx. EUR 955,237 million of total USO compensation granted to Correos over 2004-2010 approximately EUR 637,850 Million (the accounting loss of the reserved area) would be allocated to the reserved area and EUR 317,387 million (the remainder) to the non-reserved area (see table 6).

Table 6

Compensations for USO Reserved and Non Reserved area

(EUR million)

	2004	2005	2006	2007	2008	2009	2010	Total
Reserved Area	46,171	40,435	39,558	80,823	101,783	176,559	152,521	637,850
Non Reserved Area	44,859	47,294	55,199	39,441	40,863	45,919	43,812	317,387
Total	**91,030**	**87,729**	**94,757**	**120,264**	**142,646**	**222,478**	**196,333**	**955,237**

(141) The Spanish authorities consider that the two compensations should then be assessed separately leading to a different result from the one reached by the Commission in the 2016 Opening Decision.

5.3.1.1. ***Assessment of the compensations to the USO reserved area***

(142) The Spanish authorities suggest to assess the compensations to the USO reserved area using the cost allocation methodology and a Return on Sales ([33]) (hereinafter 'ROS') benchmark of 4,8 % ROS (the benchmark applied in the bpost case for low risk entrustments).

([32]) The cost allocation methodology consists in calculating the net cost of a public service obligation such as the USO) as the costs incurred minus the revenues obtained when discharging the public service obligations. Under the cost allocation methodology, a reasonable profit can be added to that net cost to calculate the maximum amount of allowable compensation.

([33]) The Return on Sales is a profitability measure, also known as operating profit margin. It is calculated as the ratio between net operating profit (before interest and tax) and sales revenues. More precisely, net operating profit is the difference between revenues and costs at operational level.

(143) Such an approach results in clear under-compensation of Correos for this SGEI since aid granted for the USO reserved area corresponds exactly to its net accounting cost as illustrated by table 7, under-compensation amounting to the reasonable profit not accounted for.

Table 7

Under-compensation of the USO reserved area

(EUR million)

USO reserved area	2004	2005	2006	2007	2008	2009	2010	Total
Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost = Costs-Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Reasonable profit (based on 4,8 % ROS)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost + reasonable profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation allowed to Correos	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation granted to Correos	46,171	40,435	39,558	80,823	101,783	176,559	152,521	637,850
Undercompensation = compensation allowed – compensation granted	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**

(144) The Spanish authorities explain that given that Correos is undercompensated for the delivery of the USO reserved services and that the other conditions of the 2012 SGEI Framework are complied with, the compensation allocated to the USO Reserved area should be considered compatible.

5.3.1.2. ***Assessment of the compensations to the USO non-reserved area***

(145) The Spanish authorities consider that as regards the USO non-reserved services, the benchmark used in the bpost case for high risk entrustments can be applied.

(146) However, under such an assumption, the Spanish authorities recognize that the USO non-reserved area would exhibit a negative net cost in every year, that is, a net profit which would not allow for any compensation as illustrated by table 8.

Table 8

Overcompensation of the USO Non Reserved area

(EUR million)

USO non-reserved area	2004	2005	2006	2007	2008	2009	2010	Total
Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

(EUR million)

USO non-reserved area	2004	2005	2006	2007	2008	2009	2010	Total
Net cost = Costs-Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Reasonable profit (based on 7,4 % ROS)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost + reasonable profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation allowed	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
Compensation granted	44,859	47,294	55,199	39,441	40,863	45,919	43,812	317,387
Overcompensation = compensation granted – compensation allowed	**44,859**	**47,294**	**55,199**	**39,441**	**40,863**	**45,919**	**43,812**	**317,387**

(147) Under this approach, the compensation allocated to the USO non-reserved area could be considered incompatible to the extent that it overcompensated Correos. However, the Spanish authorities also underline that dividends should be taken into account as having de facto reduced the amount of compensation granted to Correos as explained in recitals 148 to 152.

5.3.2. DIVIDENDS

(148) The Spanish authorities explain that Correos has paid dividends over 2004-2010 (see Table 9).

Table 9

Dividends paid by Correos

(EUR million)

	2004	2005	2006	2007	2008	2009	2010	Total
Dividends paid	0,000	0,000	29,775	30,576	51,958	38,966	0,000	151,275

(149) The Spanish authorities explain that these dividends should not be seen primarily as a shareholder remuneration as they have rather played the role of an implicit claw-back mechanism allowing the Spanish authorities, in the particular circumstances of this case, to reduce potential over-funding by recovering resources from the company. The State, acting in its capacity of budgetary authority, decided to include such dividends in each State General Budget adopted in the period 2005-2008 to address potential over-funding identified in the previous year to the one when such budgetary decisions were taken. No such provision was adopted in 2009 and 2010, as forecasts pointed to company losses in those years.

(150) First, the Spanish authorities explain that the decision to pay dividends is imputable to the Spanish State, as a public authority, rather than to Correos management. In this respect, the Spanish authorities explain that:

(a) The provision on paying dividends by Correos is reflected in the State General Budget both under the Capital item of the Company and the non-tax State income Chapter. The State General Budget is adopted through a draft Law (Anteproyecto de Ley) approved by the Council of Ministers and submitted to the Parliament for final decision.

(b) The need to undertake funding adjustments through dividends is based on the Company's results of the year preceding the one in which they are reflected in the State General Budget, as such results are the only ones available when the draft Budget Law is adopted in September each year.

(c) Correos as a company had clearly no interest in paying dividends to the State which was anyway committed to pay the USO compensation until 2010.

(151) Second, the Spanish authorities explain that circumstances were such that the dividends were the only practical way to modulate the potentially excessive funding in certain years for the following reasons:

(a) In 2000, Spain adopted a contract with Correos according to which a certain compensation amount was automatically payable, its calculation being based on a pre-defined formula, until 2010.

(b) While Spain did not undertake as such a formal check for overcompensation, the Spanish authorities were aware that the particularly positive financial situation of the company in certain years provided evidence that part of the funding may not have been fully necessary in these years.

(c) In such circumstances, collecting dividends stood as the only legal mean for the State to reduce the potential funding excess granted to Correos, no alternative means being foreseen in the contract. The dividends worked in this case as a kind of claw-back mechanism.

(d) The Spanish authorities also explain that Correos did not get any particular economic advantage from receiving excess funding and repaying it through dividends. The company was very profitable in these years (and did not need the extra funds to function), did not get bank loans (so did not benefit from a better credit-worthiness) and did not make particular acquisitions.

(152) Based on that logic, the Spanish authorities explain that the dividends paid in year N, were decided in year N-1 based on the accounting results available for year N-2. Therefore these dividends aimed at reducing the overcompensation arising from Year N-2 as summarized in table 10.

Table 10

Dividends and overcompensation

(EUR million)

	Amount of dividends	Year of payment	Related year of overcompensation	Amount of overcompensation of the given year	Reduced overcompensation for the given year
	29,775	2006	2004	44,859	15,084
	30,576	2007	2005	47,294	16,718
	51,958	2008	2006	55,199	3,241
	38,966	2009	2007	39,441	0,475
	0,000	2010	2008	40,863	40,863
	0,000	2011	2009	45,919	45,919
	0,000	2012	2010	43,812	43,812
Total	**151,275**			**317,387**	**166,112**

6. ADDITIONAL OBSERVATIONS SUBMITTED BY UNIPOST

(153) On 20 March 2018, Unipost informed the Commission that it had entered liquidation on 19 February 2018 and that it considers that incompatible State aid granted to Correos had played a significant role in its bankruptcy.

(154) According to Unipost such incompatible aid has made it possible to Correos to apply lower prices in the non-reserved markets, applying a pricing policy that was not related to its costs in such non-reserved markets.

7. **ASSESSMENT OF THE MEASURES**

7.1. *THE USO COMPENSATIONS GRANTED UNDER THE 1998 POSTAL LAW*

7.1.1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

(155) According to Article 107(1) of the 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 internal market'.

(156) It follows that, in order for a financial measure to be qualified as State aid within the meaning of Article 107(1) of the Treaty, the following cumulative conditions have to be met: (i) the measure must be imputable to the Member State and granted through State resources, (ii) it must confer an economic advantage to undertakings, (iii) that advantage must be selective, and (iv) the measure must distort or threaten to distort competition and be liable to affect trade between Member States.

7.1.1.1. ***Measure imputable to the State and granted through State resources***

(157) For a measure to constitute State aid within the meaning of Article 107(1) of the Treaty, it must be granted by the State or through State resources. State resources include all resources of the public sector ([34]), including resources of intra-State entities (decentralised, federated, regional or other) ([35]).

(158) The compensations for the provision of the USO under the 1998 Postal Law are paid directly from the State General Budget and are hence clearly imputable to the State and granted through State resources.

7.1.1.2. ***Selective economic advantage to an undertaking***

A. **Selectivity**

(159) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective manner fall under the notion of aid.

(160) The USO compensations are clearly selective as they benefit only one undertaking: Correos.

B. **The notion of undertaking**

(161) 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) of the Treaty. The Court of Justice of the European Union ('Court of Justice') has consistently defined undertakings as entities engaged in economic activity ([36]). 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 ([37]). An activity must generally be considered to be economic in nature where it consists in

([34]) Case T-358/94 *Compagnie nationale Air France v Commission of the European Communities* EU:T:1996:194, paragraph 56.
([35]) Case 248/84 *Federal Republic of Germany v Commission of the European Communities* EU:C:1987:437, paragraph 17; and Joined Cases T-92/00 and T-103/00 *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* EU:T:2002:61, paragraph 57.
([36]) Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, paragraph 74.
([37]) Case C-41/90 *Höfner & Fritz Elser v Macrotron GmbH* EU:C:1991:161, paragraph 21 and Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, paragraph 74.

offering goods and services on a market ([38]). An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former ([39]). The mere fact that an entity does not pursue a profit does not necessarily mean that its operations are not of an economic nature ([40]).

(162) In the present case, Correos offers postal services against remuneration on the Spanish market and in competition with other providers. Offering postal services on this market thus amounts to an economic activity. The USO compensations compensate Correos for the provision of certain of these postal services and hence compensate an economic activity. Accordingly, with respect to the activities financed by the measures in question, Correos must be qualified as an undertaking.

C. **Economic advantage**

(163) An advantage for the purposes of Article 107(1) of the Treaty is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention ([41]). Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention ([42]). Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(164) The USO compensations are designed to cover all or part of the net cost incurred by Correos in performing the USO. Without State intervention, Correos would have to bear these costs itself. The measure under assessment relieves Correos of some of the costs of its economic activities and thus improves Correos' financial situation. In consequence, and without prejudice to the question of whether the measure complies with the conditions set by the Altmark judgment, the measure under assessment prima facie grants Correos an advantage.

D. **Compliance with the Altmark criteria**

(165) Public service compensation granted to a company that complies with the four criteria laid down by the Court of Justice in its Altmark judgment is deemed not to grant any economic advantage and thus does not constitute State aid ([43]). Those four cumulative criteria are the following:

(a) '(…) First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined (…).

(b) (…) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (…).

(c) (…) 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 (…).

(d) (…) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant 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

([38]) Case C-118/85 *Commission of the European Communities v Italian Republic* EU:C:1987:283, paragraph 7.
([39]) Case C-82/01 P *Aéroports de Paris v Commission of the European Communities* EU:C:2002:617, paragraph 74; and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* EU:C:2008:376, paragraph 25. See also 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 (2012/C 8/02), paragraph 9.
([40]) Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* EU:C:2008:376, paragraph 27; and Case C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* EU:C:1995:392, paragraph 21.
([41]) Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* EU:C:1996:285, paragraph 60; and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* EU:C:1999:210, paragraph 41.
([42]) Case C-173/73 *Italian Republic v Commission of the European Communities* EU:C:1974:71, paragraph 13.
([43]) Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* EU:C:2003:415.

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.'

(166) Concerning the compensation granted to Correos during the period under review, the Commission confirms the views taken in the 2016 Opening Decision ([44]) that the third and the fourth Altmark criteria are not fulfilled.

The third Altmark criterion

(167) In its decision of 25 January 2012 regarding bpost ([45]), the Commission determined a reasonable profit range benchmark applicable to all postal operators in the Union. The Commission determined that benchmark profit level on the basis of three expert studies (by respectively WIK Consult, Deloitte, and Charles River Associates). That benchmark profit level applicable to all EU postal operators (expressed as ROS) is based on the observed profitability of sets of comparable firms in the postal and parcel sector in several countries. In particular, in cases where a postal operator is exposed to a significant degree of risk, the benchmark range [5,4-7,4 % ROS] applies, whereas in cases where only a limited risk is present the benchmark range [3,6-4,8 % ROS] is used ([46]).

(168) The Commission had expressed doubts in the 2016 Opening Decision that Correos may have been overcompensated based on the following calculation (see table 11) using the highest ROS benchmark determined in the bpost case.

Table 11

Potential overcompensation of Correos

(EUR million)

	2004	2005	2006	2007	2008	2009	2010	Total
USO Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
USO Costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost = Costs-Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Reasonable profit (based on 7,4 % ROS)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost + reasonable profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation allowed to Correos	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation granted to Correos	91,030	87,729	94,757	120,264	142,646	222,478	196,333	955,237
Potential overcompensation = Compensation granted – Compensation allowed	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**	**[…]**

([44]) See paragraphs 71-82 of the 2016 Opening Decision.
([45]) See recitals 296-320 of Decision 2012/321/EU.
([46]) In the case of bpost a reasonable profit level of 4,8 % was applied for the years 2004 and 2005 and of 7,4 % ROS for the years 2006-2010. On the basis of these reasonable profit levels the Commission concluded that bpost had been overcompensated which led to the recovery of EUR 417 million (see http://europa.eu/rapid/press-release_IP-12-45_en.htm).

(169) The Spanish authorities and/or Correos ([47]) have made some comments regarding the doubts expressed by the Commission (see sections 4.1.1 and 5.1.1):

(a) The NAC methodology can be used to verify whether the 3rd Altmark criterion is fulfilled.

(b) The Spanish methodology is a valid implementation of the NAC methodology.

(c) The compensations granted to Correos correspond to the NAC of the USO, so there cannot be any overcompensation and therefore the 3rd Altmark criterion should be deemed fulfilled.

(d) Legitimate expectations would apply in respect of the fulfilment of the 3rd Altmark criterion by the use of the NAC methodology and therefore by the use of the Spanish methodology.

(e) The Spanish authorities have also proposed an alternative for the implementation of the cost allocation methodology which leads to a different result than the one of the Commission.

(170) These different arguments are discussed below.

— The NAC methodology can be used to verify whether the 3rd Altmark criterion is fulfilled.

(171) The Spanish authorities and/or Correos consider that the 3rd Altmark criterion can be verified by means of the NAC methodology (i.e. that the absence of overcompensation requested by the 3rd Altmark criterion can be verified by comparing the NAC of the SGEI and the compensation granted to the SGEI provider).

(172) The Commission recalls that the Altmark judgment was adopted on 29 July 2003. There is no doubt that at the moment of the adoption of that judgment, the only applicable method for the calculation of the net cost of SGEIs was the cost allocation methodology. The Altmark judgment itself refers to incurred costs and receipts which identifies without doubt the cost allocation methodology while the NAC relies essentially on the notion of avoided costs (which are by definition not incurred).

(173) The cost allocation methodology was included in the 2005 SGEI Framework ([48]) which applied from 29 November 2005 until 31 January 2012, and served as the basis for several Commission decisions on compensation for USOs in that period ([49]). It is also the methodology to be used under the 2012 SGEI Framework if the NAC methodology cannot be applied ([50]). The NAC methodology was only introduced formally by the Commission, as a valid way to calculate the net cost of the USO, in Directive 2008/6/EC (which entered into force on 1 January 2011) and the 2012 SGEI Framework (which entered into force on 31 January 2012).

(174) The Court of Justice of the European Union has clarified that the notion of State aid is an objective and legal concept defined directly by the Treaty ([51]). It would then seem incorrect to modify over time the methodology used to appreciate the presence of aid under the Altmark judgment to align it with the options chosen by the Commission in the 2012 SGEI Framework which describes the conditions for the compatibility of certain SGEI compensations. In any case as explained in recital 172, such interpretation is contrary to the letter of the judgment.

(175) The Commission therefore disagrees that the NAC methodology could be used to verify the compliance with the 3rd criterion of the Altmark judgment.

— The Spanish methodology is a valid implementation of the NAC methodology

(176) The Spanish authorities and/or Correos defend that the Spanish methodology is a valid implementation of the NAC methodology recognized as an appropriate method to calculate the net cost of the USO in Directive 2008/6/EC and the 2012 SGEI Framework.

([47]) Given that the comments of the Spanish State and Correos are very convergent, the Commission will refer to comments made by the Spanish authorities and/or Correos in the following of the document. In most cases, the same comment is made by both parties. In some cases, it is only made by one of them.

([48]) Communication from the Commission: European framework for State aid in the form of public service compensation (2005) (OJ C 297, 29.11.2005, p. 4).

([49]) See in particular Decision 2012/321/EU and Decision 2012/636/EU.

([50]) See footnote 2 of paragraph 21 of the 2012 SGEI Framework. This cost allocation methodology is described in paragraphs 28 et seq. of the 2012 SGEI Framework.

([51]) See Judgment of the Court of Justice of 22 December 2008, British Aggregates v Commission, C-487/06 P, ECLI:EU:C:2008:757, paragraph 111.

(177) The Commission considers that, even if the NAC methodology could be used to verify compliance with the 3rd criterion of the Altmark judgment, *quod non*, the Spanish methodology can clearly not be considered as a valid implementation of the NAC methodology.

(178) First, it can be observed that, as recognized by the Spanish authorities themselves, the Spanish method applies the cost allocation methodology to the USO Reserved area (see recital 139). According to the Spanish authorities, only the approach applied to the USO non-reserved area (where the net cost is equal to the sum of the losses of the loss making segments of the USO non-reserved area) could potentially be compared to a NAC (see recital 139). Such dual approach seems in itself contradictory with the NAC methodology as described ([52]) and implemented by the Commission in its decision practice ([53]) which implies to compare the situation of the whole company with and without the public service obligation (in this case the USO).

(179) Even considering only the USO non-reserved area, the Spanish methodology also presents a number of differences with the NAC methodology as described and implemented by the Commission in its decision practice.

(180) First, the Spanish methodology does not seem to be built on a realistic counterfactual scenario which is a major element of the net avoided cost methodology. Indeed, it simply considers *ex-post* the losses of the loss making cost centres. The Spanish authorities argue that it is built on an implicit counterfactual scenario: any private operator would discontinue these loss-making centres in the absence of public service obligations (see recital 139). However, such an approach does not seem to describe a real business strategy which would require determining *ex-ante* the cost centres to discontinue as an operator could not be expected to know in advance exactly which cost centres would be loss-making. Moreover, the Spanish methodology seems to imply that costs centres could be discontinued and recreated at will from one year to the other over the assessment period which is not a realistic counterfactual scenario.

(181) Furthermore, the Spanish methodology does not correct for the impact of the cessation of delivery of those unprofitable traffic flows on the profitability of other (USO or non-USO) products and services, as also required by the NAC methodology.

(182) Finally, the Spanish methodology does not take into account intangible and market benefits nor does it contain incentives for cost efficiency, as required by the NAC methodology.

(183) Considering the above, the Commission does not consider that the Spanish methodology is a valid implementation of the NAC methodology.

— The compensations granted to Correos correspond to the NAC of the USO, so there cannot be any overcompensation and therefore the 3rd Altmark criterion should be deemed fulfilled.

(184) As explained in recitals 172 to 175, the Commission does not consider that the NAC methodology is appropriate to verify the 3rd Altmark criterion, moreover as explained in recitals 176 to 183, the Commission does not consider the Spanish methodology as a valid implementation of the NAC methodology.

(185) As a consequence, the Commission considers that the compensations granted to Correos according to the Spanish methodology do not correspond to the NAC of the USO and that even if they did this would not be sufficient to ensure compliance with the 3rd Altmark criterion.

([52]) As for example described in the Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive and in particular the Annex on the calculation of the net cost of the postal universal service obligation. Further guidance can be found in the Commission's State aid decision practice since 2012.

([53]) See for example Commission Decision of 4 December 2015 in case SA.43243 (2015/N) — State compensations granted to Poste Italiane SpA for the delivery of the universal postal service over the periods 2012-2015 and 2016-2019 (OJ C 104, 18.3.2016, p. 1)., Commission Decision of 1 August 2014 in Case SA.35608 (2014/C) implemented by Greece in favour of Hellenic Post (ELTA) (OJ C 348, 3.10.2014, p. 48). Commission Decision of 5 August 2016 in case SA.38869 (2014/N) Compensation of Poczta Polska for the net cost of USO 2013-2015 (OJ C 284, 5.8.2016, p. 1).

— Legitimate expectations would apply in respect of the fulfilment of the 3rd Altmark criterion by the use of the NAC methodology and therefore by the use of the Spanish methodology.

(186) The Spanish authorities and/or Correos claim that Spain could have legitimate expectations regarding the fulfilment of the 3rd Altmark criterion by the use of the NAC methodology and the Spanish methodology.

(187) The Court of Justice has held ([54]), in respect of State aid, that where the aid has not been notified to the Commission, and is therefore unlawful aid, there can be no recourse to the principle of protection of legitimate expectations. Accordingly, a legitimate expectation that aid granted is lawful cannot, barring exceptional circumstances, be entertained unless that aid was notified to the Commission.

(188) Spain has never notified the USO compensations to the Commission despite the publicity made by the Commission on its State aid decisional practice in the postal sector ([55]). In particular, several State aid decisions of the Commission in the postal sector publicly available assess the compliance with the Altmark conditions and none of them has accepted the NAC methodology as an appropriate mean to verify the 3rd Altmark criterion. Moreover, several decisions provide guidance on the approach of the Commission regarding the NAC methodology ([56]) and it is clear on that basis that the Spanish methodology does not correspond to the NAC methodology as implemented by the Commission (as explained in recitals 177 to 183).

(189) The Commission considers that the NERA report issued in 1998 (which had no binding effect) cannot generate legitimate expectations as regards the assessment of the presence of aid in public service compensations which has been clearly framed by the 2003 Altmark judgment and by the decisional practice of the Commission since this judgment.

— The Spanish authorities have also proposed an alternative for the implementation of the cost allocation methodology which leads to a different result than the one of the Commission.

(190) The Spanish authorities suggest different approaches to calculate the overcompensation of the USO (see section 5.3.1).

(191) Without taking a position at this stage on these alternative approaches, the Commission notes that they also lead to the conclusion that Correos has been overcompensated for the delivery of the USO Non reserved services. On that basis, the 3rd Altmark criterion would not be fulfilled.

The fourth Altmark criterion

(192) Concerning the fourth Altmark criterion, it is undisputed that the USO was not awarded as a result of an open public procurement procedure, but was directly entrusted to Correos by the Spanish authorities.

(193) However, the Spanish authorities argued that Correos is compensated according to the costs of a typical well-run undertaking. In support of that claim, the Spanish authorities have provided a study by Frontier Economics to the Commission.

(194) The study aims to present a comparative analysis of Correos' costs with the costs of other European postal operators responsible for providing the USO in order to prove that the USO compensations granted to Correos fulfil the fourth Altmark criterion. The study uses an econometric model to estimate the costs of a hypothetical typical well-run undertaking on the basis of information from several European postal USO providers. Correos' actual costs are compared to the costs that this hypothetical typical well-run undertaking would have incurred should it have been in a situation (e.g. with regard to the network density) similar to that of Correos. The study's results suggest that Correos' costs in the period 2005-2010 were lower than those of the hypothetical typical well-run undertaking as estimated by the econometric model.

([54]) Case C-471/09 P Diputación Foral de Vizcaya and Others v Commission, ECLI:EU:C:2011:521, paragraph 65.
([55]) Press releases, publication of decisions on its website.
([56]) See footnote 53.

(195) The Commission expressed doubts in the 2016 Opening Decision that the hypothetical typical well-run undertaking defined in the study would actually be an efficient postal operator. Indeed, it has not been demonstrated that the USO providers used to establish this benchmark are themselves efficient operators. Instead, the study simply mentions that these postal operators are considered 'well-run and adequately provided, because there is no evidence of any kind that would show them to be inefficient, or that would indicate that they have incentives to operate inefficiently'. This argument is however all the more difficult to accept that the set includes USO providers ([57]) which have received USO compensation, and for which the Commission has already adopted decisions concluding that their costs could not be considered efficient costs ([58]).

(196) The Spanish authorities and/or Correos argue that the Commission has not formally stated in the decisions on the USO compensations granted to Hellenic Post and Poste Italiane that the operator were not efficient (see recitals 62 and 95). It can be noted that the Commission has rejected a similar approach in the 2012 Poste Italiane decision ([59]) based on a comparison with a set of postal operators on the ground that it could not be inferred from available information that these operators were efficient. The Commission maintains its views that it is not possible to simply assume that in average postal operators are cost-efficient in particular in light of the continuous restructuring which is impacting this sector.

(197) Furthermore, the USO compensation of Correos has been defined on the basis of the Spanish methodology which according to the Spanish authorities is an implementation of the NAC methodology. This seems to contradict the letter of the fourth Altmark criterion which refers to the incurred cost of a well-run undertaking.

(198) Finally, as explained in recitals 167-168, the Commission considers that the 3rd Altmark criterion is not fulfilled because the methodology used by the Spanish authorities appears to have resulted in compensation amounts that exceeded Correos USO net cost (including a reasonable profit). This means that even if it were accepted that Correos' costs are those of a well-run undertaking, it could still not be considered that the compensation granted to Correos were set on the basis of these costs.

(199) Consequentely, it cannot be concluded that the level of compensation granted to Correos was 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.

Conclusion

(200) The Commission concludes that two of the four cumulative Altmark conditions are not fulfilled in the present case, so that the compensations must be considered as conferring an advantage to Correos.

7.1.1.3. ***Distortion of competition and effect on trade***

(201) Public support to undertakings only amounts to State aid within the meaning of Article 107(1) of the Treaty if it 'distorts or threatens to distort competition' and only insofar as it 'affects trade between Member States'.

(202) Concerning the principle of distortion of competition, 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 ([60]). For all practical purposes, a distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.

([57]) E.g. Hellenic Post, Poste Italiane.

([58]) See Commission Decision of 20 November 2012 in Case SA.33989 (2012/NN) implemented by Italy in favour of Poste Italiane (OJ C 77, 15.3.2013, p. 12) and Commission Decision in Case SA.35608 (2014/C) implemented by Greece in favour of Hellenic Post (ELTA).

([59]) See paragraph 50 of the Commission Decision in Case SA.33989 (2012/NN) implemented by Italy in favour of Poste Italiane.

([60]) Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* EU:C:1980:209, paragraph 11; and 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 *Alzetta Mauro and others v Commission of the European Communities* EU:T:2000:151, paragraph 80.

(203) Concerning the principle of 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 ([61]). In the field of State aid rules, an effect on trade is not a priori precluded by the local or regional character of the service provided. While there is no strict threshold or percentage below which it may be considered that trade between Member States is not affected, the limited scope of the economic activity, as may be evidenced by a very low turnover, renders the presence of an effect on trade less likely.

(204) As regards the present case, the Commission observes that Correos has been active on the markets for postal items and parcels which are characterized by intense competition with other providers from different Member States (i.e. Deutsche Post, TNT, La Poste, UPS, CTT Correios Portugal and Royal Mail). As a consequence, there are no doubts that any measure benefiting Correos is liable to affect competition and trade between Member States.

7.1.1.4. ***Conclusion***

(205) On the basis of the foregoing considerations, the Commission considers that the USO compensations granted to Correos under the 1998 Postal Law fulfil the cumulative criteria of Article 107(1) of the Treaty and hence that the measure constitutes State aid within the meaning of that provision.

7.1.2. EXISTING OR NEW AID

(206) Article 1(b) of Council Regulation (EU) 2015/1589 ([62]) provides that existing aid means 'all aid which existed prior to the entry into force of the TFEU in the respective Member States.' It thus follows that any aid scheme that existed in Spain prior to its accession to the Union on 1 January 1986 should be considered to be existing aid.

(207) According to Article 1(c) of the same regulation: '"new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.' According to the Court of Justice, to establish whether an aid has been altered, it is decisive to examine whether the provisions providing for it have been altered. ([63]). In subsequent judgments, the Court of Justice and the General Court have further elaborated on what kind of alteration of the provisions providing for the aid converts existing aid into new aid. According to the General Court, '[i]t is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.' ([64])

(208) In this respect, it is worth noting that, before the entry into force of the 1998 Postal Law, Correos' net global losses (regardless of whether these losses were caused by the USO or non-USO activities) were directly compensated from the Spanish State budget. After the adoption of the 1998 Postal Law, the State limited the public funding of Correos to the compensation for the provision of the newly defined and circumscribed USO activity and no longer to the global net losses of the company.

(209) The Commission thus considers that the nature of the USO compensation was fundamentally altered in two ways. First, the 1998 Postal Law reduced the scope of the compensation by limiting it to the USO activities, while before all of Correos' activities (i.e. including non-USO) were eligible for compensation. It is worth noting that such scope reduction is considered to constitute a fundamental alteration and not a mere decrease of the

([61]) Case 730/79 *Philip Morris Holland BV v Commission of the European Communities*, EU:C:1980:209 paragraphs 11 and 12; and Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities* EU:T:1998:77, paragraphs 48-50.
([62]) 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).
([63]) Case C-44/93 *Namur-Les Assurances* EU:C:1994:311, paragraphs 28 and 35.
([64]) See Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* EU:T:2002:111, paragraph 111.

compensation ([65]). Indeed, depending on the respective financial situations of the USO and non-USO services, the alteration could result in an increase or decrease of the compensation ([66]). Second, the method to determine the amount of compensation was also altered by means of the *Plan de Prestación* of 2000 (see recital 26). Indeed, while initially USO compensation was based on the net losses incurred by Correos, the *Plan de Prestación* required the use of a specific methodology (see recitals 27 and 28) to determine the amount of that compensation.

(210) The Commission therefore considers the scheme to have been significantly altered since Spain's accession to the European Union in 1986. Therefore, the Commission concludes that the USO compensations granted to Correos under the 1998 Postal Law cannot qualify as existing aid for State aid purposes and therefore must be considered as new aid, at least since the entry into force of the 1998 Postal Law in the year 1998.

7.1.3. LAWFULNESS OF THE AID MEASURE

(211) The Commission notes that the USO compensations covered by this decision, to the extent that they constitute State aid within the meaning of Article 107(1) of the Treaty, have not been subject to notification under Article 108(3) of the Treaty. Therefore the USO compensations constitute unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

7.1.4. COMPATIBILITY WITH THE INTERNAL MARKET

7.1.4.1. ***Legal basis***

A. **Compatibility under Article 106(2) of the Treaty**

(212) Insofar as the USO compensations benefiting Correos amount to State aid within the meaning of Article 107(1) of the Treaty, their compatibility with the internal market needs to be assessed. The grounds on which a State aid measure can or must be declared compatible with the internal market are listed in Articles 106(2), 107(2), and 107(3) of the Treaty.

(213) Considering that the Spanish authorities have consistently asserted that the USO compensations granted to Correos under the 1998 Postal Law constitute compensation for carrying out services of general economic interest ('SGEI'), the compatibility of those compensations with the internal market will need to be assessed on the basis of Article 106(2) of the Treaty. That article 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.'

B. **Temporal application of the 2012 SGEI Package**

(214) The Commission has laid down the conditions according to which it applies Article 106(2) of the Treaty in a series of instruments, most recently, inter alia, the 2012 SGEI Framework and the 2012 SGEI Decision ([67]) (hereinafter together: 'the 2012 SGEI package'). Previously, the Commission had issued and applied the conditions for assessing compatibility under Article 106(2) of the Treaty laid down in the 2005 SGEI Framework ([68]) and the 2005 SGEI Decision ([69]).

([65]) According to article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1), modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market as well as an increase in the original budget of an existing aid scheme by up to 20 % shall not be considered an alteration to existing aid.

([66]) For example, if the USO services were loss making but overall the company was profit making, no compensation was to be granted while some could be granted after the change. Alternatively, if the company would be loss-making overall with a very profitable USO, it could receive compensation.

([67]) Decision 2012/21/EU.

([68]) Community framework for State aid in the form of public service compensation, (OJ C 297, 29.11.2005, p. 4).

([69]) Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty 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 312, 29.11.2005, p. 67).

(215) As regards the 2012 SGEI Decision, since the amount of the USO compensations granted to Correos over the 2004-2010 period are above EUR 15 million per year, those compensations do not fall within the scope of the 2012 SGEI Decision, as set out in Article 2 thereof. They also do not fall within the scope of the 2005 SGEI Decision, as set out in Article 2 thereof.

(216) At the current stage of development of the internal market, State aid falling outside the scope of the 2012 SGEI Decision may be declared compatible with Article 106(2) of the Treaty if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. ([70])

(217) The 2012 SGEI Framework describes the conditions under which such balance is achieved. However, in accordance with paragraph 69 of the 2012 SGEI Framework, since the USO compensations over the period 2004-2010 constitute illegal State aid, the conditions laid down in the following paragraphs of that framework are inapplicable for the Commission's compatibility assessment under Article 106(2) of the Treaty:

— Paragraph 14: give proper consideration to public service needs when entrusting the provider with a particular SGEI;

— Paragraph 19: compliance with EU public procurement rules when entrusting an SGEI;

— Paragraph 20: absence of discrimination;

— Paragraph 24 (and onwards): application of the NAC methodology to calculate the net cost;

— Paragraph 39 (and onwards): efficiency incentives;

— Paragraph 60: transparency.

(218) Therefore, in the following section the Commission will assess the USO compensations under the 2012 SGEI Framework, excluding the aforementioned paragraphs, and determine whether those compensations comply with the remaining conditions laid down by that framework.

7.1.4.2. ***Compatibility under the 2012 SGEI Framework***

A. **Genuine service of general economic interest as referred to in Article 106 of the Treaty**

(219) The service entrusted to Correos by the Spanish State is the universal postal service as required by Article 3(1) of Directive 2008/6/EC which reads: '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.'. As outlined in recitals 4 to 8 of Directive 2008/6/EC amending Directive 97/67/EC, universal postal service obligations as defined in the Postal Services Directive are recognised by the Union as constituting genuine services of general economic interest within the meaning of Article 106(2) of the Treaty.

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

(220) As indicated in section 2.3 of the 2012 SGEI Framework, the concept of SGEI within the meaning of Article 106 of the Treaty means that the undertaking in question has been entrusted with the operation of the service of general economic interest by way of one or more official acts.

(221) Those acts must specify, in particular:

(1) The precise nature of the public service obligation and its duration;

(2) The undertaking and territory concerned;

([70]) See paragraph 11 of the 2012 SGEI Framework.

(3) The nature of the exclusive rights assigned to the operator;

(4) The description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation;

(5) The arrangements for avoiding and repaying any overcompensation.

(222) The 1998 Postal Law and the 2000 Plan de Prestación which were the relevant entrustment acts for the period 2004-2010 clearly define and entrust Correos with the USO. The territory concerned is the whole national territory of Spain.

(223) The 1998 Spanish Postal Law further indicates, in its Article 19, the exclusive rights assigned to Correos. Those rights include, for instance, the use of the brand 'España', the word 'Correos' and the related symbols.

(224) The 2000 *Plan de Prestación* provides for a mechanism to calculate the net cost of the USO (the Spanish methodology) which is used as the basis for the amount of compensation ([71]). The compensation mechanism and the parameters for calculating the compensation can therefore be considered defined.

(225) Given that the Spanish methodology foresaw that the USO compensations amount should correspond to an *ex-post* calculation of the net cost, it can be accepted that the system were designed to avoid overcompensation to the extent that the calculation methodology would have been considered reliable. While the Commission disputes the applicability of the Spanish methodology, this is not considered to affect the compliance with the condition to foresee mechanisms to avoid overcompensation.

(226) The Commission therefore considers that the entrustment of Correos can be considered to be in compliance with the 2012 SGEI Framework.

C. **Duration of the period of entrustment**

(227) As indicated in section 2.4 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.'

(228) The 1998 Spanish Postal Law did not specify the duration of the entrustment of the USO to Correos. However, the entrustment ended in 2011, when the new 2010 Spanish Postal Law entered into force, and hence the actual duration of the entrustment was 12 years.

(229) First, the Commission does not consider that this requirement of the 2012 SGEI Framework can lead to the incompatibility of aid that predates the entry into force of this Framework. Indeed, the objectives of the limited duration provision included in the 2012 SGEI Framework are to ensure that the State reviews the market situation regularly to verify that maintaining a public service is still justified and to allow competition for the granting of this public service through the application of public procurement rules. Such objectives cannot be pursued for a measure which is completed in the past and can therefore not lead to incompatibility of the USO compensations granted up to 2010 ([72]).

(230) In addition, the Commission notes that the 12 year duration of the entrustment does not appear excessive and is similar to the entrustment periods that apply to other USO providers in the EU ([73])

(231) It can therefore be accepted that the duration of 12 years would not exceed the depreciation period of the most significant assets used by Correos for the provision of the USO as required by the 2012 SGEI Framework.

([71]) See recital 28.
([72]) The provision could apply to a measure starting in the past and still ongoing. In such case, a modification or even termination of the entrustment could possibly be requested.
([73]) See for example *La Poste* (France), *Poste Italiane* (Italy) and *ELTA* (Greece): all 15 years.

D. **Compliance with Commission Directive 2006/111/EC** ([74]).

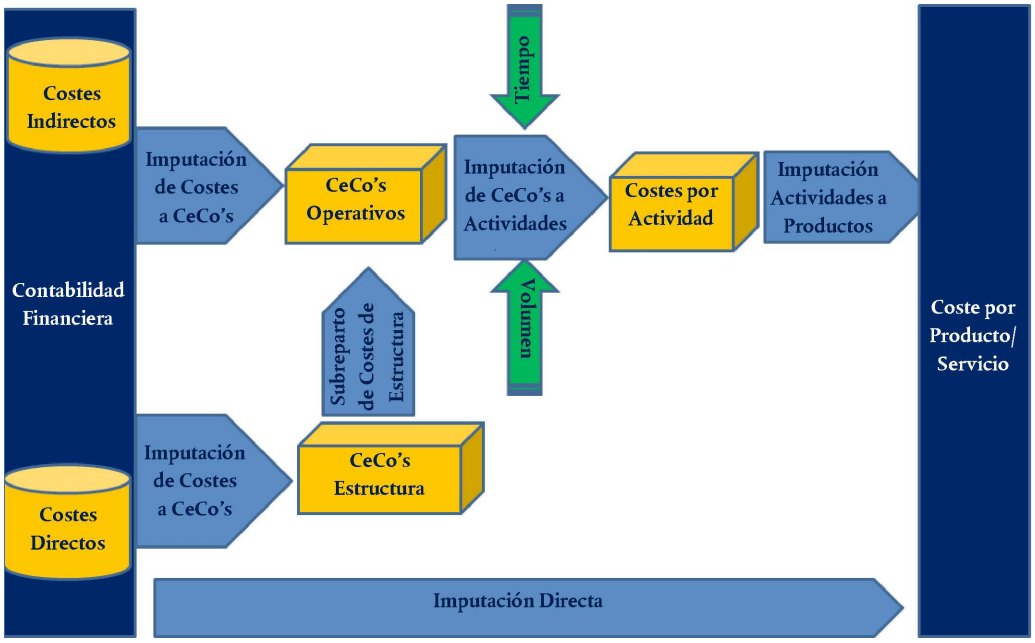
(232) According to paragraph 18 of the 2012 SGEI Framework, 'aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the undertaking complies, where applicable, with Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings'.

(233) Article 29 of the 1998 Spanish Postal Law imposes separate accounts within the internal accounting system of the universal service provider.

(234) This obligation is notably implemented through Order FOM/2447/2004 of 12 July on 'analytical accounting and separation of accounts'. The Commission has verified that the principles established in that regulation are in line, in terms of allocation of direct and incorrect costs, with the principles established in the 2012 SGEI Framework ([75]).

(235) Moreover, following the request of the Commission in the 2016 Opening Decision, the Spanish authorities have provided the Commission with a detailed description of the analytical accounting system of Correos which is summarised in the figure.

Cost allocation system of Correos



(236) As illustrated in recital 235, the Correos cost accounting system is based on the cost accounting methodology called activity-based costing. The activity-based costing system is a particular method of the fully distributed cost allocation method, which complies with the applicable provisions of the 2012 SGEI Framework ([76]) and is also in line with the sector specific requirements on separate accounting laid down in Article 14 of the Postal Services Directive.

(237) The analytical model of Correos contains essentially the following phases:

(1) Determination of the costs to be imputed from the Profit & Loss account: In 2005, the imputable costs amounted to approximately EUR […] billion.

([74]) 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 (OJ L 318, 17.11.2006, p.17).
([75]) See paragraph 31 of the 2012 SGEI Framework.
([76]) See paragraph 44 of the 2012 SGEI Framework.

(2) Imputation of costs to cost centers:

(a) A small percentage of the costs ([…] % — approx. EUR […] million in 2005) is imputed directly to final products.

(b) The bulk of the imputable costs ([…] %— EUR […] billion) is imputed to cost centers (CeCos).

The CeCos (there were […] CeCos in 2005) are the basic unit of the analytical accounting system. They are defined as unit of consumption of resources which are relevant from a cost accounting viewpoint.

The analytical accounting system of Correos distinguishes between:

— operational CeCos: which consume resources that are directly related to the final products and services (e.g. post office). There were […] operational CeCos in the analytical accounting system of Correos in 2005. An amount of EUR […] billion was imputed to operational CeCos in 2005.

— structural CeCos: which concentrate the structural costs which are not directly related to final products and services. These correspond notably to the support, administration, human resources management, IT functions. There were 180 structural CeCos in the analytical accounting system of Correos in 2005. An amount of EUR […] million was imputed to structural CeCos in 2005.

(c) The costs imputed to structural CeCos are then distributed to operational CeCos based on a causality relationship between operational CeCos and structural CeCos.

(3) Imputation to activities of the costs imputed to CeCos:

Activities are group of homogeneous tasks aiming at providing final services or at supporting their provision (e.g. manual sorting, automatic sorting, transport…). 16 activities are distinguished in the analytical accounting system of Correos in 2005.

The costs imputed to operational CeCos are distributed to activities based on the consumption by the activities of the resources of the CeCos.

(4) Imputation to each final products and services of the costs of activities:

Costs are imputed to final products and services based on their causal link with the activities.

(5) Determination of the revenues for each final products and services

To determine the revenue, the following steps are followed:

(a) First, the amount revenues to be distributed are determined from the Profit & Loss account: In 2005, the imputable revenues amounted to approximately EUR […] billion.

(b) Part of these revenues ([…] % — EUR […] billion in 2005) corresponds to direct sales registered in the billing system of Correos and can be imputed directly to final products and services.

(c) The rest of the revenues ([…] % — EUR […] million in 2005) which are not registered in the billing system but have different origins are allocated to final products and services on the basis of a table of percentages derived from studies made by Correos on the causality link between the registered revenues and the products and services that have generated these revenues.

(6) The margin per final product and services can therefore be calculated.

(238) The Commission concludes that the analytical accounting system put in place by Correos is appropriate to separate the USO activities from the non USO activities and also within the USO the reserved from non-reserved activities.

(239) The Commission concludes that Correos has complied with Directive 2006/111/EC.

A. **Amount of compensation**

Appropriate calculation method

(240) Paragraph 21 of the 2012 SGEI Framework states that '(…) the amount of the compensation must not exceed what is necessary to cover the cost of discharging the public service obligations, including a reasonable profit'. It also indicates that '(…) Where the undertaking also carries out activities falling outside the scope of the SGEI, the costs to be taken into consideration may cover all the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities. The costs linked to any activities outside the scope of the SGEI must include all the direct costs and an appropriate contribution to the common costs.'

(241) Paragraph 24 of the 2012 SGEI Framework states 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.'

(242) The Commission has estimated in the 2016 Opening decision that, since the USO compensations granted under the 1998 Postal law were granted as unlawful aid before the entry into force of the 2012 SGEI Framework on 31 January 2012, paragraph 69 of that framework specifically excluded the application of paragraph 24 of the framework and thus the application of the NAC methodology to unlawful aid.

(243) Indeed, footnote 2 of Recital 21 of the 2012 SGEI Framework clarifies that if the NAC methodology cannot be applied (or, as in this case, does not apply) the net cost must be determined as the costs minus the revenues of discharging the public service obligations. This 'cost allocation methodology' is described in paragraphs 28 *et seq*. of the 2012 SGEI Framework. It was considered the appropriate methodology to calculate SGEI compensation under the 2005 SGEI Framework, which applied from 29 November 2005 until 31 January 2012, and served as the basis for several Commission decisions on compensation for USOs in that period. ([77])

(244) The Spanish authorities and/or Correos specifically disputed that argument in their comments arguing that the 2012 SGEI Framework did not prevent the use of the NAC but simply allowed not to use it before its entry into force (see notably recital 98).

(245) The Commission considers that accepting the use of the NAC methodology for illegal aid granted before the entry into force of the 2012 SGEI Framework would allow the Member States to draw an advantage from the non-notification of such illegal aid measure as it could choose between the cost allocation and NAC methodology while Member States which have notified their SGEI compensations, as foreseen by the State aid rules, were obliged to use only one method i.e. the cost allocation method. Such an approach would therefore both allow Spain to draw an advantage from infringing notification obligations and entail a possible breach of the principle of equal treatment. The Commission therefore maintains that only the accounting method can be used in this case.

(246) In any case, even if it were accepted that the NAC methodology as prescribed by the 2012 SGEI Framework and Directive 2008/6/EC could be used in this case, as explained in recitals 176 to 183, the Commission considers that the Spanish methodology cannot be considered as a valid implementation of the NAC methodology contrary to what is argued by the Spanish authorities and/or Correos.

(247) The Spanish methodology is therefore, regardless of its potential intrinsic merits, not a method that the Commission has ever recognized, neither before the entry into force of the 2012 SGEI Framework nor after its entry into force.

(248) In such circumstances, the Commission considers that the only method that can be used is the accounting method which was the only reference method at the time when the USO compensations were granted and which was the basis for several Commission decisions on compensation for USOs in that period.

([77]) See in particular Decision 2012/321/EU and Decision 2012/636/EU.

Appropriate benchmarks for the reasonable profit

(249) As explained in recital 167, the Commission, in its bpost decision of 25 January 2012, the Commission determined a reasonable profit range benchmark applicable to all postal operators in the Union.

(250) The Spanish authorities have disputed the applicability of these benchmarks to Correos, arguing that each case should be assessed on its own merits. The Commission has invited the Spanish authorities to provide detailed information on the Spanish postal market that would allow an assessment of the opportunity to have different benchmarks for Correos. However such information has not been provided. As a consequence, the Commission will apply the reasonable profit range benchmark established in the bpost case to the case at hand.

Assessment of the alternative approach suggested by the Spanish authorities

(251) In the event, that the Commission would apply the accounting method to the USO compensations granted to Correos under the 1998 Postal Law, the Spanish authorities have argued that the following elements should be considered (see section 5.3.1):

— A separated assessment of the compensations granted to the USO reserved area and the USO non reserved area

— A reduction by the overcompensation by dividends paid by Correos.

(252) These suggestions are analysed in recitals 253 to 263.

— A separated assessment of the compensations granted to the USO reserved area and the USO non reserved area

(253) The Spanish authorities have argued that the USO compensations received by Correos for the delivery of reserved and non-reserved services should be assessed separately.

(254) After analysing the arguments provided by the Spanish authorities in the course of the formal investigation procedure, the Commission considers that the split between the Reserved/Non-Reserved area can be accepted since:

— The arguments supporting the differentiation of the two different SGEIs seem reasonable (in particular the context of the delivery of the obligations is different between the USO reserved area and the USO non-reserved area);

— The split is fully coherent with the way the USO compensation was calculated which distinguishes clearly the reserved and non-reserved services and which are significantly different between the two areas. As explained by the Spanish authorities, while the cost allocation methodology was applied to the USO reserved services, another approach was applied to the USO non-reserved services that the Spanish authorities identify to the NAC methodology. While the Commission disagrees with such qualification, it agrees that the calculation methodology is fundamentally different between the USO reserved area and the USO non-reserved area.

(255) The Commission wishes to stress that accepting this split entails that the USO compensations to the reserved area and the USO compensations for the non-reserved area have to be assessed separately without any ulterior reconciliation of the two assessments.

With the split, the Commission confirms that the results presented in section 5.3.1 are correct:

— no overcompensation of Correos for the delivery of the USO reserved services as the compensation for the USO reserved services is exactly equal to the net accounting cost of Correos

— an overcompensation of Correos for the delivery of the USO non reserved services equal to the amount of USO compensations allocated to the USO non reserved area as the profit level of the USO non reserved services was always above the maximum profit benchmark level considered in the bpost case.

(256) The overcompensation of Correos for the delivery of the non-reserved services is therefore equal to EUR 317,387 million (in nominal terms).

— A reduction by the overcompensation by dividends paid by Correos.

(257) The Spanish authorities have argued that the overcompensation of Correos should be reduced by the dividends paid by Correos over 2004-2010 (approximately EUR 151 million).

(258) As a matter of principle, the Commission does not consider that dividends are an appropriate mean to reduce overcompensation as mentioned in the Dansk Statsbaner case ([78]). However, in the case at hand, the Commission understands that the specific circumstances of the case had made the payment of dividends probably the only practical way to limit the impact of an overcompensation of Correos deriving from the high profits of Correos in the non-reserved area.

(259) First, the Commission agrees that Spain has provided sufficient evidence proving that the decision to pay dividends originated rather from the Spanish State (using its position as sole shareholder of Correos) than from the management of Correos itself.

(260) Besides the inclusion of these dividends by the State in its budget well before their actual payment which tend to show that the State was in control of the decision, it is also difficult to identify the economic interest for Correos, as a company, to pay dividends to the State in that period. The typical incentives for a company to remunerate its shareholder (attract investors, secure future funding, demonstrate the good financial health of the company) do not seem relevant in the situation at hand where the State is the sole shareholder and where the company was ensured to receive continuous funding until 2010 from the State. For these reasons, considering the specific legal framework which was in place, it can be accepted that the decision to pay dividends originates essentially from the State which has used this tool to extract funds from the company.

(261) As regards the Spanish State, paying significant USO compensations and at the same time collecting dividends could seem inconsistent but can be understood in the context where the dividends were in fact a way to reduce potential over-funding that had to be paid anyway to Correos according to the 2000 Plan de Prestación. Indeed, since Spain had signed a public service contract defining automatically the amount of compensation to be paid to Correos irrespective of the actual profit level of the company, it can be understood that the dividends could play in such circumstances de facto the role of a claw-back mechanism.

(262) The Commission also takes into account that these dividends essentially originated from the overcompensated USO non reserved services which were the source of profit of Correos. Moreover, Correos which was very profitable in the corresponding years does not seem to have drawn any particular benefit from the funds temporarily held: in particular it did not get bank loans which could have benefited from a better credit-worthiness and it did not make particular acquisitions.

(263) In such circumstances, the Commission accept to reduce the overcompensation paid by Correos with the dividends paid by Correos over 2004-2010.

(264) Table 12 summarizes the calculation of the nominal recovery amount:

Table 12

Calculation of the overcompensation

(in EUR million)

USO non-reserved area	2004	2005	2006	2007	2008	2009	2010	Total
Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Costs	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

([78]) See footnote 31. Even if dividends were taken into account in that case, the Commission also indicated in paragraph 345 of the decision, the Commission notably indicated that '*dividend policy cannot be equated with a refund clause which makes it possible to adjust compensation for the fulfilment of a public service obligation and to prevent overcompensation.*'

(in EUR million)

USO non-reserved area	2004	2005	2006	2007	2008	2009	2010	Total
Net cost = Costs-Revenues	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Reasonable profit (based on 7,4 % ROS)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net cost + reasonable profit	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Compensation allowed to Correos	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
Compensation granted to Correos	44,859	47,294	55,199	39,441	40,863	45,919	43,812	317,387
Overcompensation = compensation granted – compensation allowed	44,859	47,294	55,199	39,441	40,863	45,919	43,812	317,387
Imputed dividend	29,775	30,576	51,958	38,966	0,000	0,000	0,000	151,275
Adjusted overcompensation = overcompensation — dividends	**15,084**	**16,718**	**3,241**	**0,475**	**40,863**	**45,919**	**43,812**	**166,112**

7.1.5. CONCLUSION

(265) The Commission concludes first that the USO compensations granted to Correos under the 1998 Postal Law constitutes unlawful State aid.

(266) Moreover these USO compensations constitute incompatible aid pursuant to Article 106(2) of the Treaty to the extent that they overcompensated Correos.

(267) After deduction of the dividend, the overcompensation is equal to EUR 166,112 million.

(268) The actual amount to be recovered may take into account a tax adjustment ([79]) as provided for by the Recovery Notice ([80]) which states in its paragraph 50 that 'National authorities are allowed to take into account the incidence of the tax system in order to determine the amount to be reimbursed. Where a beneficiary of unlawful and incompatible aid has paid tax on the aid received, the national authorities may, in accordance with their national tax rules, take account of the earlier payment of tax by recovering only the net amount received by the beneficiary. The Commission considers that in such cases, the national authorities will need to ensure that the beneficiary will not be able to enjoy a further tax deduction by claiming that the reimbursement has reduced his taxable income, since this would mean that the net amount of the recovery was lower than the net amount initially received.'

(269) The actual amount to be recovered may therefore take into account a tax adjustment under the assumption that Spain will respect the conditions established in paragraph 50 of the recovery notice. It will also include interests from the date on which each USO compensation was put at the disposal of Correos until recovery.

([79]) The Spanish authorities have indicated their intention to request a fiscal adjustment for the calculation of the recovery amount.
([80]) Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4–17

7.2. *THE TAX EXEMPTIONS OBTAINED BY CORREOS: REAL ESTATE TAX (IBI) AND TAX ON ECONOMIC ACTIVITIES (IAE)*

7.2.1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

7.2.1.1. ***Measure imputable to the State and granted through State resources***

(270) Article 107(1) of the Treaty requires that the measure be granted by a Member State or through State resources in any form whatsoever. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.

(271) As the Court of Justice held in case *Banco Exterior de España,* a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a cash transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, fulfils the notion of 'state resources' within the meaning of Article 107(1) of the Treaty. ([81])

(272) By exempting Correos from the Real Estate Tax and the Tax on Economic Activities, the Spanish authorities forego revenues which constitute State resources.

(273) Therefore, the Commission takes the view that these tax exemptions involve a loss of State resources and are consequently granted by the State through State resources.

(274) The Spanish authorities and/or Correos have argued in their comments that the IBI tax exemption is not imputable to the State because it results from the decisions of national Court and not of the State itself (see recitals 67 and 102).

(275) The Commission disagrees with that argument, indeed in cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities ([82]). Therefore, aid granted through judgements stemming from national courts is imputable to the State and can, thus, qualify as State aid.

7.2.1.2. ***Selective economic advantage to an undertaking***

A. **The notion of undertaking**

(276) As indicated in recital 162, Correos must be qualified as an undertaking for the provision of the USO services which are the object of the tax exemption.

B. **Economic advantage**

(277) The precise form of a measure is irrelevant in establishing whether it confers an economic advantage on the undertaking ([83]). The notion of advantage covers not only positive benefits but also interventions which, in various forms, mitigate the charges normally borne by an undertaking's budget. ([84]) Therefore, a relief from economic burdens (such as tax obligations) can also constitute an advantage.

(278) Correos has been fully or partly exempted from certain taxes, such as the IBI and IAE, whereas other undertakings, also engaged in economic activities including the provision of postal services, are in principle fully subject to those taxes. Therefore, Correos benefits from an economic advantage for the purposes of Article 107(1) of the Treaty.

(279) The tax exemptions granted to Correos reduces the charges that are normally included in its operating costs. Consequently, it benefits Correos in comparison to other undertakings subject to the IBI or the IAE, which cannot benefit of these tax exemptions.

([81]) Case C-387/92, *Banco Exterior de España*, EU:C:1994:100, paragraph 14.
([82]) Judgment of the General Court of 12 December 1996, Air France v Commission, T-358/94, ECLI:EU:T:1996:194, paragraph 62.
([83]) Case C-280/00 *Altmark Trans* EU:C:2003:415, paragraph 84.
([84]) Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* EU:C:1961:2, p. 19; and Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598, paragraph 38.

C. **Selectivity**

(280) A measure is selective inasmuch as it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) of the Treaty.

(281) Differential taxation has to be examined in light of the case-law on the notion of selectivity ([85]). A tax measure is *prima facie* selective if it constitutes a departure from the general (or reference) tax framework. In this regard, it is necessary to assess whether the measure favours certain undertakings in comparison with other undertakings, which are in a comparable legal and factual situation in light of the objective pursued by the reference tax system. According to the Court's case-law, a prima facie selective measure can be justified by the logic of the tax system. However, in this regard, only intrinsic reasons inherent to the tax system and no external policy reasons can be taken into account. If the *prima facie* selective measure cannot be justified by the logic of the tax system, it would amount to a selective advantage and, if all other conditions laid down by Article 107(1) of the Treaty are fulfilled, that measure constitutes State aid within the meaning of that provision ([86]).

Real Estate Tax (IBI)

Reference framework

(282) The determination of the reference taxation system (or reference framework) has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with the 'normal taxation system' ([87]).

(283) In the present case, the reference framework should be defined as the IBI, as laid down in the Royal Legislative Decree 2/2004, of 5 March 2004. It follows from this law that, according to the normal rules, undertakings -among other legal and natural persons- are subject to IBI for the property rights laid down in Article 61 the Royal Legislative Decree 2/2004 over rural and urban properties and over property with special characteristics.

Derogation from the reference framework

(284) According to Article 60 of the Royal Legislative Decree, IBI 'is an objective direct tax imposed on the value of property under the terms laid down in this Royal Legislative Decree'. The taxable event of the IBI is the entitlement to any of the rights laid down in Article 61 the Royal Legislative Decree 2/2004 ([88]) over rural and urban properties and over property with special characteristics. The IBI is not imposed on any activity, but on the value of property.

(285) Under Article 19(1)(b) of the 1998 Postal Law and Article 22(2) of the 2010 Postal Law, Correos is in principle entitled to an exemption from taxes on the economic activities related to its services in the reserved area (under the 1998 Postal Law) or USO (under the 2010 Postal Law). Although the Spanish authorities argue that the IBI is not directly linked to a particular economic activity and therefore Correos could not benefit from the exemption, in practice Correos lodged complaints before local Courts because it believed it was entitled to the IBI exemption for postal offices in certain municipalities.

(286) The tax exemption from IBI applicable to Correos constitutes a derogation from the general IBI tax system applicable in Spain and grants a selective advantage to Correos. Indeed, by applying the tax exemption, Correos, which is involved in real estate transactions just like other undertakings, enjoys a tax benefit to which other companies are not entitled. Hence, the measure derogates from the common IBI tax regime inasmuch as it differentiates between economic operators who, in the light of the objective of the IBI tax system (which is to tax real estate property rights laid down in Article 61 the Royal Legislative Decree 2/2004 over rural and urban), are in a comparable factual and legal situation ([89]).

([85]) Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* EU:C:2011:550, paras 49 *et seq*.
([86]) See Case C-143/99 *Adria-Wien Pipeline* EU:C:2001:598.
([87]) Cases T-211/04 and T-215/04, *Commission and Spain v Government of Gibraltar and United Kingdom* EU:T:2008:595, para 80.
([88]) Administrative concession over the property itself or over the public services for which the property is used, right in rem to a tenancy, right in rem to usufruct and right of ownership.
([89]) See, inter alia, case C-88/03 *Portugal v. Commission* EU:C:2006:511, paragraph 56; Joined cases C-78/08 to C-80/08 *Paint Graphos* EU:C:2011:550, paragraph 49.

Intrinsic logic of the tax system

(287) The Commission preliminarily concludes that the IBI tax exemption applicable to Correos is *prima facie* selective. However, it is still necessary to determine (as mentioned in recital 281), whether the tax exemption from IBI can be justified by the nature or general scheme of the IBI tax system by demonstrating that the measure directly results from the basic or guiding principles of its tax system.

(288) The Spanish authorities and/or Correos have not provided before the adoption of the 2016 Opening Decision or in the course of the formal investigation procedure any argument that would demonstrate that the tax exemption from IBI would result from the application of a guiding principle of the IBI tax system. The Commission has also not been able to identify such a justification. The inherent logic of the IBI tax system is to tax the property rights laid down in Article 61 the Royal Legislative Decree 2/2004 over rural and urban properties and over property with special characteristics. Applying a total exemption from IBI exclusively to Correos does not fit within the logic of the IBI tax system.

Conclusion

(289) Since the Spanish authorities have not provided in the course of the formal investigation procedure any argument that contradicts the assessment of the Commission, the Commission confirms the preliminary conclusion reached in the 2016 Opening Decision that the tax exemption from IBI granted to Correos constitutes a selective advantage that cannot be justified by the nature and logic of the IBI tax system.

Tax on Economic Activities (IAE)

Reference framework

(290) It follows from Article 78 of the Royal Legislative Decree 2/2004 that undertakings that carry out economic, business, professional or artistic activities are subject to IAE. The IAE tax on postal services and telecommunications is laid down in the Tariff Group 847 'Postal services and telecommunications' of Royal Legislative Decree 1175/1990 of 28 of September. Accordingly, the reference framework is the IAE, as laid down in the Royal Legislative Decree 2/2004, of 5 March 2004.

Derogation from the reference framework

(291) Note 3 to Tariff Group 847 of Royal Legislative Decree 1175/1990 provides that the Public Business Entity of Correos is entitled to pay only 50 % of the tax amount laid down for the undertakings subject to the Tariff Group 847 'Postal services and telecommunications'.

(292) The partial tax exemption from IAE applicable to Correos constitutes a derogation from the IAE tax system applicable to economic, business, professional and artistic activities generally and postal services and telecommunications in particular. That exemption can therefore be considered to grant a selective advantage to Correos. Indeed, by applying the 50 % tax exemption, Correos, which is involved in economic activities generally and postal services in particular, enjoys a tax benefit to which other undertakings in general and other postal operators in particular are not entitled. Hence, the measure derogates from the common IAE regime applicable to all undertakings in general and postal services and telecommunications operators in particular, inasmuch as it differentiates between economic operators who, in the light of the objective of the IAE (which is to tax the performance of an economic activity), are in a comparable factual and legal situation ([90]). The Commission therefore concludes that the partial exemption from the IAE applicable to Correos is *prima facie* selective.

Intrinsic logic of the tax system

(293) It is therefore necessary to determine, in accordance with the Court's case law, whether the tax exemption from IAE granted to Correos can be justified by the nature or general scheme of the IAE tax system by demonstrating that the measure directly results from the basic or guiding principles of its tax system.

([90]) See, inter alia, case C-88/03 *Portugal v. Commission* EU:C:2006:511, paragraph 56; joined cases C-78/08 to C-80/08 *Paint Graphos*, EU:C:2011:550, paragraph 49.

(294) Correos argues that the exemption from the IAE would be justified by the logic of the IAE tax system because the intrinsic logic of the IAE would be to tax economic activities with the aim to intervene in the production or distribution of goods and services and Correos is engaged not only in economic activities that consist in the production of goods and services, but also in providing public services like the USO, which do not follow an economic purpose(see recital 70).

(295) The Commission cannot agree with that argument. Delivering the USO is an economic activity and a tax exemption that would target the USO should be considered State aid which could possibly be compatible if it complied with the SGEI rules on compatibility. This argument seems to contradict the request of Correos that the IAE and IBI tax exemptions are not assessed in light of the 1998 or 2010 Postal law which entrust Correos with the USO but with direct reference to the legislation governing each tax (see recital 66). The Commission notes in this respect that Correos has not argued that the IAE tax exemptions could constitute USO compensations.

(296) As a consequence, the Commission considers that it is not demonstrated that the exemption from the IAE could be justified by the logic of the IAE tax system.

Conclusion

(297) The Commission confirms the preliminary conclusion reached in the 2016 Opening Decision that the partial tax exemption from IAE granted to Correos constitutes a selective advantage that cannot be justified by the nature and logic of the IAE tax system.

7.2.1.3. ***Distortion of competition and effect on trade***

(298) As explained in Recital (204), any measure benefiting Correos is liable to affect competition and trade between Member States.

7.2.1.4. ***Conclusion***

(299) On the basis of the foregoing considerations, the Commission confirms its preliminary assessment that the exemptions from IBI and IAE granted to Correos fulfil the cumulative State aid criteria and hence constitute State aid within the meaning of Article 107(1) of the Treaty.

7.2.2. EXISTING OR NEW AID

(300) As regards the tax exemption to IBI, the tax exemptions were obtained by Correos between 2008 and 2013, hence after the accession of Spain to the Union in 1986. Therefore, the Real Estate Tax exemption cannot be regarded as existing aid.

(301) As regards the IAE tax exemption, the tax was introduced by Articles 79 to 92 of Law 39/1988, regulating the Local Finance, of 28 December 1988. The tax was introduced after the accession of Spain to the Union. Therefore, the IAE tax exemption cannot normally be qualified as existing aid.

(302) It can be noted that the Spanish authorities and/or Correos argue that the IAE tax exemption are existing aid because the exemption would derive from the so-called Licence Quota, which was a modality of the Tax on Activities and Commercial and Industrial Benefits, adopted by Decree 3313/1966 of 29 December 1966 (see recitals 71 and 103).

(303) The Spanish authorities have not provided information to the Commission that would demonstrate continuity between the 1966 Tax on Activities and Commercial and Industrial Benefits and the 1988 IAE Tax which introduced a very specific system (see recitals 42 to 44). Moreover, even assuming that the IAE tax introduced in 1988 could derive from the 1966 Tax on Activities and Commercial and Industrial Benefits, the Commission

notes that the Spanish authorities also recognize that Correos enjoyed full exemption from the 1966 Tax on Activities and Commercial and Industrial Benefits when it was an administrative body due to its nature (see recital 103). Correos has been an administrative body until 1990 (see recital 22) so it has a priori never been subject to the 1966 Tax on Activities and Commercial and Industrial Benefits while the IAE Tax system has clearly classified Correos in a specific taxable category and Correos has benefited from a 50 % reduction of the payable amount under that category.

(304) The Commission therefore maintains its views that the IAE tax exemption does not constitute existing aid.

7.2.3. LAWFULNESS OF THE AID MEASURE

(305) The Commission notes that the IBI and IAE tax exemptions have not been subject to notification under Article 108(3) of the Treaty.

(306) Therefore, the tax exemptions granted to Correos constitute unlawful aid within the meaning of Article 1(f) of Regulation (EU) 2015/1589.

7.2.4. COMPATIBILITY WITH THE INTERNAL MARKET

(307) State aid shall be deemed compatible with the internal market if it falls within any of the categories listed in Article 107(2) of the Treaty ([91]) and it may be deemed compatible with the internal market if it is found by the Commission to fall within any of the categories listed in Article 107(3) of the Treaty ([92]). However, it is the Member State granting the aid which bears the burden of proving that State aid granted by it is compatible with the internal market pursuant to paragraphs (2) or (3) of Articles 107 of the Treaty.

(308) The Commission observes that the IBI and IAE tax exemptions relieve Correos from costs which it would normally have had to bear in its day-to-day management or normal activities. In other words, those exemptions constitute operating aid, without any limitation in time. As a general rule, operating aid cannot be deemed compatible with the internal market under paragraphs (2) or (3) of Article 107 of the Treaty.

(309) Moreover, the Spanish authorities have not advanced any arguments, before the adoption of the 2016 Opening Decision or in the course of the formal investigation procedure, showing that the IBI and IAE tax exemptions granted to Correos could fall under any of the exemptions listed in paragraphs (2) or (3) of Article 107of the Treaty.

(310) The Spanish authorities have also provided no justification, before the adoption of the 2016 Opening Decision or in the course of the formal investigation procedure, according to which the IBI and IAE exemptions (which apply in any case not only to SGEI but also purely commercial activities) could be compatible under Article 106(2).

7.2.5. CONCLUSION

(311) Considering the above, the Commission considers that the IBI and IAE tax exemptions constitute incompatible State aid and the corresponding amounts should be recovered.

(312) Correos argues in this respect that even if the Commission were to find the IBI tax exemptions incompatible, these could not be recovered because of the res judicata principle which would entail, according to Correos that the judgment of the Spanish Supreme Court could no longer be put in question (see recital 69).

(313) The Commission does not share the views of Correos on this point.

([91]) The exceptions provided for in Article 107(2) of the Treaty concern: (a) aid of a social character granted to individual consumers; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to certain areas of the Federal Republic of Germany.

([92]) The exceptions provided for in Article 107(3) of the Treaty concern: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest or to remedy a serious disturbance in the economy of the Member State; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision

(314) First the Spanish Supreme Court has not ruled on the existence or non-existence of aid in the IBI exemptions granted by the local Courts (see recitals 40 and 41). The only conclusion of the Supreme Court was that the IBI exemptions were not justified. As explained by the Spanish authorities, the Court also did not have the powers to order recovery. The res judicata can therefore not be evoked in this context given that there is actually no judgment concluding that Correos should not repay the corresponding amounts.

(315) Second, the assessment of the compatibility of aid is an exclusive competence of the Commission and to the extent that there is State aid, the national Courts could not pronounce themselves on compatibility and recovery.

(316) The recovery amount for the IBI exemption in nominal terms corresponds to the sum of the exemptions granted to Correos by local Courts between 2008 and 2013 and is equal to EUR 752 840,50. The actual amount to be recovered will include interests from the date on which each tax refund was paid to Correos until their actual recovery.

(317) The recovery amount for the IAE partial exemption in nominal terms corresponds to the total amount of IAE reduction granted to Correos from 2004 to 2017: EUR 113 591,24. The actual amount to be recovered will include interests from the date on which the reduced IAE taxes were paid by Correos until their actual recovery.

7.3. *THE THREE CAPITAL INCREASES GRANTED RESPECTIVELY IN 2004, 2005 AND 2006*

7.3.1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

(318) The Spanish authorities have argued that the three capital increases granted to Correos in 2004 (EUR 16 million), 2005 (EUR 16 million) and 2006 (EUR 16 million) complied with the MEIP and therefore did not constitute State aid.

(319) According to the Spanish authorities, those capital increases were part of Correos' strategic business plan for the period 2001-2006 in order to compensate for the slowing down of the postal market. This included investments in Correos' infrastructure, organization structure and automation process.

(320) Following the doubts expressed by the Commission in the 2016 Opening Decision, the Spanish authorities have provided the Commission with additional arguments in favour of MEIP compliance (see section 4.1.3), namely:

— the prospects of Correos were good at the moment of the investment based on *ex-ante* multiannual plans. In particular, the 2004-2006 multiannual plans foresaw an improvement in the profitability of Correos against profit stability in the event of no investment activity. In that sense the capital increases were a key element in achieving the *ex-ante* forecasted profitability of the company.

— the modernisation of the company was a coherent business decision that any shareholder would have upheld, specifically for 2004-2006 the investment activity was higher than the average of 1994-2004, therefore the capital increases were part of the response to the need for additional funding.

— the company made profits following the investments (even excluding the USO compensation received by Correos),

— an *ex-post* independent study (from Ernst-Young) based on *ex-ante* data concluded that the expected return of the Spanish State's investment in Correos was greater than its cost of capital at the time of the investment.

(321) The Commission agrees that the investments financed partially by the Spanish State into Correos are typical of modernisation measures taken in the postal sector in response to the slowing down of the postal letter market. The decisions of the State were based on multi-annual plans which clearly foresaw an improvement of profitability of Correos and that this was further confirmed by the facts. The Ernst-Young study also confirms that the investment was a rational economic decision at the time.

7.3.2. CONCLUSION

(322) The Commission takes the view that the 2004-2006 capital injections can be regarded as complying with the MEIP and therefore does not constitute State aid within the meaning of Article 107(1) of the Treaty.

7.4. *THE COMPENSATIONS GRANTED TO CORREOS FOR THE ORGANISATION OF ELECTIONS*

7.4.1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TREATY

7.4.1.1. ***Measure imputable to the State and granted through State resources***

(323) The compensation is paid directly from the State General Budget and is imputable to the State and granted through State resources.

7.4.1.2. ***Selective economic advantage to an undertaking***

A. **The notion of undertaking**

(324) It follows from the case-law that Article 107 of the Treaty does not apply where the State acts 'by exercising public power' ([93]) or where public entities act 'in their capacity as public authorities' ([94]). An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject ([95]). Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities.

(325) In the case at hand, the services provided by Correos are part of the State's obligation of regulating and organizing the election procedure, which recognizes the right to vote either in person or via postal ballot. The Spanish authorities and/or Correos argue that all the activities performed by Correos in the context of the organization of elections should be considered to be part of the prerogatives of the State and that therefore Correos should not be considered as an undertaking when performing these activities (see recitals 79-81, 118 and 119).

(326) The Commission considers the activities that are directly related to the voting procedure such as the handling of postal ballots, the sending of materials by the Electoral Roll Office (e.g. voter registration cards) and the collection of electoral documentation once the counting is complete to be part of the essential functions of the State. As a result, the Commission agrees with the Spanish authorities that those activities cannot be considered as economic activities and that their financing does not amount to State aid, since for those activities Correos cannot be considered to constitute an undertaking.

(327) However, with respect to the postal handling of electoral material sent out by political candidates, the situation is different. In its decision on Poste Italiane ([96]) the Commission considered that the distribution of electoral material by Poste Italiane at a reduced subsidized tariff constituted an economic activity and hence that the compensation for this service amounted to State aid. This measure is very similar to the Italian system (i.e. electoral candidates can send pamphlets to voters at reduced tariffs subject to certain conditions and the State compensates the postal operator for the residual cost) and is clearly separable from the non-economic activities directly related to the voting procedure carried out by Correos. Accordingly, in relation to the postal handling of electoral material sent out by political candidates, Correos should be considered to constitute an undertaking for the purposes of Article 107(1) of the Treaty.

([93]) Case 118/85 *Commission v Italy* EU:C:1987:283, paragraphs 7 and 8.
([94]) Case C-30/87 *Bodson* EU:C:1988:225, paragraph 18.
([95]) See, in particular, Case C-364/92 *SAT* EU:C:1994:7, paragraph 30 and Case C-343/95 *Calì & Figli* EU:C:1997:160, paragraphs 22 to 23.
([96]) See Commission Decision in Case SA.33989 (2012/NN) implemented by Italy in favour of Poste Italiane.

(328) Given the content of the service, other postal operators could also be able to perform this service in exchange for public compensation ([97]). This is evidenced by the fact that electoral candidates currently use the system set up by the State (and hence choose Correos) to send their pamphlets as they only have to pay a low price per item. However, if they wish to send more than one item per citizen, they have to pay the full price and in such case freely choose to use Correos or other postal operators (especially in urban areas) to do so.

B. **Economic advantage**

(329) The compensation granted to Correos for the postal handling of electoral material sent out by political candidates is designed to cover all or part of the net cost incurred by Correos in performing the service in question. Without that compensation, Correos would have to bear those costs itself. The compensation therefore constitutes an advantage to Correos since it relieves the latter of a burden it would otherwise need to bear absent that compensation.

C. **Selectivity**

(330) The measure is clearly selective as it benefits only one undertaking: Correos.

7.4.1.3. ***Distortion of competition and effect on trade***

(331) As explained in recital 204, any measure benefiting Correos is liable to affect competition and trade between Member States.

7.4.1.4. ***Conclusion***

(332) The Commission considers the financing of the distribution of electoral material for electoral candidates to constitute State aid within the meaning of Article 107(1) of the Treaty.

7.4.2. EXISTING OR NEW AID

(333) According to the Spanish authorities and Correos (see recitals 83-85 and 121), should financing of the distribution of electoral material for electoral candidates constitute aid, it would be existing aid since it predates the accession of Spain to the European Economic Community in 1986.

(334) The Spanish authorities explain in particular that the compensation granted to electoral candidates for the distribution of electoral material has been in place since 1977 without undergoing any substantial modifications.

(335) Based on the information submitted by the Spanish authorities, the Commission notes that the scheme which dates back to 1977, provided for fixed low tariffs that were applicable to all elections (local, regional, national and Union). Correos also received for each election partial funding of the full delivery cost over the whole period.

(336) The Commission concludes that the financing of the distribution of electoral material for electoral candidate qualifies as existing aid within the meaning of Article 1(b) of Regulation (EU) 2015/1589.

7.4.3. CONCLUSION

(337) The compensation granted to Correos for the distribution of electoral material sent out by political candidates constitutes existing aid and will be dealt with separately in accordance with Articles 17, 18 and 19 of Council Regulation (EC) No 659/1999 ([98]).

([97]) Indeed, according to paragraph 13 of the Commission's SGEI Communication: '*[t]he decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity*'.

([98]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

8. **SUMMARY CONCLUSIONS**

(338) The USO compensations granted to Correos under the 1998 Postal Law, the tax exemptions from the real estate tax (IBI) and the tax on economic activities (IAE), and the compensation granted to Correos for the distribution of electoral material constitute aid measures within the meaning of Article 107(1) of the Treaty because they relieved Correos of costs that are normally borne by private undertakings.

(339) The three capital increases granted in 2004, 2005 and 2006, do not constitute aid within the meaning of Article 107(1) of the Treaty because the State acted in conformity with the MEIP.

(340) The Commission finds that Spain unlawfully implemented the aid measures referred to in Recital (338) in breach of Article 108(3) of the Treaty, with the exception of the compensation granted to Correos for the distribution of electoral material sent out by political candidates which constitutes existing aid.

(341) The USO compensations granted to Correos under the 1998 Postal Law constitutes incompatible aid pursuant to Article 106(2) of the Treaty to the extent that they overcompensated Correos.

(342) The tax exemptions from the real estate tax (IBI) and the tax on economic activities (IAE) constitute incompatible aid.

(343) The compensation granted to Correos for the distribution of electoral material sent out by political candidates constitutes existing aid and will be dealt with separately in accordance with Articles 17, 18 and 19 of Regulation (EC) No 659/1999.

9. **RECOVERY**

(344) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ([99]). The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ([100]).

(345) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([101]).

(346) In line with the case-law, Article 16(1) of Regulation (EU) 2015/1589 stated that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]'.

(347) Thus, given that the USO compensations granted to Correos under the 1998 Postal Law (to the extent that they overcompensated Correos) and the tax exemptions from the real estate tax (IBI) and the tax on economic activities (IAE) were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting.

(348) The nominal recovery amounts corresponding to the different incompatible aid measures are EUR 166,112 million for the USO compensations granted to Correos under the 1998 Postal Law (see recital 267), EUR 752 840,50 for the IBI exemptions (see recital 316) and EUR 113 591,24 for the IAE partial exemptions (see recital 317).

([99]) See Case C-70/72 *Commission v Germany* [1973] ECR 813, paragraph 13.
([100]) See Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75.
([101]) See Case C-75/97 *Belgium v Commission* [1999] ECR I-030671 paragraphs 64 and 65.

(349) Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery. It may also take into account a tax adjustment as mentioned in recitals 268-269.

HAS ADOPTED THIS DECISION:

Article 1

The amount corresponding to EUR 317,387 million, granted to Correos in the form of universal service obligation compensations under the 1998 Postal law, implemented by Spain in breach of Article 108(3) of the Treaty, constitute State aid within the meaning of Article 107(1) of the Treaty.

Out of the amount referred to in the previous paragraph, the amount corresponding to EUR 166,112 million is incompatible with the internal market, since it constitutes overcompensation to Correos.

Article 2

The State aid, amounting to EUR 752 840,50, granted to Correos in the form of a real estate tax (*Impuesto sobre Bienes Inmuebles*) exemption, unlawfully implemented by Spain in breach of Article 108(3) of the Treaty is incompatible with the internal market.

Article 3

The State aid, amounting to EUR 113 591,24, granted to Correos in the form of a tax on economic activities (*Impuesto de Actividades Económicas*) partial exemption, unlawfully implemented by Spain in breach of Article 108(3) of the Treaty is incompatible with the internal market.

Article 4

The capital contributions into Correos made by Spain in 2004, 2005 and 2006 do not constitute aid within the meaning of Article 107(1) of the Treaty.

Article 5

The State aid in the form of compensation granted to Correos for the distribution of electoral material constitutes existing aid within the meaning of Article 1(b) of Regulation (EU) 2015/1589.

Article 6

1. Spain shall recover the incompatible aid granted under the measures referred to in Articles 1, 2 and 3.

2. The amount of State aid referred in Article 1, second subparagraph, can be further reduced by deducting the tax that has been paid on the aid received on condition that the beneficiary will not be able to enjoy a further tax deduction as referred to in paragraph 50 of the Recovery Notice.

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

5. Spain shall cancel all outstanding payments of the aid referred to in Articles 1, 2 and 3 with effect from the date of adoption of this decision.

Article 7

1. Recovery of the aid referred to in Articles 1, 2 and 3 shall be immediate and effective.

2. Spain shall ensure that this Decision is implemented within four months following the date of its notification.

Article 8

1. Within two months following notification of this Decision, Spain shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Articles 1, 2 and 3 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 9

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 10 July 2018.

For the Commission
Margrethe VESTAGER
Member of the Commission