The notion of economic advantage in the context of reforms to pension regimes

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In recent years, in the face of an ageing population, some Member States have carried out in-depth reforms of their social security regimes. These reforms have raised the question of their compatibility with the Community rules on state aid.

This article looks at two decisions adopted by the Commission on 10 October 2007. These decisions relate to the reform of the pension regime in the banking sector in Greece (2) and the reform of the pension scheme for La Poste’s public servants in France (3).

The object of this article is to examine how the key notion of economic advantage in the sense of Article 87(1) EC Treaty has been interpreted by the Commission.

The key issue raised by the reforms

The ultimate objective of the above-mentioned reforms is to put certain undertakings on an equal footing with their competitors in terms of pension costs. A legacy of the past, these special pension regimes used to impose higher pension costs on these companies, often to fund, as in the Greek case, more generous pension systems for their employees.

The pension reform in the Greek banking sector

First-pillar pension insurance in Greece is a public law system, enshrined in the constitution. It is universal, compulsory, endowed with statutory force and redistributive (i.e. financed on a pay-as-you-go basis). The first-pillar system provides two levels of insurance: main insurance (about 80% of total pension benefits) and supplementary insurance.

Whereas all bank employees are insured with the main pension scheme, IKA-ETAM, for their main pension, supplementary pension insurance in the banking sector is organised on a fragmented basis. Bank personnel recruited before 1 January 2005 are affiliated either to ETEAM, the general social security scheme providing basic supplementary insurance for employees, or to separate insurance bodies, depending on the banks they work for.

The banks affiliated to separate insurance bodies for supplementary insurance pay an employer’s contribution at least equal to and usually higher than the contribution rate paid by the banks affiliated to ETEAM (i.e. 3% of gross income). In addition, they may also have to pay an additional one-off annual contribution in order to cover any deficit of their insurance body.

The reform provides for the optional integration of these separate insurance bodies within the general social security regime.

Technically, supplementary pension rights under the special regime can be divided into two categories:

a) basic supplementary pension rights, corresponding to the supplementary pension rights provided by the compulsory supplementary insurance scheme;

b) specific supplementary pension rights for bank personnel, calculated as the difference between the pension rights provided by the separate insurance bodies and the basic supplementary rights.

The reform allows the basic supplementary pension rights to be transferred to ETEAM in exchange for the payment of ETEAM contributions by employers and employees. This means that the reform will relieve the banks from the obligation of ensuring the viability of their insurance bodies. As far as the specific supplementary pension rights are concerned, the banks will fully finance the financial charge incurred by the take-over of these rights.

This article will focus on the issue raised by the transfer of the basic supplementary pension rights to the general social security regime (4).

(1) Directorate-General for Competition, unit F-3, and Directorate-General for Energy and Transport, unit A2 (previously Directorate-General for Competition, unit D3). The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.


(4) The Commission has verified that the banks will fully finance the cost of the transfer of the specific supplementary pension rights to the general social security regime and has hence concluded that this transfer does not contain any aid elements.
La Poste

In addition to the 120 000 employees working under contracts similar to those used by private operators, 180 000 public servants are currently working for La Poste, the French Post Office. The pension rights of these public servants are defined in the ‘Code Général des pensions civiles et militaires de retraites’ (general civilian and military retirement pensions code), and are similar to the rights of other public servants.

The system is managed by the State and is financed on a pay-as-you-go basis. However, under a specific law dating back to 1990, La Poste was obliged to finance all the pension costs of the retired officials it used to employ. In other words, unlike other employers, which pay a ‘withholding’ contribution that discharges them from any additional pension liabilities towards their employees (5), La Poste used to pay every year the full cost of the pensions of its retired officials (i.e. on top of the contributions deducted from the wages of its current employees, La Poste was paying to the State an additional amount to cover the yearly cost of pensions for its retired officials). This led La Poste to bear higher costs than required under the standard pension regime for both public servants and other employees (6).

In 1991, La Poste started to progressively replace its civil servants with contractual employees coming under the standard social security system (also a pay-as-you-go system). The transition from a situation where La Poste had only public servants to one where it had mainly employees on a contract basis under the standard pension regime then began to create unaffordable pension charges, especially in the light of the liberalisation of postal activities.

To address this situation, France first decided in 1998 to cap the employer’s contribution due from La Poste at the 1997 level (in constant euros), responsibility for the balance being assumed by the State. Then, under a new reform in 2006, which replaced the 1998 cap, La Poste was to pay an employer’s contribution based on a ‘competitively fair rate’ (CFR). The CFR is intended to bring the obligatory contributions paid by La Poste for its public servants into line with those paid by other undertakings in the postal and banking sectors (which employ workers under the ordinary rules governing social security contributions, including pensions).

The key issue

Article 87(1) of the EC Treaty states: ‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.’

Therefore, in order to determine whether the reforms at issue do contain state aid elements within the meaning of Article 87(1) EC Treaty, it must be established whether the measures confer an economic advantage on the undertakings concerned by the reform.

It follows from the above that the key issue raised by the two pension cases is whether the alleviation of part of the costs of the special pension regimes is likely to give an economic advantage to the undertakings concerned.

The existence of an economic advantage: the approach followed by the Commission

It is established case law of the European Court of Justice that an economic advantage exists if the measure being assessed enables the undertakings concerned to avoid having to bear charges that would normally have had to be met out of their own financial resources, thereby preventing market forces from having their normal effect (7).

In this context, a normal charge is a ‘normal burden inherent in the day-to-day […] management or usual activities […] of an undertaking’ (8). The Court has also stated that ‘an aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question […]’, whereas a special charge is, on the contrary, an additional charge over and above those normal charges’ (9).

In the light of the above, the Commission considers that whether a charge is normal or not has to be determined by reference to the general system of charges in question. Consequently, the determination of a reference framework is of particular importance, because the existence of an economic advantage depends upon the comparison between the special and normal charges (10).

(5) Withholding contributions are the norm for both private and public businesses in France.

(6) The fact that La Poste did not benefit from the withholding contributions regime also meant that it remained liable towards its officials for their acquired pension rights. This debt, recorded as an off-balance-sheet liability until 2006, amounted to €76 billion in 2005.


advantage can only be established by comparison with a given system of financial charges considered to be ‘normal’ in the geographical area of reference.

It follows that the Commission has to establish a legal reference framework, a ‘benchmark’, in order to determine whether the pension costs in question are ‘normal charges’ for the undertaking concerned.

If so, any alleviation of these ‘normal charges’ should be considered as conferring an economic advantage upon the undertaking concerned in the sense of Article 87(1) of the EC Treaty.

Here, it has to be recalled that, for the application of Article 87(1), the only question to be considered is whether a state measure favours certain undertakings or the production of certain goods in comparison with other undertakings in a comparable legal and factual situation in terms of the objective pursued by the measure in question. It is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation previously, or even remains unchanged (10).

Concrete example: the pension reform in the Greek banking sector

Determination of the reference system

Applying this methodology to the pension reform in the Greek banking sector, the Commission considered that the system of charges affected by the reform was the system of financial charges borne by undertakings for the financing of basic supplementary pension rights for employees under a pay-as-you-go pension regime.

Accordingly, the Commission considered that the reference framework was the general social security system providing basic supplementary insurance for employees, i.e. ETEAM, for the following reasons.

First, the supplementary pension rights provided to pensioners by ETEAM are strictly identical to the basic supplementary pension rights. Indeed, basic supplementary pension rights are by definition the supplementary pension rights provided by the compulsory supplementary insurance scheme.

Second, the legal status of persons affiliated to ETEAM is the same as that of the population concerned by the reform.

Third, the financing system of ETEAM follows the same logic, i.e. pay-as-you-go. By law, ETEAM is financed through compulsory contributions (3% of gross income) paid by employees and employers. The contributions are managed and apportioned in accordance with the rules of ETEAM, which operates on a pay-as-you-go basis.

Finally, the majority of banks in Greece are already affiliated to ETEAM for supplementary pension rights. These undertakings are indeed ‘in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question’ (11).

Determination of the normal charges arising from the normal application of the reference framework

Having defined ETEAM as the reference framework, the Commission then established the financial charges inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM.

The financial charges arising from the normal application of the rules of ETEAM are defined, in line with the case law, as the ‘normal charges’, i.e. the charges inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM.

Due to the pay-as-you-go nature of ETEAM, these normal charges are exclusively the annual employers’ contributions paid by the undertakings affiliated to ETEAM. In a pension regime organised on a pay-as-you-go basis, the payment of their regular contributions indeed frees employers from any future commitment towards their employees for basic supplementary pensions.

Assessment of the reform

On the basis of the above considerations, the Commission finally determined whether the reform exempts the banks concerned from paying partially or totally the employers’ contributions due under the normal application of the rules of ETEAM.

The Commission noted that, after the reform, as far as basic supplementary pension rights are concerned, the contribution rates paid by banks to ETEAM will be at least equal to the rates paid by other undertakings affiliated to ETEAM. In other words, the banks opting for integration will not be relieved from paying financial charges arising from the normal application of the rules of ETEAM.


(11) Case Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke, cited above, paragraph 41.
The Commission acknowledged that the reform would relieve the banks from financial charges relating to their last-resort responsibility to ensure the viability of their insurance bodies. If a deficit arises between the contributions paid (by both employers and employees) and the basic pension benefits paid under the pay-as-you-go system, it will be taken in charge by society as a whole and no longer by the banks.

The remaining issue was therefore to determine whether the obligation to cover a deficit of the insurance body, beyond the payment of employers’ contributions, is inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM. If not, the financial charge arising from this obligation would not be a normal charge for an undertaking affiliated to ETEAM, but would be a ‘special charge’ (\(^{12}\)).

The Commission first noted that the financial charge arising from an obligation to cover a deficit in a pay-as-you-go pension regime is not a normal charge for an undertaking affiliated to ETEAM. In other words, this financial charge is not a charge arising from the normal application of the rules of ETEAM. The banks already affiliated to ETEAM do not have to cover the deficit of their insurance body, this being taken in charge by society as a whole.

Second, the Commission found that it is difficult to see ‘how a private undertaking could offer on the market a non-funded pension whereby present contributions fund present benefits. In such a scheme, redistribution is not ancillary to some other activity which could exist independently of it. Rather, the scheme consists entirely of the State-compelled redistribution of resources from those currently employed to those who have retired’ (\(^{13}\)).

In the light of the above, the Commission concluded that the reform did not exempt or release the banks concerned by the reform from financial charges arising from the normal application of the general system of social security. The Commission considered that a measure by the State to relieve the abnormal or ‘special’ obligation to cover any deficit of the insurance body does not confer any economic advantage upon the banks concerned by the reform in comparison with undertakings already affiliated to ETEAM.

The Commission concluded that the integration of the banks’ insurance bodies within the general social security scheme for the basic supplementary pension rights simply widened the coverage of inter-generational solidarity and reduced the insurance risk of the integrated fund by enlarging the group of insured persons.

For these reasons, the Commission considered that the transfer of basic supplementary pension rights to ETEAM did not confer any economic advantage upon the undertakings concerned and hence was not aid within the meaning of Article 87(1) EC Treaty.

**What if there is no benchmark? A concrete example with the La Poste case**

The Commission decision recalls that it has to be determined whether the measures under scrutiny confer an economic advantage on La Poste in that they allow it to avoid costs that would normally have had to be borne from its own financial resources, and have thus prevented market forces from producing their normal effect (\(^{14}\)).

Conversely, in the wake of the Banks case (see footnote 9), the decision notes that the concept of ‘special charge’ could apply. The withdrawal of such a special charge by legislation would not grant any advantage to the beneficiary and would therefore not constitute state aid.

While the broad objective of the reform is to create a level playing field between La Poste and its competitors regarding obligatory wage-based social and tax contributions, several possible reference frameworks have been identified by the Commission:

— the situation of La Poste’s competitors

La Poste’s competitors are private-law companies operating on competitive markets, whereas La Poste has a status similar to that of an industrial and commercial public establishment (termed ‘EPIC’ in French) (\(^{15}\)) with a

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\(^{12}\) See by analogy Article 4(c) of the ECSC Treaty.

\(^{13}\) Opinion of Advocate-General Jacobs in Case C-264/01, paragraph 33.


\(^{15}\) In France a distinction is made in principle between administrative public establishments (EPAs), which perform the traditional tasks of the public administration, and industrial and commercial public establishments (EPICs), which engage in activities of an economic nature. A number of public establishments have not been classified by law as either EPAs or EPICs. Such is the case with La Poste. However, the Court of Cassation, in its ruling of 18 January 2001 (second civil chamber), accepted the principle whereby La Poste is treated as an EPIC — see Commission Recommendation of 4 October 2006 proposing the adoption of appropriate measures regarding the State’s unlimited guarantee in favour of La Poste (Case E 15/2005).
statutory monopoly \(^{(16)}\). Moreover, La Poste’s competitors have employees under private-law contracts while the comparison specifically concerns civil servants working for La Poste.

— the situation of other public undertakings

Among the EPICs, to which La Poste is similar by virtue of its status, no economic operators forming a homogeneous group that could provide a comparison can be identified.

— the pension scheme applicable to state civil servants

State civil servants do not, as a rule, work in market sectors such as those where La Poste operates.

— France Télécom

Having become a limited listed company in 1996, France Télécom is no longer in a legal and factual situation comparable to that of La Poste.

To sum up, no external comparison is available to define a ‘normal’ contribution for undertakings in a legal and factual situation comparable to that of La Poste in the light of the objective pursued by the measures under review.

As there is no suitable external comparison, the reference framework for the possible existence of an economic advantage has to be the situation of La Poste itself prior to the reform.

Accordingly, the Commission has concluded that the retirement costs borne by La Poste under the 1990 law are normal costs. One of the effects of the reform has been to replace La Poste’s contribution with a contribution that fully discharges all its liabilities, thus aligning the pension costs borne by La Poste with those of its competitors. Without the reform, the employer’s contribution would, in the years ahead, have continued to rise significantly. Therefore, the Commission has concluded that the reform relieves La Poste of normal charges that it would have had to bear from its own financial resources, conferring on the operator an advantage in the sense of Article 87(1).

Lastly, in response to the doubts expressed in the decision to initiate this procedure, the Commission has also examined whether or not the charges alleviated by the reform correspond overall to ‘abnormal’ charges or to a ‘structural disadvantage’ as referred to in the Combus \(^{(17)}\) case law. The Commission has come to the view that the factual differences between the Combus case and the case at issue are sufficient to justify a different reasoning in each case.

**Conclusion**

In both cases, the existence of an advantage is established in a first stage through a comparison with other undertakings in a comparable legal and factual situation in terms of the objective pursued by the reform in question or, if this is not possible, through a comparison with the situation of the undertaking itself before the reform.

An external benchmark exists in the Greek banking case and allows the conclusion that no advantage is granted.

No corresponding benchmark could be identified in the La Poste case. So the comparison has to be made between the situations before and after the reform. Because the reform relieves La Poste of costs that would normally have had to be financed from its own financial resources, an advantage is granted to the operator.

The choice of the undertaking itself as a benchmark is a second-best solution and has to be made when market conditions are not normal or when it is not possible to find a comparable undertaking.

\(^{(16)}\) Tariffs are fixed according to principles laid down by Directive 97/67/EC. In particular, Article 12 of the Directive stipulates that prices must be geared to costs and that Member States may decide that a uniform tariff should be applied throughout their national territory.
