Services of general economic interest: Crédit Mutuel decision - not overcompensated

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This article concerns the Commission’s assessment of a service of general economic interest (SGEI) in the banking sector, namely the decision closing the formal investigation of Crédit Mutuel’s Livrets Bleu savings accounts.

Introduction

In its decision of 24 May 2011 (hereinafter “the closing decision”), the Commission ruled that the bank Crédit Mutuel was not overcompensated for collecting funds to finance social housing. The collection of deposits was made through distribution of the Livret Bleu account in France.

Description of the Livret Bleu and the Commission investigation

In 1975, the French Government created the Livret Bleu savings account and entrusted Crédit Mutuel with its distribution. At that time, Crédit Mutuel had a lot of discretion in determining the use of funds collected. Following a Government Order (“arrêté” of the Minister of Economy and Finance) of 1991, Crédit Mutuel gradually had to transfer funds collected through the Livret Bleu accounts to the Caisse des Dépots et Consignations (CDC), which, in return, paid Crédit Mutuel an annual fee (initially set at 1.3% of the amounts transferred to CDC, subsequently cut to 1.1% in 2005). CDC used these funds to finance the social housing sector.

Competitors complained to the Commission that thanks to the State-subsidised Livret Bleu, Crédit Mutuel was able to attract customers and increase its market share in the French retail market. In 1998, the Commission opened an in-depth investigation under State aid rules.

In 2002, the Commission adopted a decision (2) ruling that Crédit Mutuel had benefited from overcompensation for costs incurred in distributing Livret Bleu accounts and this overcompensation constituted incompatible State aid which had to be recovered. This decision was annulled by the EU Court of First Instance in 2005 (3).

While reopening the assessment of the case under State aid rules (extension decision of 2006) (4), the Commission tackled the exclusive distribution rights entrusted to Crédit Mutuel for Livret Bleu under internal market rules. In 2007, the Commission adopted a decision (5) calling on France to withdraw Crédit Mutuel’s exclusive rights to distribute Livret Bleu accounts, as these constituted a restriction on freedom of establishment and freedom to provide services. As the restriction remained in place, the Commission opened an infringement procedure provided for under Article 226 of the EC Treaty (now Article 256 TFEU) with a letter of formal notice addressed to the French Government in 2008.

France eventually introduced a reform on 1 January 2009, granting all banking institutions the right to distribute Livret A accounts and ending the distinction between Livret A and Livret Bleu accounts. As a result, Crédit Mutuel’s Livret Bleu in effect ceased to exist, and although a product with that name is still marketed, this is now merely a Livret A account.

In October 2009, the Commission closed the infringement procedure under internal market rules (6) while continuing to assess the compensation paid for distribution of the Livret Bleu with reference to State aid rules.

Final State aid decision, 24 May 2011

Existence of aid

In the closing decision, the Commission confirmed that the annual fee CDC paid to Crédit Mutuel for funds transferred to the latter constituted State aid.

(1) 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.


(3) Case T-93/02, Confédération nationale du Crédit mutuel v. Commission [2005], ECR II-143.


(6) See IP/09/1482.
Indeed, while not contesting that Crédit Mutuel performed a service of general economic interest (SGEI), i.e. the collection of retail savings for the financing of social housing, the Commission concluded that the fourth condition of the Altmark jurisprudence (1) was not fulfilled as the French authorities did not determine the yearly fee on the basis of the costs of a well-run undertaking.

Compatibility of aid with internal market

In the annulled 2002 final decision, the Commission had concluded that Crédit Mutuel had been overcompensated and that this overcompensation was incompatible aid that had to be recovered. In the decision to extend the procedure, adopted in 2006, the preliminary conclusion was also that Crédit Mutuel had been overcompensated and that the aid had to be recovered. Departing from these preliminary conclusions, the final decision concludes that the bank was not overcompensated for performing the public service.

This change stems from the fact that in its final decision, the Commission corrected its calculations regarding potential overcompensation on three points, explained below.

First correction: starting point for calculation (27 September 1991)

The Commission first identified a time inconsistency in its calculation. Following the annulment by the Court, the Commission had clarified in the extension decision of 2006 that the only measure which constituted State aid was compensation CDC paid to Crédit Mutuel. But in that calculation of potential overcompensation, the decision continued to take into account some revenues which Crédit Mutuel had earned in the first three quarters of 1991. The aid measure being investigated did not exist at that time. The SGEI of collecting funds for CDC and the compensation CDC paid Crédit Mutuel were introduced by the Order of 27 September 1991. In other words, neither the SGEI nor the associated State existed before that Order.

In its closing decision, the Commission explained that it could not reasonably be claimed that the net revenues from Livret Bleu investment before 27 September 1991 constituted revenues related to the operation of an SGEI (2) which did not exist at that time. Those revenues were manifestly not related to the aid measure being investigated and were therefore excluded from the calculation of potential overcompensation.

It should be recalled that because the Commission initially considered that the aid was related to the exclusive right of collecting Livret Bleu deposits, which had existed since 1975 (but for which data were available only from 1 January 1991), it was rational and coherent to take revenues from 1 January 1991 into account in the calculation of potential overcompensation. However, when the Commission clarified in its extension decision of 2006 that only the yearly fee paid by CDC (the SGEI’s remuneration for collecting funds for CDC) was being investigated, not the exclusive right that dated from 1975, it forgot to take into account that only Livret Bleu revenues generated from the date the SGEI was created should be taken into account in calculating potential overcompensation for SGEI costs.

Second correction: Use of ‘global’ method until end-2005

According to the Community framework for State aid in the form of public service compensation (3) (hereinafter “the 2005 SGEI Framework”), any overcompensation at the end of a given year must be recovered, though overcompensation not exceeding 10 % of total annual compensation can be carried over to the next year (4). Under this annual approach, overcompensation is controlled each year with the recovery of aid in excess of the 10 % margin.

In the 2006 extension decision, the Commission was in favour of applying an annual approach for the entire period under assessment. This meant that under-compensation in certain years could not offset years where the aid exceeded the net loss of the system (1991, 1992 and 1993). The excess aid in the latter years should therefore be recovered.

The final decision considers that this preliminary conclusion laid down in the 2006 extension decision was not appropriate. According to point 26 of the 2005 SGEI Framework, “In the case of non-notified aid, the Commission will apply a) the provisions of [the] framework if the aid was granted after publication of the framework in the Official Journal b) the provisions in force at the time the aid was granted in all other cases.”

Before the adoption of the 2005 SGEI Framework, there were no explicit rules regarding assessment of potential overcompensation over several years. As regards case practice, the final decision observes that when the Commission assessed whether an undertaking entrusted with an SGEI had been

(2) According to point 17 of the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p.4.) “The revenue to be taken into account must include at least the entire revenue earned from the service of general economic interest.”
(4) See point 21 of the 2005 SGEI Framework.
overcompensated, it followed a “global” approach, whereby the amount of aid received in years of overcompensation could, without limitation, be offset by undercompensation in other years (11). In other words, over the entire period under consideration, the total amount of aid received was compared with the total net costs incurred.

In the Crédit Mutuel case, the aid was granted annually and had not been notified. The 2005 SGEI Framework was published in the Official Journal on 29 November 2005.

Therefore, in the closing decision, the Commission applied the global approach for the period until end-2005 (i.e. from 27.09.1991 to 31.12.2005) and the annual approach for the period from 01.01.2006 to 31.12.2008. In other words, it checked for overcompensation cumulatively over the entire period for the former period, and year by year for the latter.

Third correction: Allowing a limited profit margin for the SGEI for collecting funds

When assessing whether a company entrusted with a SGEI was overcompensated, a reasonable profit should be taken into account (12). The 2005 SGEI Framework specifies that “Reasonable profit should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking […] This rate must normally not exceed the average rate for the sector concerned in recent years”.

In the annulled 2002 decision and in the 2006 extension decision, the Commission considered that a reasonable profit was allowed on the regulatory capital which Crédit Mutuel had to hold for the assets (loans) financed with Livret Bleu deposits. But Livret Bleu deposits are liabilities and therefore under prudential rules, do not require regulatory capital. Only the assets financed by these resources consume regulatory capital.

Following the logic based on regulatory capital, the 2006 extension decision found that no reasonable profit should be allowed for the activity of collecting funds for CDC, as Crédit Mutuel is not required to hold any regulatory capital against funds transferred to CDC. Indeed, from a prudential point of view, the exposure towards CDC is considered as equal to Crédit Mutuel’s risk exposure vis-à-vis the French state, i.e. a risk-weighting of zero, which does not call for the holding of any corresponding own capital.

Given that funds collected thanks to Livret Bleu deposits and transferred to CDC rose steadily, from zero in 1991 to 100% in 1999, the amount of regulatory capital used by assets financed by Livret Bleu deposits dropped steadily between 1991 and 1998 and was zero thereafter.

Therefore, calculating the ‘reasonable profit’ that Crédit Mutuel was allowed by using the cost of regulatory capital employed would have meant that Crédit Mutuel was in fact not allowed any profit at all for collecting funds on behalf of CDC. This would have meant that Crédit Mutuel would not have been allowed any profit on this SGEI from 1999 onwards.

In the closing decision, the Commission considered that at least some profit should be allowed. An economic operator should not have to accept carrying out an activity without any profit, even if the activity does not consume any regulatory capital. The absence of a regulatory capital requirement only reflects the absence of credit loss risk. It is true that, on top of the absence of credit risk, the activity of collecting funds for CDC does not present liquidity and maturity transformation risks and that operating the SGEI at issue therefore meant a low level of risk for Crédit Mutuel.

However, there were still risks involved, such as operational risks, economic risks (that the fee earned might be insufficient to cover costs), as well as legal and reputation risks. Moreover, other banking activities such as distributing mutual funds, managing customers’ wealth or selling bonds and shares, do not consume regulatory capital (and do not present liquidity and maturity transformation risks) but are nevertheless highly profitable, showing that there is no direct link between the consumption of regulatory capital (on the basis of the rules existing at the time) and profitability.

Determining what would constitute a reasonable profit for Crédit Mutuel’s activity of collecting funds on behalf of CDC is not easy. The original version of the Livret Bleu was quite an unusual product that could not be directly compared with others, notably because it was a mix of a current account and a savings account and because all the funds collected were deposited with the State.

To determine the reasonable profit margin and return on assets for Crédit Mutuel, the Commission followed a reverse approach. It calculated the minimum profit on the activity of collecting funds for

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(11) It for instance concerned cases in which the undertaking entrusted with a SGEI was acting in the audiovisual sector (see for instance the Commission Decision of 10 December 2003 on State aid implemented by France for France 2 and France 3 (notified under document number C(2003) 4497), OJ L 361, 8.12.04, p. 21).

(12) According to point 14 of the Community framework for State aid in the form of public service compensation: “The amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations.” (emphasis added).
CDC that would result in no overcompensation on the overall Livret Bleu system over the whole 1991-2008 period, with no overcompensation carried over at the end of 2005 (taking into account the possibility opened by the 2005 SGEI Framework (13) to carry over up to 10% of the aid received in one year to the next year).

The Commission found that a profit margin of 4.2% on all funds centralised at CDC and a return on assets of 5 bps on the activity of collecting funds for CDC (i.e. a pre-tax profit equal to 0.05% of the amount of funds collected for CDC) would eliminate any overcompensation.

In the final decision, the Commission considered that such a low level of profit was reasonable when compared to the profit margin and return on assets of the French banking system and that such a level of profit appropriately reflected the low level of risk incurred by Crédit Mutuel when collecting funds on behalf of CDC.

**Conclusion**

On the basis of the three amendments described above, the Commission came to the conclusion that Crédit Mutuel had not been overcompensated for providing the SGEI of collecting funds to finance social housing through CDC. It therefore concluded that the aid was compatible with the internal market.

(13) See footnote 8 above.