



II-2.16: French regulators fine La Poste for not providing an affordable service for the shipment of low-value objects weighing less than two kilograms.

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MAIN INFORMATION

On December 20, 2011, the *Autorité de Régulation des Communications électroniques et de la Poste* (ARCEP — French postal and telecommunications regulator) fined *La Poste*, France's universal postal service provider, one million Euros for not having provided an easily-available and affordable priority mail service for the shipment of low-value objects weighing less than two kilograms. This failure was in disregard of the regulator's injunction, French legislation, and European directives.

CONTEXT AND SUMMARY

To see the decision, click [here](#).

Article L.1 of the *Code français des Postes et des Communications Electroniques* (French Code of the Post and Electronic Communications) provides that universal service “*garantit à tous les usagers, de manière permanente et sur l'ensemble du territoire nationale, des services postaux...de qualité...à des prix abordables pour tous les usagers.*”¹

French legislation has provided that state-owned enterprise *La Poste* be the universal service provider, which subjects it to “*obligations en matière de qualité des services, d'accessibilité à ces services,*”² etc. (Article L.2). The shipment of packets weighing less than two kilograms falls within the scope of the universal service, and the regulator therefore concluded that *La Poste* “*a une obligation d'abordabilité et d'accessibilité des prestation qu'elle offre au titre du service universel.*”³

In October 2007, *La Poste* modified its general conditions of service in order to forbid the widespread practice of sending small objects using standard priority mail. It then tried to push users towards more expensive services such as *Colissimo* (the brand name for parcel post service) for sending small objects. In October 2007, a new service branded *Lettre Max* was introduced to allow customers to send small objects via priority mail using a special tracking envelope, but which was not included in the universal service, and whose price was accordingly superior to regular priority mail service. In December 2008, *La Poste* created a new service called *Mini Max* within the universal service, which allowed customers to send small objects via priority mail as long as they did not weigh more than two kilograms and were no thicker than two centimeters. Furthermore, a study showed that consumers did not know that this service existed and had not been informed of its existence, and that it did not meet their needs.

Under these conditions, the Regulator decided on June 3, 2010 to investigate the matter, because the universal service provider is obligated to provide users with affordable and accessible service. On July 10, 2010, the General Director of the Regulatory Authority issued an injunction to *La Poste*, commanding it to justify the conditions of use it had placed on the “*Mini Max*” service, to adequately

¹ Permanently guarantees all users access everywhere in the country to quality postal services at affordable prices for all users.

² Obligations in terms of quality of service and accessibility of these services

³ An obligation of affordability and accessibility for the products it provides under universal service.

inform users about the existence of this service, and to provide an affordable service for sending objects that weigh more than two kilograms and are thicker than two centimeters at a similar price and with similar standards of service to priority mail service.

La Poste complied with its obligation to inform consumers, but the Regulator believed that the operator still did not provide an affordable service. Disciplinary proceedings took their course.

In its defense, *La Poste* argued that the reason for limiting thickness to two centimeters was because this was the standard height of letterbox slots, and it also allowed for machine sorting of these packets, which allowed for lower costs and thereby corresponded to the prices of universal service products. Greater weight or heterogeneous volumes would imply manual sorting of these packets, which greatly increases costs and hinders *La Poste's* efforts to increase industrial processing of the mails. It produced economic studies that suggested that because of these higher costs, it was economically impossible to provide priority mail service for objects thicker than 2.5 centimeters at a similar price to a normal letter. *La Poste* also argued in detail that its *Mini Max* service had gradually become more flexible, and now allowed users to write *Mini Max* by hand on their packets or to use regular stamps to send objects using this service, rather than the previous requirement of obtaining a special *Mini Max* label and going to a post office to obtain a meter sticker for postage.

La Poste also challenged the ARCEP's authority to order changes to its universal service catalogue, because universal service is defined and approved in conjunction with the appropriate minister, who must therefore also be involved in the ARCEP's proceedings (which wasn't done in this case). Furthermore, according to *La Poste*, although legislation gives the ARCEP the right to oversee prices for universal postal service products to ensure they are affordable and accessible, this only concerns existing products and does not give the ARCEP the authority to create new services. By doing so, the Regulator is acting without any sort of legislative mandate. *La Poste* also argued that such a service does not fulfill any social need, which is a condition for including a service in the universal service. Furthermore, the universal service provider claimed that it was impossible for it to provide such a service within the legislative constraints of the universal service. Lastly, *La Poste* argued that the regulator should take into account the fact that if the regulator made such an offer obligatory, it would effectively unbalance the market for postal services to the detriment of its competitors.

The ARCEP was unconvinced by these arguments. The regulator reminded *La Poste* that as the universal service provider, it is legally obligated to "*proposer une offre permettant d'envoyer de petits objets, dans des conditions abordables, c'est-à-dire proches de l'offre commerciale d'envoi des correspondances appelée « Lettre »*",⁴ and that *La Poste* had failed to fulfil this obligation.

The Regulator pointed out that European directive 97/67 requires universal service to be "affordable" and take into account the "needs of users". Moreover, the regulator decided that European Union legislation defined "correspondence" as a "postal item weighing less than two kilograms and containing a communication in written form on any kind of physical medium". The regulator is of the opinion that any medium, even a digital one, is included in this definition, and that characters of any form, even ones that do not use the alphabet, are also included in this definition.

The Regulator dismissed the allegation that it was creating a new service, because demanding an affordable service for the shipment of small objects is something that is supposed to be provided within the universal service. *La Poste* therefore has not fulfilled its obligations as universal service provider.

Concerning its jurisdiction over this matter, because the ARCEP denies creating a new obligation, the discussion over its involving the minister is no longer pertinent. The Regulator was happy to point out that the aforementioned European directive gave national regulatory authorities the power to sanction operators that did not fulfill their universal service obligations and that involving the minister would be contrary to the intention of giving the regulator this autonomous power.

Concerning the discussion over the "*besoin social*" (social need), the regulatory authority stated that its primary function was to apply the law and especially its dispositions relating to the provision of universal postal service. It added that many associations have sent it letters expressing this need and

⁴ To provide a service allowing for the shipment of small objects at affordable prices, meaning at prices close to those of the retail service for the shipment of correspondence, also known as "*Lettre*" (priority mail).

that consumers have spontaneously alerted the authority as to the problems they have experienced while trying to send small objects through the post.

Regarding the greater costs involved with manually sorting packets of variable thicknesses and weights, the regulator admits that this may be true but is unconvinced by the arguments advanced by *La Poste* and thinks that the extra costs will be negligible.

Furthermore, *La Poste* is alone amongst major postal operators in distinguishing between the contents of small packets. Indeed, *La Poste* allows any packet containing documents or brochures weighing less than three kilograms to be sent as a “letter”, irrespective of its thickness. De facto, any letter weighing more than 100 grams requires manual sorting, but this is not reflected in *La Poste*'s pricing. Most other major postal services do not distinguish between the contents of packets—which is dubious in terms of the principle of the secrecy of correspondence—but rather apply higher prices to shipments that cannot be sorted by machine because of their thickness or format that requires manual processing.

The ARCEP concluded that although it had issued an injunction ordering *La Poste* to provide an accessible and affordable service for sending packets containing objects thicker than two centimeters and weighing less than two kilograms, *La Poste* did not comply and did not provide sufficient justification for its non-compliance.

La Poste profited from its non-compliance with its obligations as provided by Article L.1 of the *Code des Postes et des Communications Electroniques* (CPCE – French Code of the Postal Service and Electronic Communications) by reorienting consumer demand towards the more expensive *Colissimo* (parcel post) service, which does not correspond to the definition of an affordable service.

This is why the fine of 1 million Euros is proportionate to the gravity of this non-compliance and the profit *La Poste* drew from it.

BRIEF COMMENTARY

At a time where all over the world postal services risk going bankrupt (such as in the United States⁵ or the United Kingdom⁶), France is demonstrating great severity towards *La Poste*.

Perhaps this is deserved, because *La Poste* is indeed France's universal postal service provider. It is possible that legal action will clarify the ARCEP's decision in the future.

We will simply make a few observations.

First of all, for what Professor Denis Mazeaud designated as *La saga Chronopost* (the *Chronopost saga*)⁷, *La Poste* attempted to demonstrate that it had no obligations regarding the general conditions its customers are obliged to abide by. The relationship between regulation and contract is yet to be elucidated⁸, but it is doubtlessly a clumsy move by the universal service provider, who is bound by legislative obligations (as pointed out by the regulator) to try to use its general conditions in its defense. By doing so, it simply played into the hands of its accusers.

Secondly, we would like to highlight the regulator's artful interpretation of the law. What is a “postal item”? What is a “communication”? We observe that the regulator was resolutely modern in refusing to be bound by the alphabet and by extending the concept to the notion of characters, messages, etc. The “letter” can be placed between quotation marks, since, according to the regulator, it includes a vaster category of everything sent between private parties.

⁵ RAIFFE, Alex, The United States Postal Service announces plans to end next-day priority mail service and requests legislative approval for other service cuts, *The Journal of Regulation*, II-2.15

⁶ RAIFFE, Alex, Postcomm, the British Postal Service Commission, publishes a new regulatory Framework for a sustainable postal service, *The Journal of Regulation*, III.2-7

⁷ French *Cour de cassation, chambre commerciale* (commercial chamber), 22 oct. 1996.

⁸ For a preliminary approach, cf. FRISON-ROCHE, Marie-Anne, Régulation et contrat, *Les Petites Affiches*, 3 mai 2005, p.3-10.

Thirdly, and regardless of the heuristics applied to the law, is it legitimate to broadly interpret an obligation imposed on an operator when the operator can only apply “cost-oriented prices”? Traditionally speaking, the answer should be no. But if universal service is taken to be a principle that exists in order to meet a social need, as does the regulator, then the answer becomes yes. Although the ruling was punitive—and so a restrictive interpretation of the laws upon which it was based should have been employed—reading it demonstrates that the regulator considers universal service to be the norm rather than the exception. Lesson learned.

Fourthly and finally, the regulator accepted that a defense based on an increase in cost would have been an appropriate justification for not providing the service that the regulator demanded. It is true that the operator insufficiently provided said justification, because the regulator placed the burden of proof on the operator, but at least it accepted that the argument was valid. This is logical in a system that, as in all network industries, uses the *credo* of ‘cost-oriented pricing’.