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Self-provision by online platforms vertically integrated into delivery activities

(Preliminary version)

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Purpose of the paper

The purpose of this paper is to investigate the legal and economic aspects relating to applicability of the concept of “self-provision” in postal markets.

- Some e-commerce platforms are gradually vertically integrating in delivery activities.
- It is therefore necessary to assess if such platforms should be considered as postal operators
- As some of them deliver both their own goods and third-party sellers’ goods, it is also necessary to assess whether delivery of own goods should be qualified as “self provision”?
- The paper describes how self-provision has been assessed in the Amazon’s cases in Italy and Spain.

“Pure” and “hybrid” marketplaces

Vertically integrated delivery platforms may be:

- “*pure marketplaces*” (example: eBay): offer intermediation services to third-party sellers and buyers, do not own the goods, do not set the price and are extraneous to the contractual relationship between sellers and buyers.
- “*hybrid marketplaces*” (example: Amazon): sell both third party’s goods and goods purchased from other suppliers (own goods); in this last case they own the products, set the price, are the contractual counterpart of online buyers.

Platforms as postal operators' competitors

Platforms engaged in delivery activities from being postal operators' customers have become their competitors.

- Should such platforms be considered, to all intents and purposes, as postal operators hence be subject to the regulatory, supervisory and sanctioning powers of the NRAs?
- Should delivery of own goods by “hybrid marketplaces” be qualified as “self provision”? Or should it be considered as a postal activity?

Are vertically integrated online platforms postal operators? (1)

- The ECJ (Confetra case) clarified the scope of application of the PSD: companies providing collection, sorting, transport and distribution services are, unless their activity is limited to "transport", postal service providers within the meaning of Art. 2, point 1a, of the PSD
- The EU Regulation 2018/644: identifies as postal service providers those subjects that use alternative business models which make use of the collaborative economy or electronic commerce platforms. The Regulation's indication is clear: what matters is the activity actually carried out, therefore, it is necessary to assess whether the company carries out one of the phases of the postal value chain.
- The 2021 ERGP “Report on online Platforms” concluded that online platforms and alternative business models based on the collaborative economy may be subject to postal regulation to the extent that they provide postal services, as defined by the PSD and EC Regulation 2018/644. Hence, online platforms performing delivery activities should be treated like any other postal operator.

The ERGP Report shows that, in 2021, in 8 countries (Austria, Switzerland, Denmark, Spain, Italy, Lithuania, Poland and Romania) there are platforms providing services similar to postal services. In several cases, NRAs analysed the case of Amazon, which so far is considered a postal operator in four countries (Austria, Germany, Spain and Italy).

- In all cases in which online platforms are considered postal operators, there are a number of common elements:
 - i) the delivered object falls under the definition of postal item;
 - ii) the delivery activity concerns one or more stages of the postal value chain, excluding transport alone;
 - iii) the organization network used for delivery is similar, if not equal, to that of postal operators.
 - iv) no reference to a special type of authorization. Where national legislation requires prior authorization, it is also required for these new operators (not a licence).

Private self-provision: a legal reservation, to a State (or a public entity), of a market monopoly for the provision of goods/services to the public, should not result in third parties being prohibited from producing such goods/services for their own use. The right is circumscribed to the production of goods/services not intended for the public but exclusively for own use. The mixed production of goods/services for one's own use for third parties is not allowed.

Public self-provision (in-house provision): EU case law has recognized the legitimacy of directly entrusting self-provision tasks to formally private and profit-making companies, owned by a public entity, with the following constraints: i) the control by the public entity is similar to that exercised over its own departments; ii) in-house activities exclusively/predominantly intended to meet the needs of the public entity (not to carry out activities in competition with private companies).

Self –provision_ Legal profile (2)

The rules applicable to private and public self-provision have common elements: the constraints imposed on self-provision are justified by the need to prevent self-provision from being altered by offering the same services to third parties, thus distorting competition

In conclusion, the self-provision scheme is unambiguous and does not allow hybridisation, which would seriously alter the competitive game.

Self –provision_ Economic profile (1)

When identifying the relevant market in the presence of vertically integrated undertakings, it should be assessed whether self-provision needs to be taken into account.

- **“Merchant market rule”**: self-provision should be excluded from the calculation of market shares as it is a “captive sale” intended for the company itself, and not sold to third party customers. The rule is based on the consideration that captive sales would not exert the same competitive pressure on the market as merchant sales.
- However, it would be advisable to assess whether the company making captive sales would be able to make an offer to third-party customers within the time horizon of the analysis, considering as “captive” only those shares of self-provision which, during the relevant period, cannot be made available for sale to third parties (electronic communication regulatory practice, for example bitstream market).

Self –provision by vertically integrated online platforms

- What distinguishes the electronic communications markets from the case under consideration of vertically integrated platforms in the delivery sector is that, in the former case, the upstream and downstream markets are relevant markets belonging to the same sector.
- Conversely in the case of platforms, the upstream market is the online intermediation market, which is not part of the postal sector.

Should self-production be considered postal activity? (1)

- Recital 21 of the PSD defines self-provision,, as *“provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person.*
- Hence the PSD clearly states that the self-provision is, for all intents and purposes, aimed at providing a service that qualifies as a postal service.
- According to the PSD, there is no reason to include "self-provision" among the services that may be reserved to the USP. This does not exclude “self provision” from the scope of postal services;
- Therefore, self-provision can be qualified as a postal activity within the meaning of European legislation.
- These considerations may justify the acquisition and evaluation of data relating to self-provision services as part of the market analysis.

Should self-production be considered postal activity? (2)

In the EU legal framework, the concept of self-provision is governed by precise external boundaries and internal requirements,

- **External boundaries** are aimed at preventing the extension of the reserved area in favour of the USP. They were the subject of the judgment of the ECJ in Case C-240/02: in the light of the purpose then pursued by the PSD, namely the liberalisation of postal services, the Court held that MS were not entitled to extend as they wished the services reserved to the USPs. The ECG draws a clear boundary to safeguard the so-called "right to self-provision", configured as a subjective right exercisable in regimes of monopoly or legal reservation of certain activities.
- **Internal requirements** (relevant in a market in a liberalized market and aimed at ensuring the competitiveness of the market) concerns, instead, the requirements that the activity must possess in order to be qualified as self-provision. Self-provision takes the form of an exemption regime because it does not require the subject to apply for an authorization.
- **Conclusions:** while in a monopolistic situation, a restrictive interpretation is justified in order to avoid an inadmissible widening of the area of reservation, in a fully liberalised market, the competitive context would be distorted if the area of exemption (the issue of the licence and compliance with the provisions of the sectoral regulations) were extended to situations that cannot be qualified as self-provision.

ERGP considerations on self-provision

Based on the above considerations, the ERGP Report on online platform states that delivery services provided by an online platform can be considered as self-provision if:

the online platform delivers only its own goods **through its own network** or through third party companies working **exclusively** for the online platform.

Hence, when online platforms deliver both their own goods and third-party goods their deliveries cannot be considered as self-provision within the meaning of European legislation.

- This issue has been addressed in detail in the Amazon cases of Italy and Spain.

The Italian and Spanish Amazon cases

Both the Italian and Spanish NRAs (Agcom and CNMC) established that Amazon carries out postal activities and that the delivery of Amazon's own goods should be considered in the same way as other postal deliveries.

The decisions of the two NRAs show several similarities. For both NRAs Amazon's activity:

- is in line with the concept of postal activity within the meaning of both the PSD and the EC Regulation on cross border parcels;
- in no way differs from the service provided by postal operators, such as express couriers, as it includes the phases of the postal cycle: from sorting to delivery at the addressee's premises or to lockers;
- cannot be seen as mere intermediation but as an integral part of an overall postal service because Amazon manages and coordinates the activities of local couriers, acting as a parent company: its influence on the organisation of local couriers' work is so strong that it does not leave them a sufficient degree of independence. Amazon and the local couriers operate as a single organisation.

The Italian and Spanish Amazon cases

The classification of an activity as a postal is not determined by the place where it is carried out (logistics centre, automated processing centre, warehouse, etc.) but by the characteristics of the activity itself and by whether or not they coincide with the definitions of the various phases of the postal cycle.

The difference between Amazon and other online retailers offering delivery services is that:

- all goods leaving the warehouses of such retailers are their own property;
- they do not provide postal or logistical services to third parties;
- even when they prepare these parcels for delivery, once the carrier takes care of them, the retailer has no ability to influence their route, the number of parcels to be distributed.

On the contrary, Amazon uses the delivery network both for the delivery of its own goods and third-party sellers' goods sold through the platform hence its production capacity is not exclusively captive.

For these reasons, the service provided by Amazon cannot be qualified as 'self-provision' and, therefore, be excluded from the application of postal legislation (e.g. exemption from the obligation to apply for a licence).

The Italian and Spanish Amazon cases

- Amazon uses both DSPs (constituting its own network) and third-party couriers (who do not work exclusively for Amazon). This mixed supply excludes Amazon from the self-provision regime since it does not support a combination of the two systems.
- The mixed supply is also relevant for the competitive pressure exerted by Amazon's own deliveries on the delivery services market
- Switching from third-party suppliers to self-provision exerts a bargaining power on delivery operators that allows Amazon to obtain more advantageous terms; this power is all the more effective the more delivery operators depend on Amazon's deliveries.
- Ultimately, Amazon is able to influence the market conditions for parcel delivery services to a significant extent; therefore, the competitive dynamics of the market can be more adequately represented by including Amazon's self-provision.

Conclusions

- In a liberalised market, self-provision is no longer the bulwark against the expansion of the monopolist's privileges, but the assertion of a private right that cannot prevail but must be respectful of the rules governing the market.
- The so-called right to “self-produce” postal services meets an insuperable constraint in the requirement not to distort the competitive context.
- The claim of a subject to be able to carry out the same activity, partly under the hat of self-provision, partly under that of supply to the market, should be an unacceptable hybridisation.
- The activity consisting of the provision of postal services by one and the same subject cannot be divided and classified partly as self-provision and partly as supply to the market.
- The activity carried out must be considered as a whole and, consequently, can only be qualified as **ordinary postal activity**, since a partial application of the special self-provision scheme is not permissible, either on the basis of general principles or on the basis of the sectoral rules.

Thank you

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