Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 26 September 2024[1]

Case C-254/23

INTERZERO Trajnostne rešitve za svet brez odpadkov d.o.o.,
Interzero Circular Solutions Europe GmbH,
and Others,
Surovina, družba za predelavo odpadkov d.o.o.,
DINOS, družba za pripravo sekundarnih surovin d.o.o.,
and Others
v
Državni zbor Republike Slovenije

(Request for a preliminary ruling from the Ustavno sodišče (Constitutional Court, Slovenia))

(Reference for a preliminary ruling – Environment – Waste – Services of general economic interest – Freedom of establishment and freedom to provide services – Directive 2006/123/EC – Directive 2008/98/EC – Articles 16 and 17 of the Charter – Principles of legal certainty and the protection of legitimate expectations – Proportionality)

I. Introduction

1. The Republic of Slovenia introduced an extended producer responsibility ('EPR') scheme[2] in respect of discreet categories of consumer products. Under the scheme, responsibility for the fulfilment of EPR obligations for each such category is conferred upon a single organisation, operating on a not-for-profit basis. The Ustavno sodišče (Constitutional Court, Slovenia) asks ten questions of the Court as to the compatibility of the scheme with the rules on services of general economic interest ('SGEI'), the internal market and certain provisions of EU secondary legislation.

[1] Original language: English.

[2] Member States adopt EPR schemes in order to ensure that producers of goods bear financial and organisational responsibility for the management of waste connected with their products.

II. Legal context

A. European Union law

1. The Services Directive

2. Recitals 8, 40, and 70 of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market [3] ('Services Directive') state as follows:

'(8) It is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services.

…

(40) The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case-law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case-law of the Court of Justice covers at least the following grounds: … public health, … the protection of the environment …

…

(70) For the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task.'

3. Under Article 1 of the Services Directive:

'…

2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.

3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those

[3] OJ 2006 L 376, p. 36.

services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

…'.

4. Article 2(2)(a) of the Services Directive provides that it does not apply to non-economic services of general interest. Article 4 of the Services Directive defines the terms 'requirement' and overriding reasons relating to the public interest' as follows:

'7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) "overriding reasons relating to the public interest" means reasons recognised as such in the case-law of the Court of Justice, including the following grounds: … public health; … the protection of the environment and the urban environment …'.

5. Under Article 15 of the Services Directive:

'1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

…

(c) requirements which relate to the shareholding of a company;

(d) requirements … which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;

…

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only in so far as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.'

6. By Article 16(1) of the Services Directive:

'Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

…'

7. Under Article 17(1)(e) of the Services Directive, Article 16 does not apply to services of general economic interest provided in another Member State, including waste treatment.

2. The Waste Framework Directive

8. Under Recital 27 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [4] ('the Waste Framework Directive'):

'The introduction of extended producer responsibility in this Directive is one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources during their whole life-cycle including their repair, re-use, disassembly and recycling without compromising the free circulation of goods on the internal market.'

9. Article 3(21) of the Waste Framework Directive [5] defines, for the purposes of that Directive, 'extended producer responsibility scheme' as 'a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organisational responsibility for the management of the waste stage of a product's life cycle.'

10. Under Article 8(1) of the Waste Framework Directive [6]:

'In order to strengthen the re-use and the prevention, recycling and other recovery of waste, Member States may take legislative or non-legislative measures to ensure that any natural or

[4] OJ 2008 L 312, p. 3.

[5] As amended by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (OJ 2018 L 150, p. 109), which sought to define the concept of EPR and to establish minimum requirements therefor.

[6] As amended by Directive 2018/851.

legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product) has extended producer responsibility.

Such measures may include an acceptance of returned products and of the waste that remains after those products have been used, as well as the subsequent management of the waste and financial responsibility for such activities. These measures may include the obligation to provide publicly available information as to the extent to which the product is re-usable and recyclable.

Where such measures include the establishment of extended producer responsibility schemes, the general minimum requirements laid down in Article 8a shall apply.

Member States may decide that producers of products that undertake financial or financial and organisational responsibilities for the management of the waste stage of a product's life cycle of their own accord should apply some or all of the general minimum requirements laid down in Article 8a.'

11. Article 8a of the Waste Framework Directive [7] establishes general minimum requirements for EPR schemes. Under these requirements, read in the light of recital 14 of Directive 2018/851, producers may fulfil their EPR obligations either individually or collectively.

B. National law

12. The former Zakon o varstvu okolja [8] (the old Law on Environmental Protection) provided that producers of products could fulfil their waste management obligations either individually or collectively through the creation of an association with other producers. Producers of products could also rely on one or more economic operators for that purpose.

13. The new Zakon o varstvu okolja [9] (the new Law on Environmental Protection) repeals that legislation. Producers of consumer products must meet their EPR obligations through a collective organisation that the competent public authorities authorise for that purpose. Producers that place at least 51% of a given category of products on the market must establish a collective organisation to manage waste connected with those products. [10] Producers of such goods that are not shareholders of a collective organisation must meet their EPR obligations by concluding a contract with that organisation. Whilst each collective organisation enjoys a legal monopoly for the purpose of ensuring compliance with EPR obligations, they operate on a not-for-profit basis. Collective organisations ensure the collection and the treatment of waste connected with a given category of products, but they neither collect nor treat that waste, those tasks being carried out by independent operators under contracts which the collective organisations award each year. [11] Whether they are members of a collective organisation or conclude a contract with it, all producers pay the same fee, calculated on a cost recovery basis, for the services the collective organisation provides.

7 Inserted by Directive 2018/851.

8 Official Journal of the Republic of Slovenia No 39/06.

9 Official Journal of the Republic of Slovenia No 44/22.

10 A collective organisation may ensure that EPR obligations are met in respect of several product categories.

11 Collective organisations and their shareholders are prohibited from providing waste collection and waste management services and may not have a direct or indirect financial interest in undertakings that provide those services. Producers that enter into a contract with a collective organisation in order to discharge their EPR obligations are not subject to either of these restrictions.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

14. On 9 June 2021, the European Commission sent a reasoned opinion to the Republic of Slovenia wherein it expressed the view that it had failed to transpose Directive 2018/851 within the prescribed deadline.[12] In March 2022, the Republic of Slovenia adopted the new Law on Environmental Protection. In February 2023, the Commission closed the infringement procedure with respect to the non-transposition of Directive 2018/851.

15. Interzero Trajnostne rešitve za svet brez odpadkov d.o.o. ('Interzero') and Surovina družba za predelavo odpadkov d.o.o. ('Surovina') are commercial undertakings that provide waste management services in Slovenia. Interzero is a subsidiary of Interzero Circular Solutions Europe GmbH, a company established in Austria ('Interzero Austria'). In 2022, Interzero, Interzero Austria, Surovina, several Slovenian commercial companies active in the waste management sector and a number of producers subject to EPR obligations initiated proceedings before the Ustavno sodišče (Constitutional Court) claiming that the new Law on Environmental Protection was contrary to certain provisions of the Slovenian Constitution and EU law, namely Articles 49, 56, 102 and 106 TFEU, Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the Services Directive. They challenged the new Law on Environmental Protection on the grounds that it converted the economic activity of waste management into a non-economic activity reserved to monopolies. Interzero and Surovina submitted that the Slovene Government had neither shown that the system operated under the old Law on Environmental Protection had been ineffective nor explained why the activity of waste management is to be carried out on a not-for-profit basis without competition.

16. The Slovene Government argued that the changes the new Law on Environmental Protection introduced were necessary to transpose the Waste Framework Directive and to ensure that EPR obligations, namely the collection and the treatment of waste, were met. The new regime envisages that the authorised not-for-profit organisations created thereunder are dedicated to advancing environmental objectives, unencumbered by commercial considerations. The Waste Framework Directive permits Member States to require the discharge of EPR obligations through the establishment of a single collective organisation set up and managed by producers with respect to a given product category.[13] In the opinion of the Slovene Government, such a system is more effective from an environmental viewpoint, more efficient from an economic aspect and easier to monitor from a compliance perspective. The Slovene Government emphasises that the collection and the treatment of waste continues to be an economic activity carried out by third parties.

17. On 19 May 2022, the Ustavno sodišče (Constitutional Court) suspended the application of the contested provisions of the new Law on Environmental Protection, pending the delivery of its judgment in these proceedings.

18. The Ustavno sodišče (Constitutional Court) wonders if the fulfilment of EPR obligations through the establishment of a network of collective organisations charged with managing that task may constitute a SGEI. In that context, it asks whether the establishment of a not-for-profit monopoly is contrary to EU law. It inquires as to whether EU law allows Member States to decide that a given economic activity is to be pursued as a non-economic activity. If Member States may do so, are they required to lay down a transition period and/or compensate economic operators affected by that change. The Ustavno sodišče (Constitutional Court) also seeks to ascertain whether certain specific rules, such as those governing the membership of collective

[12] By Article 2 thereof, Member States were to comply with Directive 2018/851 by 5 July 2020.

[13] The Slovene Government adds that the Czech Republic and Estonia provide for a similar regime.

organisations and the activities that those bodies may engage in, comply with EU law. Finally, it has doubts as to whether a requirement that producers that are not shareholders of a relevant collective organisation must enter into contracts to manage waste with the latter complies with EU law.

19. In those circumstances, the Ustavno sodišče (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must a legal person that has the exclusive right to carry out the collective fulfilment of extended producer responsibility obligations in respect of products of the same type within the territory of the Republic of Slovenia be regarded as an undertaking entrusted with the operation of a service of general economic interest, within the meaning of Article 106(2) of the Treaty on the Functioning of the European Union (read in the light of Article 14 TFEU, Protocol No 26 on services of general interest and Articles 8 and 8a of [Directive 2008/98]), where that activity includes:

– the conclusion of contracts with the producers of certain products pursuant to which those producers entrust that legal person with the task of ensuring on their behalf the proper management of the waste resulting from those products;

– the organisation of a system for the collection and treatment of waste (the conclusion of contracts with commercial companies to carry out, on the Organisation's behalf, the collection and proper treatment of all waste resulting from products to which extended producer responsibility applies), and

– the keeping of a register of the products to which extended producer responsibility applies and which are placed on the market in the Republic of Slovenia, and the keeping of a register of the collected and treated waste resulting from the products to which extended producer responsibility applies, and the transmission of that data to the Ministry,

and where that legal person is obliged, in order to carry out that activity, to conclude contracts both with producers having extended producer responsibility and with the commercial companies that will carry out the collection and treatment of waste?

(2) Must Articles 16 and 17 of the [Charter], Articles 49, 56 and 106 TFEU, [Directive 2006/123] and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation pursuant to which the collective fulfilment of extended producer responsibility obligations in respect of products of the same type may be carried out by only one legal person in the territory of the Member State and only on a non-profit-making basis, meaning that income must not exceed actual expenditure incurred in the collective fulfilment of the extended producer responsibility obligations and that the legal person in question must use any profits solely for carrying out its activities and implementing measures for the collective fulfilment of the extended producer responsibility obligations?

(3) In the event that question 2 is answered in the negative, must Article 16 of the [Charter], Articles 49, 56 and 106 TFEU, the principles of legal certainty and of the protection of legitimate interests and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation by means of which a Member State changes the activity of the collective fulfilment of extended producer responsibility obligations in respect of products of the same type, transforming it from a regulated, market-oriented profit-making activity carried on by a

number of economic operators into an activity that only one organisation is authorised to carry on and which must be carried out on a non-profit-making basis, as described in question 2?

(4) Must the provisions of EU law referred to in question 3 be interpreted as precluding national legislation which, by reason of the entry into force of a new legislative framework for the collective fulfilment of extended producer responsibility obligations, results, by operation of law (*ex lege*), in interference in individual relationships such as to terminate all contracts concluded between the economic operators that carried on the collective fulfilment of extended producer responsibility obligations in accordance with the previous regime and the producers having extended producer responsibility obligations, and between the economic operators that carried on the collective fulfilment of extended producer responsibility obligations in accordance with the previous regime and the economic operators that collected and treated waste resulting from products in respect of which the collective fulfilment of extended producer responsibility obligations must be carried out?

(5) In circumstances where new legislation as described in questions 3 and 4 is adopted, must the principles of legal certainty and of the protection of legitimate expectations be interpreted as requiring the legislature to establish a transition period and/or to introduce a system of compensation? If so, what criteria determine the reasonableness of the transition period or the system of compensation?

(6) Must Article 16 of the [Charter], Articles 49, 56 and 106 TFEU, [Directive 2006/123] and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation pursuant to which producers that have extended producer responsibility obligations and place on the market 51% of the products of the same type to which the extended producer responsibility obligation applies are required to establish a legal person entrusted with the collective fulfilment of the extended producer responsibility obligations, and pursuant to which producers of products of the same type must, in the event that authorisation is withdrawn, establish such a legal person anew, or must the abovementioned provisions of EU law be interpreted as precluding rules pursuant to which only producers may hold a share in such legal person?

(7) Must Article 16 of the [Charter], Articles 49, 56 and 106 TFEU, [Directive 2006/123] and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation pursuant to which producers that hold a share in the legal person that carries out the collective fulfilment of extended producer responsibility obligations may not be persons that carry on the collection or treatment of waste resulting from the products to which the collective fulfilment of extended producer responsibility obligations applies in that legal person?

(8) Must Article 16 of the [Charter], Articles 49, 56 and 106 TFEU, [Directive 2006/123] and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation pursuant to which a producer that holds a share in the legal person that carries out the collective fulfilment of extended producer responsibility obligations and the legal person that carries on the collective fulfilment of extended producer responsibility obligations may not:

– have direct or indirect capital links with the person carrying on the collection or treatment of waste resulting from products to which the collective fulfilment of obligations applies in the legal person that carries on the collective fulfilment of extended producer responsibility obligations or have management or control rights in that legal person;

– have capital links or family ties with a person that holds or controls voting rights in the governing body or supervisory body of the legal person referred to in the previous indent or with that legal person's representative?

(9) Must Article 16 of the [Charter], Articles 49, 56 and 106 TFEU, [Directive 2006/123] and Articles 8 and 8a of [Directive 2008/98] be interpreted as precluding legislation pursuant to which the restrictions mentioned in questions 7 and 8 apply equally to members of the governing body of the legal person that carries on the collective fulfilment of extended producer responsibility obligations, to members of the supervisory body of that legal person and to that legal person's representative?

(10) Must Article 16 of the [Charter] and Articles 49 and 56 TFEU be interpreted as precluding legislation pursuant to which producers that have extended producer responsibility obligations and place on the market products intended for household use must without exception conclude a contract under which they entrust the legal person that has the authorisation to carry on the collective fulfilment of extended producer responsibility obligations with the task of fulfilling their obligations flowing from extended producer responsibility?'

20. Interzero, Surovina, the Czech, Netherlands and Slovene Governments, and the Commission filed written submissions. At the hearing on 11 June 2024, Interzero, Surovina, the Czech, Hungarian, Netherlands and Slovene Governments and the Commission presented oral argument and answered questions from the Court.

IV. Assessment

A. The first question

21. By its first question, the referring court seeks to ascertain whether an organisation that is made responsible for the collective fulfilment of EPR obligations may be an undertaking entrusted with a SGEI within the meaning of Article 106(2) TFEU.

22. None of the parties to the proceedings before the Court disputes that Member States enjoy a wide margin of appreciation when they designate a SGEI. The Commission observes that two conditions must be met for a service to be so designated. A Member State must formally entrust an operator with responsibility to provide a SGEI. It must also explain why that service is so different from other economic activities as to justify that designation. Subject to the referring court's verification, the Commission accepts that the establishment of the collective organisations which are the subject matter of the main proceedings may satisfy those requirements.

23. The Slovene Government explains that the operation of the system under the old Law on Environmental Protection was unsatisfactory. The economic operators responsible for ensuring compliance with EPR obligations treated an insufficient amount of packaging waste.[14] Municipal waste services were consequently required to store a significant amount of packaging waste, thereby creating risks for human health, public safety and the environment. To eliminate those

[14] The Slovene Government adds that the economic operators charged with ensuring collectively the discharge of EPR obligations were found to have breached domestic competition law by their having entered into a horizontal anti-competitive agreement.

risks, the public authorities took over the treatment of that waste and the costs associated therewith. For these reasons, the Republic of Slovenia decided to entrust responsibility for attaining EPR objectives to collective organisations which provide a SGEI.

24. For five reasons, Interzero submits that the Court should answer the first question in the negative. First, under the new Law on Environmental Protection, the collective organisations perform tasks of a purely administrative character that are not a SGEI. Second, the Slovene authorities did not adopt a formal act by which it entrusted the collective organisations with a SGEI. Third, the explanation for the inadequate treatment of a certain amount of packaging waste the municipal services collected was because the national legislation then in force exempted producers that placed less than 15 tonnes of packaging on the market per year from EPR obligations. Fourth, the new Law on Environmental Protection has established a system that is less efficient than its predecessor. Fifth, issues that had arisen from the treatment of packaging waste have been resolved to the extent that there is no longer any market failure.

25. The Czech Government is of the view that the Court need not decide if the collective organisations provide a SGEI since the national legislation falls to be assessed by reference to the Waste Framework Directive.

26. Article 14 TFEU, and Article 1 of Protocol No 26 on services of general interest ('Protocol No 26'), which purports to interpret that Treaty article, recognise that SGEIs play an essential role within the European Union. By Article 36 of the Charter, the European Union recognises and respects access to SGEIs in accordance with the Treaties. It is in that context that Article 106(2) TFEU shields SGEIs from EU law to the extent necessary to ensure that its full application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. National, regional and local authorities thus enjoy a wide discretion as to the creation, the commissioning and the organisation of such services,[15] and the exercise of that discretion may be successfully challenged only where it is exercised in a manifestly erroneous manner.[16]

27. Whilst Article 106(2) TFEU defines neither the concept of a SGEI nor the conditions under which a Member State may apply that concept, the case-law of the EU Courts furnishes three pointers in that direction.

28. First, a Member State will be deemed to exercise its discretion lawfully where it is demonstrated that market forces have failed to meet a demand that ought to be met in the public interest.[17] The Commission also endorses the presence of market failure as a pre-condition for a

[15] Protocol No 26 moreover asserts that the Treaties do not in any way affect Member States' competence to provide, to commission and to organise non-economic services of general interest.

[16] See, to that effect, the first indent of Article 1 of Protocol No 26 on services of general interest. See judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission* (C-66/16 P to C-69/16 P, EU:C:2017:999, paragraphs 69 and 70 and the case-law cited). See also judgments of 1 March 2017, *France* v *Commission* (T-366/13, EU:T:2017:135, paragraph 92 and the case-law cited) and of 1 March 2017, *SNCM* v *Commission* (T-454/13, EU:T:2017:134, paragraph 111).

[17] Advocate-General Sharpston observed that '[t]he essential characteristic of an undertaking providing a SGEI is that something is supplied whose provision serves the public good but which would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the free market in the absence of public intervention (the so-called "market failure test")': Opinion in *Farrell* (C-413/15, EU:C:2017:492, point 90). The Opinion of Advocate General Wathelet in *Comunidad Autónoma del País Vasco and Others* v *Commission* (C-66/16 P to C-69/16 P, C-70/16 P and C-81/16P, EU:C:2017:654, point 122) defended the same thesis. In a similar vein, see also the judgments of 1 March 2017, *France* v *Commission* (T-366/13, EU:T:2017:135, paragraph 123) and of 1 March 2017, *SNCM* v *Commission* (T-454/13, EU:T:2017:134, paragraph 172), where the General Court ruled that Member States can establish a SGEI where it satisfies a real public service need and market forces do not meet that demand.

Member State establishing a SGEI.[18] Where market forces fail to meet requirements pertaining to the public interest, such as the protection of the environment and of public health, with particular regard to waste management, a Member State will be justified in creating a SGEI in order to meet those needs.[19]

29. Second, a Member State that wishes to establish a SGEI must also respect certain criteria that may be considered as having a more formal character. A public authority must entrust operators with the performance of a comprehensive and compulsory mission in the public interest.[20] The law provides considerable flexibility as to the status of the act by which a SGEI is entrusted: it may consist of a bundle of measures[21] or take the form of a contract, but it must be identifiable.[22] That an operator was involved in the process that led it to being charged with the performance of a SGEI does not prevent an act of a public authority entrusting that task to it.[23] A Member State must also indicate why it takes the view that the specific nature of the relevant activity is so different that it may be characterised as a SGEI. These requirements facilitate an objective review of any manifest error that a Member State may make in the exercise of its discretion to establish a SGEI.[24] Member States must therefore clearly set out the obligations that they entrust to undertakings, which presupposes a precise definition of the nature, the duration and the scope of those responsibilities.[25]

30. Third, Article 106(2) TFEU makes it clear that 'undertakings' perform SGEIs. Whilst the Treaty does not define the concept of an undertaking, the case-law has consistently held that it encompasses any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed.[26] Economic activity consists in the offer of goods and services for remuneration. Remuneration constitutes consideration for the provision of goods and/or services.[27] Once goods or services are provided in exchange for remuneration, it is irrelevant whether the provider operates on a not-for-profit basis,[28] or enjoys a legal monopoly.[29]

18 See paragraph 14 of the Commission Communication on Services of General Economic Interest in Europe (OJ 2001 C 17, p. 4), p. 3 of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'A Quality Framework for Services of General Interest in Europe', of 20 December 2011 (COM(2011) 900 final), and paragraph 48 of the 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 (OJ 2012, C 8, p. 4; 'the Communication on the application of the State aid rules to SGEIs'). For an analysis of the case-law on the requirement of a market failure in the context of SGEIs, see Szyszczak, E., *Services of General Economic Interest, State Aid and State Measures Affecting Competition*, Journal of European Competition Law & Practice, 2017, vol. 8, No 10, pp. 680-683. See also Collins, A.M., Martínez Navarro, M., *Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango*, Journal of European Competition Law & Practice, 2021, vol. 12, No 5, pp. 384-386.

19 See, to that effect, judgments of 10 November 1998, *BFI Holding* (C-360/96, EU:C:1998:525, paragraph 52); of 23 May 2000, *Sydhavnens Sten & Grus* (C-209/98, EU:C:2000:279, paragraph 75); and of 19 December 2019, *Engie Cartagena* (C-523/18, EU:C:2019:1129, paragraph 33).

20 See, to that effect, judgments of 21 March 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs* (127/73, EU:C:1974:25, paragraph 20); of 12 February 2008, *BUPA and Others* v *Commission* (T-289/03, EU:T:2008:29, paragraph 172); and of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 78).

21 Judgment of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 79).

22 See, to that effect, paragraph 52 of Communication on the application of the State aid rules to SGEIs.

23 Judgment of 15 June 2005, *Olsen* v *Commission* (T-17/02, EU:T:2005:218, paragraph 188).

24 Judgment of 12 February 2008, *BUPA and Others* v *Commission* (T-289/03, EU:T:2008:29, paragraph 172).

25 Judgment of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 79). See also paragraph 52 of Communication on the application of the State aid rules to SGEIs.

26 Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 21 and the case-law cited).

27 Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraphs 45 and 47, and the case-law cited).

28 Judgments of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 27) and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 46).

29 Judgment of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission* (T-696/17, EU:T:2019:652, paragraph 98).

31. I propose to examine the first question in the light of these observations.

32. The Slovene Government argues that, under the old Law on Environmental Protection, the economic operators responsible for the fulfilment of EPR obligations failed to ensure that the packaging the municipal waste services collected was treated correctly, thereby creating risks for the environment and human health that required that government's intervention. Should the referring court confirm the truth of that account of events, it would appear to demonstrate the presence of a market failure sufficient to justify Slovenia's decision to create a SGEI to address an unsatisfied public need.

33. It is for the referring court to verify if the authorisations under which the Slovene authorities charged the collective organisations with responsibility to ensure the collective fulfilment of EPR obligations with respect to discrete categories of products are acts that entrust them with the performance of a comprehensive and compulsory mission in the nature of a SGEI. In so doing, that court must also examine whether the authorisations at issue contain adequate reasons for their adoption and define with sufficient precision the nature, duration and scope of the public service obligations that they entrust to the collective organisations.

34. According to the order for reference, the collective organisation responsible for the fulfilment of EPR obligations for a category of products charges a fee calculated by reference to the cost of its provision of those services, including the organisation of tenders for waste collection and treatment and ensuring that producers fulfil their EPR obligations. That fee thus constitutes remuneration for the provision of those services.[30] By reference to point 30 of the present Opinion, if established, those facts demonstrate that the collective organisations envisaged under the new Law on Environmental Protection are undertakings for the purposes of Article 106(2) TFEU.

35. I therefore advise the Court to answer the first question that Article 106(2) TFEU is to be interpreted to the effect that an organisation made responsible for the collective fulfilment of EPR obligations may be an undertaking entrusted with a SGEI where there is a legitimate public interest, such as the protection of the environment or of public health, that market forces have failed to meet adequately; the national authorities have clearly entrusted it with a public service mission by way of acts that contain adequate reasons for their adoption and it is shown to be engaged in economic activity.

B. The second question

36. By its second question, the referring court asks, in essence, whether entrusting responsibility to fulfil EPR obligations to a single organisation that operates on a not-for-profit basis is contrary to Articles 49, 56 and 106(2) TFEU, Articles 16 and 17 of the Charter, the Services Directive or Article 8a of the Waste Framework Directive.

37. Interzero, supported by Surovina, submits that entrusting such a responsibility to an organisation which carries out purely administrative tasks is contrary to Article 106(2) TFEU. A bar on other operators carrying out administrative tasks restricts the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU). Should the Slovene

[30] The Court has suggested that a private, not-for-profit organisation, approved by the public authorities, which received contributions from producers in exchange for ensuring the fulfilment of the latter's EPR obligations, was an undertaking: judgment of 21 October 2020, *Eco TLC* (C-556/19, EU:C:2020:844, paragraphs 31 to 51).

Government invoke environmental protection as an overriding reason in the public interest to justify that decision, Interzero and Surovina submit that it has not shown that the measures adopted are indispensable and proportionate to achieve that goal. According to Surovina, less restrictive measures, such as the creation of a specific entity to monitor the activities of the economic operators charged with meeting EPR obligations, are available to the Slovene authorities. Interzero and Surovina further emphasise that the new Law on Environmental Protection will require them to cease activity in Slovenia. For similar reasons, they claim that law is also contrary to the Services Directive.

38. To the extent that the Services Directive may apply, the Commission submits that the system of complete harmonisation it establishes renders an examination of the second question in the light of the freedom of establishment and the freedom to provide services otiose. In the Commission's view, while entrusting the tasks in question to a single organisation may be a quantitative/territorial restriction and/or reserve access to activities within the meaning of Article 15(2)(a) and (d) of the Services Directive, the obligation that such an organisation operate on a not-for-profit basis seems to fall outside of the scope of that measure, such that the Court must assess its compatibility with the freedom of establishment. The Commission recalls that, under Article 15(2) of the Services Directive, any requirements imposed on access to or the exercise of a service activity must be non-discriminatory, necessary to protect an overriding reason relating to the public interest and proportionate.[31] The rules under consideration before the referring court do not discriminate on grounds of nationality and seek, inter alia, to protect the environment, a public interest objective. Although it is for the referring court to assess the proportionality of those rules, the Commission doubts whether the same result could have been achieved without the organisations entrusted with the performance of the SGEI being conferred with exclusive rights. The obligation to perform those tasks on a not-for-profit basis may also facilitate the achievement of environmental objectives. Whilst the conditions of Article 15(3) of the Services Directive do not apply to SGEIs where those conditions may obstruct the performance, in law or in fact, of the tasks assigned to them, the Commission submits that there is nothing to suggest that Article 15(4) of the Services Directive applies in the present circumstances.

39. The Czech, Hungarian, Netherlands and Slovene Governments submit that Member States enjoy a wide margin of appreciation should they decide to entrust the fulfilment of EPR obligations to one or to several organisations required to operate on a not-for-profit basis.[32] On the proportionality of the new Law on Environmental Protection, the Slovene Government contends that, in contrast with the deficiencies of the previous regime, the system it establishes is both effective and economically efficient, thereby ensuring a high level of environmental protection. It further observes that the new regime applies only to products intended for domestic use. The Netherlands Government submits that it may be more efficient and simpler, in a small country, to entrust the fulfilment of EPR obligations to a single organisation, inter alia, in order to avoid the 'free-rider' problem that can arise where certain producers seek to do the very minimum to meet their EPR obligations.

40. In so far as its domestic rules may restrict the freedom of establishment and the freedom to provide services, the Slovene Government submits that those restrictions are justified by the goal of environmental protection, an overriding reason relating to the public interest. As a

[31] Article 15(3) of the Services Directive. The Commission also considers that the rules governing a SGEI must be necessary to exercise the particular public service task that an undertaking is entrusted to perform and be proportionate.

[32] The Hungarian Government adds that the Waste Framework Directive does not oblige Member States to allow producers to meet their EPR obligations by the collection and treatment of waste themselves.

consequence, the answer to the second question does not require the Court to examine the measures before the referring court in the light of Articles 16 and 17 of the Charter or of the Services Directive.

41. Notwithstanding the wide discretion available to Member States, the Court's case-law on Article 106(2) TFEU permits exemptions from the application of the Treaty rules provided that such exemptions are necessary for the performance of particular tasks assigned to an undertaking entrusted with a SGEI and are proportionate to achieve the public interest goal pursued.[33] It is sufficient for a Member State to demonstrate that, in the absence of the grant or the maintenance of the rights at issue, it would be impossible for the undertaking charged with the performance of the tasks assigned or entrusted to it to carry them out under economically acceptable conditions.[34] The Court has also ruled that Article 106(2) TFEU permits Member States to confer on undertakings they entrust with the operation of SGEIs exclusive rights which restrict, or even exclude, competition, provided that the grant of such rights is necessary to ensure the performance of the tasks assigned.[35]

42. In the present case Interzero and Surovina object to the conferral of exclusive rights on a single organisation with respect to waste connected with discrete categories of products. They also take issue with the obligation that such organisations must operate on a not-for-profit basis.

43. It follows from the case-law cited in point 41 of the present Opinion that Member States may grant exclusive rights, and thereby eliminate all competition in a given market, provided that that grant is necessary to ensure the performance of certain tasks in the public interest. The documents in the Court's file indicate that the Slovene Government entrusted the performance of such tasks to a single organisation, operating on a not-for-profit basis, precisely because the previous regime, under which a number of profit-seeking undertakings competed to provide those services, failed to perform those tasks to its satisfaction. The coexistence of several economic operators led to 'cherry-picking'[36] and prevented monitoring of the system's operation. The profit motive thus acted to obstruct, rather than to further, the goal of ensuring adequate environmental protection. The Slovene Government further submits that its decision to entrust carrying out the tasks in question to a single organisation with respect to each category of products contributes to ensuring that all of the waste connected with those products is collected and treated in a safe and environmentally friendly manner. It is for the referring court to verify whether these arguments are supported by evidence or whether the Slovene Government has manifestly less restrictive means available to it which would allow it to attain a comparable level of protection of the environment and of public health.

[33] See, to that effect, judgments of 8 March 2017, *Viasat Broadcasting UK* v *Commission* (C-660/15 P, EU:C:2017:178, paragraph 29); of 19 March 2019, *Inpost Paczkomaty and Inpost* v *Commission* (T-282/16 and T-283/16, EU:T:2019:168, paragraph 115); and of 8 September 2021, *Achema and Achema Gas Trade* v *Commission* (T-193/19, EU:T:2021:558, paragraph 102).

[34] See, to that effect, judgments of 25 June 1998, *Dusseldorp and Others* (C-203/96, EU:C:1998:316, paragraph 65); of 3 March 2011, *AG2R Prévoyance* (C-437/09, EU:C:2011:112, paragraph 76); and of 8 March 2017, *Viasat Broadcasting UK* v *Commission* (C-660/15 P, EU:C:2017:178, paragraph 30).

[35] Judgments of 19 May 1993, *Corbeau* (C-320/91, EU:C:1993:198, paragraph 14) and of 27 April 1994, *Almelo* (C-393/92, EU:C:1994:171, paragraph 46).

[36] According to the Slovene Government, economic operators focused on carrying out more lucrative waste management activities to the detriment of those that were less profitable (for instance, services provided in rural areas).

44. Article 1(2) and (3) of the Services Directive, read in combination with recital 8 thereof, exclude from the scope of its application SGEIs that were reserved to public or private entities at the date of its entry into force.[37] Since the new Law on Environmental Protection was adopted after the Services Directive entered into force, the latter's provisions apply to the facts of the case pending before the Ustavno sodišče (Constitutional Court). The Services Directive may, nonetheless, have little or no bearing on the answer to the second question for the following reasons. To the extent to which entrusting performance of the relevant tasks for each category of products to one organisation may be a requirement that reserves access to activities to particular providers for the purposes of Article 15(2)(d) of the Services Directive, that requirement must be justified by an overriding reason relating to the public interest[38] and be proportionate.[39] An analysis of the second question by reference to the freedom of establishment would not, in my view, result in a different answer from that proposed in points 41 to 43 of the present Opinion. In addition, Article 15(2) and (3) of the Services Directive apply to SGEIs only to the extent that those provisions do not obstruct the performance, in law or in fact, of the particular tasks assigned to undertakings that provide SGEIs.[40] As for the freedom to provide services, Article 17, subparagraph 1, of the Services Directive establishes that requirements concerning access to a service activity set out in Article 16 thereof do not apply to SGEIs.

45. In a field that has been the subject of exhaustive harmonisation at EU level, the compatibility of national measures with EU law falls to be assessed in the light of those harmonising provisions and not by reference to the Treaties.[41] A restriction on the freedom of establishment or the freedom to provide services that comes within the scope of the Services Directive, such as a measure that confers responsibility upon a single organisation to carry out certain tasks, need not be examined in the light of Articles 49 and 56 TFEU.[42] To the extent that the Services Directive does not govern a legal requirement to operate on a not-for-profit basis, its compliance with EU law falls to be assessed by reference to the internal market freedoms.

46. Measures that prohibit, impede or render less attractive the exercise of freedom of establishment are considered as restrictions thereon.[43] National legislation that reserves access to an economic activity to not-for-profit entities may restrict the freedom of establishment in so far as it hinders the exercise of that freedom by profit-seeking entities. Such restrictions on freedom of establishment are permitted only where they are justified by an overriding reason relating to the public interest and comply with the principle of proportionality.[44]

47. It is settled case-law that the objective of environmental protection, which ranks among one of the European Union's essential objectives,[45] constitutes an overriding reason in the general interest that may justify restrictions on the exercise of the freedom of establishment.[46] The

37 Judgment of 7 November 2018, *Commission* v *Hungary* (C-171/17, EU:C:2018:881, paragraphs 41 to 43). Article 15(4) and Article 17, subparagraph 1, of the Services Directive support the Court's interpretation since those provisions would otherwise appear to be purposeless.

38 As defined in the Court's case-law: see, to that effect, Article 4(8) of the Services Directive, read in conjunction with recital 40 thereof.

39 Article 15(3) of the Services Directive.

40 Article 15(4) of the Services Directive.

41 Judgment of 11 June 2020, *KOB* (C-206/19, EU:C:2020:463, paragraph 30 and the case-law cited).

42 See to that effect, judgments of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 118) and of 26 June 2019, *Commission* v *Greece* (C-729/17, EU:C:2019:534, paragraphs 52 and 54).

43 Judgments of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 46 and the case-law cited) and of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 61).

44 Judgment of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 64 and the case-law cited).

45 Judgment of 12 November 2019, *Commission* v *Ireland (Derrybrien Wind Farm)* (C-261/18, EU:C:2019:955, paragraph 115).

46 Judgments of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562, paragraph 71) and of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448, paragraph 69).

Slovene Government submits that the profit incentive that the old Law on Environmental Protection facilitated prevented the goal of adequate environmental protection from being attained. It is a matter for the referring court to assess whether, by reference to the facts adduced before it, there were less restrictive means available to the Slovene authorities by which they could have achieved that aim.

48. It is unnecessary for the Court to consider any limitations of the exercise of the rights and freedoms provided for in Articles 16 and 17 of the Charter in a context where it is sufficient for that purpose to examine the lawfulness of those restrictions by reference to Articles 49 and 56 TFEU.[47] In any event, Article 52(1) of the Charter provides that limitations may be imposed on the exercise of the rights and freedoms the Charter recognises as long as those limitations are provided for by law, respect the essence of the rights and freedoms so protected and, subject to the principle of proportionality, necessarily and genuinely meet objectives of general interest that the European Union recognises or the need to protect the rights and freedoms of others. Article 16 of the Charter protects the freedoms to exercise an economic or commercial activity, to contract and to compete freely.[48] These freedoms are, nevertheless, not absolute and their exercise may equally be subject to a range of interventions by public authorities, including limitations taken in the public interest.[49] Neither is the right to property that Article 17(1) of the Charter recognises absolute, and its exercise may also be subject to restrictions justified by objectives of general interest that do not constitute, in relation to the aim pursued, a disproportionate and unacceptable interference that impairs the very substance of the right guaranteed.[50] I am accordingly of the opinion that there is no necessity for the Court to interpret Articles 16 and 17 of the Charter in order to reply to the second question since that exercise would not result in an answer different to that which follows from its analysis of that question in the light of Article 106(2) TFEU.

49. Finally, the second paragraph of Article 8a(5) of the Waste Framework Directive requires Member States, where multiple organisations coexist, to appoint an independent body or public authority to oversee the implementation of EPR obligations.[51] That provision appears to have nothing to say with regard to Member States' powers to entrust the fulfilment of EPR obligations in respect of a given category of products to a single organisation.

50. I thus advise the Court to answer the second question to the effect that Articles 49, 56 and 106(2) TFEU, Articles 16 and 17 of the Charter, the Services Directive and Article 8a of the Waste Framework Directive do not preclude a Member State entrusting responsibility to fulfil EPR obligations to a single organisation operating on a not-for-profit basis, where those measures seek to ensure an adequate level of protection of the environment and of public health and there are no less restrictive means available to achieve that goal.

47 Judgments of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 60) and of 20 December 2017, *Global Starnet* (C-322/16, EU:C:2017:985, paragraph 50).

48 Judgment of 16 July 2020, *Adusbef and Others* (C-686/18, EU:C:2020:567, paragraph 82).

49 Ibid., paragraph 83.

50 Ibid., paragraph 85.

51 It provides that '[w]here, in the territory of a Member State, multiple organisations implement extended producer responsibility obligations on behalf of producers of products, the Member State concerned shall appoint at least one body independent of private interests or entrust a public authority to oversee the implementation of extended producer responsibility obligations'.

C. The third, fourth and fifth questions

51. By its third, fourth and fifth questions, which may be examined together, the referring court asks whether a change of a legal regime under which a profit-seeking activity carried out by several economic operators is transformed into an activity entrusted to a single, not-for-profit, organisation, without providing for a transition period and/or the payment of adequate compensation for any losses those economic operators may have sustained as a consequence of that change, is contrary to the principles of the protection of legitimate expectations and of legal certainty.

52. Whilst Interzero and Surovina acknowledge that economic operators cannot expect that the national legislation will not be amended, [52] they submit that, in the circumstances disclosed in the order for reference, the Court's case-law concerning the protection of legitimate expectations and legal certainty requires Member States to introduce a transition period and to afford adequate compensation to economic operators affected by such changes.

53. The Slovene Government and the Commission contend that Member States may adopt legislation with the consequence that the carrying on of a for-profit activity by a number of economic operators may be entrusted to a single organisation, operating on a not-for-profit basis. The Slovene Government submits that the principle of legal certainty is respected once the rules adopted for that purpose are clear. The principle of legitimate expectations is also respected because legislative changes of that kind have been foreseeable since the enactment of the Waste Framework Directive. Since the legislative changes were lawful there was no need to compensate economic operators for any losses they may have sustained. Notwithstanding the foregoing, the Commission does not exclude that, in certain cases, it may be necessary for a Member State to afford operators an appropriate transition period in order to allow them to adapt to a new regime. Whether the circumstances before the referring court constitute one of those cases is a matter for it to verify.

54. The principles of legal certainty and the protection of legitimate expectations form part of the European Union's legal order. Member States must respect those principles when they give effect to European Union directives. [53]

55. The principle of legal certainty does not prevent Member States from exercising their powers to amend legislation. [54] According to settled case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that rules of law are clear and precise and that their application is predictable, especially where those rules may have negative consequences for affected individuals and undertakings. [55] That principle requires that legislation is drafted so as to enable persons concerned thereby to know precisely the extent of any obligations that it may impose on them and to ascertain unequivocally their rights and obligations thereunder so as to enable them to take steps to protect themselves from such consequences as may flow therefrom. [56]

[52] Interzero accepts that, by 2023, economic operators could have contemplated that national legislation would, as a consequence of the entry into force of the Waste Framework Directive, be amended in certain respects.

[53] Judgment of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539, paragraph 43).

[54] Ibid., paragraph 49.

[55] Judgment of 11 July 2019, *Agrenergy and Fusignano Due* (C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 29 and the case-law cited).

[56] Ibid., paragraph 30.

56. The principle of the protection of legitimate expectations aims to ensure that, where a national authority gives precise assurances to an economic operator, that operator may rely upon those assurances as against that authority. In the absence of assurances of that nature, where national authorities may choose to alter a state of affairs at any time, economic operators do not have a legitimate expectation that that state of affairs will continue to exist. [57]

57. The principles of legal certainty and the protection of legitimate expectations do not operate so as to prevent a Member State from amending a law with immediate effect without making any transitional arrangements. [58] The Court's case-law does not completely exclude the possibility that economic operators that have made costly investments in order to comply with a legislative scheme may invoke the protection of legitimate expectations where that scheme is withdrawn before a date that has already been announced without affording those economic operators time to adapt to the consequences of that withdrawal. [59]

58. It is ultimately for the referring court to verify the circumstances that surrounded the enactment of the national legislation at issue in the case before it. I nonetheless observe that, in so far as the new Law on Environmental Protection entrusts responsibility for the fulfilment of EPR obligations to a single organisation operating on a not-for-profit basis, it appears to be expressed in clear and precise terms. Nor does there appear to be any indication in the Court's file that a competent national authority gave any assurances to economic operators that the old Law on Environmental Protection would not be repealed or that it would remain in force for any period of time.

59. I thus advise the Court to answer the third, fourth and fifth questions to the effect that the principles of the protection of legitimate expectations and legal certainty do not prevent a change of a legal regime under which a profit-seeking activity carried out by several economic operators is transformed into an activity entrusted to a single organisation operating on a not-for-profit basis without providing for a transition period and/or the payment of adequate compensation for any losses those economic operators may have sustained as a consequence of that change.

D. The sixth question

60. The sixth question asks whether national legislation under which producers that place at least 51% of a certain category of products on the market must set up an organisation that is responsible for meeting EPR obligations ('the 51% rule') and that only such producers can be shareholders of that organisation ('the shareholders' rule') is contrary to Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive.

61. Interzero submits that the 51% rule restricts the freedom to conduct a business that Article 16 of the Charter guarantees. There is no reason why a collective organisation to ensure the implementation of EPR obligations must be established by producers of certain products, particularly since those producers are not experts in waste management. Interzero also claims that the 51% rule amounts to indirect discrimination on the grounds of nationality since domestic undertakings are a clear majority of the producers that place consumer products on the market in Slovenia.

[57] Judgment of 27 June 2024, *Gestore dei Servizi Energetici* (C-148/23, EU:C:2024:555, paragraph 54).

[58] Judgment of 9 June 2016, *Wolfgang und Dr. Wilfried Rey Grundstücksgemeinschaft GbR* (C-332/14, EU:C:2016:417, paragraph 56).

[59] Judgments of 10 September 2009, *Plantanol* (C-201/08, EU:C:2009:539, paragraph 52) and of 22 September 2022, *Admiral Gaming Network and Others* (C-475/20 to C-482/20, EU:C:2022:714, paragraph 64).

62. The Slovene Government submits that the 51% rule aims to ensure that a single collective organisation is created with responsibility for waste connected with each category of consumer product.

63. The Commission submits that the 51% rule is a restriction on the freedom of establishment in so far as it may dissuade producers from establishing themselves in Slovenia.[60] Even though that rule may be justified by reference to environmental protection, the national court must verify that the national legislation is proportionate to achieve that goal and there are no less restrictive arrangements as would guarantee responsibility for the management of waste in connection with each product category. The Commission suggests that the shareholders' rule may be disproportionate, although it accepts that that is a matter for the referring court to determine.

64. Subject to the following considerations, I advise the Court that the answer to the sixth question may be found through the application of the observations made at points 41 to 49 of the present Opinion.

65. First, in so far as the 51% rule and the shareholders' rule appear to constitute requirements that relate to the shareholding of a company for the purposes of Article 15(2)(c) of the Services Directive, I refer to the considerations in point 44 of the present Opinion. For these requirements to be compatible with the Services Directive, they must be non-discriminatory, necessary to achieve an overriding reason of public interest and proportionate.[61]

66. Although Interzero contends that the 51% rule constitutes a form of 'reverse discrimination' on grounds of nationality, it does not dispute that, from a legal perspective, that rule is non-discriminatory since it applies equally to all producers, irrespective of their nationality. That more domestic producers than producers in other Member States may be active on a given market is a circumstance that may change over time and therefore does not make the 51% rule discriminatory. As for the necessity to attain an overriding reason of general interest, the 51% rule seeks to ensure that only one collective organisation can be set up in respect of each category of products with the aim of furthering environmental protection. The shareholders' rule also seeks to achieve that aim through ensuring that producers assume full organisational responsibility for the management of waste in connection with their products. As for the application of the principle of proportionality, the parties to the present proceedings have not suggested any less restrictive arrangements that might achieve the level of environmental protection to which the Slovene authorities aspire.

67. Second, as point 45 of the present Opinion indicates, where a restriction on the freedom of establishment or the freedom to provide services falls within the scope of the Services Directive, there is no need to examine its compliance with the internal market provisions of the TFEU. The 51% rule in any event falls to be analysed from the perspective of the freedom of establishment. Any obstacle to operators established in other Member States that may wish to offer their services in order to ensure the collective fulfilment of EPR obligations arises as a consequence of conferring a SGEI on a single organisation for each category of products. It is not, therefore, a consequence of the 51% rule. The 51% rule may nevertheless render less attractive the possibility for producers to establish themselves in Slovenia, thereby constituting a restriction on the freedom of establishment.[62] The shareholders' rule constitutes a further restriction on the freedom of establishment since it prevents other undertakings from having a financial interest in

[60] The Commission had submitted that the 51% rule restricted the freedom to provide services but abandoned that claim at the hearing.

[61] See Article 15(3) of the Services Directive.

[62] See the case-law cited at point 45 of the present Opinion.

collective organisations.[63] It does not follow that either of these rules are contrary to EU law. As I observe at points 46 and 47 of the present Opinion, the imposition of such restrictions upon the freedom of establishment may be justified by overriding reasons of public interest, which include the protection of the environment and of public health, subject always to respect for the principle of proportionality, which is a matter for the referring court to verify.

68. Third, the parties to the proceedings before the Court have not identified any provision of the Waste Framework Directive which might be an obstacle to the application of the 51% rule. Both that rule and the shareholders' rule appear to aim at ensuring that producers assume financial and organisational responsibility for the waste management stage of their products' life cycle, justifications which Article 8(1), fourth paragraph, of the Waste Framework Directive permits.

69. Fourth, in view of the considerations in point 48 of the present Opinion, it appears that any assessment of these rules by reference to Article 16 of the Charter may not be indispensable and, in any event, would not lead to a different outcome in the circumstances of this reference for a preliminary ruling.

70. I thus advise the Court to answer the sixth question to the effect that Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive do not preclude national legislation under which producers that place on the market at least 51% of a certain category of products must set up an organisation responsible for ensuring the fulfilment of EPR obligations and that only such producers can be shareholders of that organisation.

E. The seventh, eighth and ninth questions

71. The seventh, eighth and ninth questions, which may be answered together, seek to ascertain whether national legislation that prevents shareholders of collective organisations from carrying out waste collection and waste treatment activities, from holding shares in any operators engaged in those activities, and which imposes the same prohibition on the members of the governing and supervisory bodies of those collective organisations ('the conflict of interest rules'), is contrary to Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive.

72. Interzero considers that the objective to avoid conflicts of interest could have been achieved by less restrictive means, such as by prohibiting collective organisations from entering into contracts with operators in which they have a financial interest.

73. The Slovene Government submits that the conflict of interest rules are necessary to prevent such conflicts arising as between collective organisations and operators active in waste collection and treatment with consequential negative consequences for the performance of the tasks assigned to the former. The Czech Government agrees and points out that the prevention of conflicts of interest between collective organisations and waste collection and waste treatment operators is among the objectives the Waste Framework Directive pursues.

74. The Commission accepts that a prohibition on shareholders of a collective organisation holding any investment in waste collection and waste treatment operators appears to be an appropriate restriction in order to avoid conflicts of interest.

[63] See, to that effect, judgment of 16 December 2010, *Commission* v *France* (C-89/09, EU:C:2010:772, paragraphs 44 to 49).

75. The principles set out in points 41 to 49 and 64 to 69 of the present Opinion assist in providing an answer to the seventh, eighth and ninth questions, subject to the following considerations as concerns the application of the Services Directive.[64]

76. In so far as the conflict of interest rules are requirements that relate to the shareholding of a company within the meaning of Article 15(2)(c) of the Services Directive, they must be non-discriminatory, necessary to achieve an overriding reason of public interest and proportionate.[65] The conflict of interest rules appear to be appropriate to secure the purpose for which they were adopted. They ultimately seek to ensure, inter alia, environmental protection, by avoiding the risk that tenderers that are not the most economically and/or environmentally efficient would be chosen on grounds of commercial considerations or connections. It is for the referring court to verify, in the light of the arguments put forward by the parties, whether there are less restrictive means available whereby Slovenia may achieve that goal.

77. I thus advise the Court to answer the seventh, eighth and ninth questions to the effect that Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive do not preclude national legislation that prevents shareholders of collective organisations from carrying out waste collection and waste treatment activities, from holding shares in any operators engaged in those activities, and which imposes the same prohibition on the members of the governing and supervisory bodies of the collective organisations, provided that there are no less restrictive means to prevent conflicts of interest that would afford the same level of protection for the environment and for public health.

F. The tenth question

78. The referring court's tenth question asks whether the obligation on producers that are not shareholders of a collective organisation to enter into contracts with the latter in order to meet their EPR obligations is contrary to Articles 49 and 56 TFEU and Article 16 of the Charter.

79. Interzero argues that that obligation is a restriction on the freedom to conduct a business that Article 16 of the Charter guarantees, is not justified by an overriding reason relating to the public interest and is, in any event, disproportionate because producers ought to have the choice to fulfil their EPR obligations by the creation of their own organisations or by making appropriate contracts with organisations of their choice.

80. The Netherlands Government considers that such an obligation may avoid 'free-riding' by certain producers that seek to do the minimum required to fulfil their EPR obligations.

81. The Commission submits that this obligation is a restriction on the freedom to provide services guaranteed by Article 56 TFEU and the freedom to conduct a business under Article 16 of the Charter. Whilst it appears to pursue the goal of, inter alia, environmental protection, the Commission invites the referring court to verify that there are no less restrictive alternative means of achieving that goal.

[64] As those points of the present Opinion indicate, it is unnecessary to conduct a separate examination of those provisions by reference to the internal market provisions of the TFEU or the Charter. I also observe that the parties to the proceedings before the Court have not identified any provision of the Waste Framework Directive that would prevent the adoption of the conflict of interest rules.

[65] See Article 15(3) of the Services Directive. That is without prejudice to the possibility of invoking Article 15(4) of the Services Directive in the context of SGEIs.

82. In my view, the answer to the tenth question is closely linked to that which I propose the Court gives to the second. If EU law allows Member States to entrust responsibility to ensure the fulfilment of EPR obligations to a single collective organisation, it follows that producers that are not shareholders of a collective organisation will be required to enter into contracts with that organisation as it will be the only lawful means whereby they can meet their EPR obligations.

83. I thus advise that the Court answer the tenth question to the effect that where EU law allows Member States to entrust responsibility for ensuring the fulfilment of EPR obligations to a single collective organisation, producers that are not shareholders of that organisation may be obliged to enter into a contract with the latter in order to meet their EPR obligations.

V. Conclusion

84. I therefore propose that the Court answer the questions referred for a preliminary ruling by the Ustavno sodišče (Constitutional Court, Slovenia) as follows:

(1) Article 106(2) TFEU is to be interpreted to the effect that an organisation made responsible for the collective fulfilment of EPR obligations may be an undertaking entrusted with a SGEI where there is a legitimate public interest, such as the protection of the environment or of public health, that market forces have failed to meet adequately; the national authorities have clearly entrusted it with a public service mission by way of acts that contain adequate reasons for their adoption; and it is shown to be engaged in economic activity.

(2) Articles 49, 56 and 106(2) TFEU, Articles 16 and 17 of the Charter, Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market ('the Services Directive') and Article 8a of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ('the Waste Framework Directive') do not preclude a Member State entrusting responsibility to fulfil EPR obligations to a single organisation operating on a not-for-profit basis, where those measures seek to ensure an adequate level of the protection of the environment and of public health and there are no less restrictive means available to achieve that goal.

(3) The principles of the protection of legitimate expectations and legal certainty do not prevent a change of a legal regime under which a profit-seeking activity carried out by several economic operators is transformed into an activity entrusted to a single organisation operating on a not-for-profit basis without providing for a transition period and/or the payment of adequate compensation for any losses those economic operators may have sustained as a consequence of that change.

(4) Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive do not preclude national legislation under which producers that place on the market at least 51% of a certain category of products must set up an organisation responsible for ensuring the fulfilment of EPR obligations and that only such producers can be shareholders of that organisation.

(5) Articles 49 and 56 TFEU, Article 16 of the Charter, the Services Directive and the Waste Framework Directive do not preclude national legislation that prevents shareholders of collective organisations from carrying out waste collection and waste treatment activities, from holding shares in any operators engaged in those activities, and which imposes the

same prohibition on the members of the governing and supervisory bodies of the collective organisations, provided that there are no less restrictive means to prevent conflicts of interest that would afford the same level of protection for the environment and for public health.

(6) Where EU law allows Member States to entrust responsibility for ensuring the fulfilment of EPR obligations to a single collective organisation, producers that are not shareholders of that organisation may be obliged to enter into a contract with the latter in order to meet their EPR obligations.