Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 24 September 2020[1]

Joined Cases C-434/19 and C-435/19

Poste Italiane SpA
v
Riscossione Sicilia SpA agente riscossione per la provincia di Palermo e delle altre provincie siciliane (C-434/19)
and
Agenzia delle entrate – Riscossione
v
Poste Italiane SpA (C-435/19),
intervener:
Poste Italiane SpA – Bancoposta

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Competence – State aid – Abuse of a dominant position – Undertaking benefiting from special or exclusive rights granted by the Member States – Services of general economic interest (SGEIs) – Management of the service for using post-office current accounts for collecting the municipal tax on immovable property – Fees determined unilaterally by the recipient undertaking)

1. In Italy, from 1992 to 2011, taxpayers subject to the municipal tax on immovable property (imposta comunale sugli immobili; 'the ICI') paid that tax to agents entrusted with its collection ('agents') which, prior to October 2006, were private entities.[2]

2. Payment had to be made either in cash or by deposit into a post-office current account that agents were required to open at any branch of Poste Italiane SpA.[3] Post Italiane charged account holders a fee on each payment transaction.

3. The Corte suprema di cassazione (Supreme Court of Cassation, Italia) asks whether the 'statutory monopoly' regime established in favour of Poste Italiane for managing the service for payment of the ICI into post-office current accounts constitutes State aid contrary to Articles 106 and 107 TFEU. It also wishes to ascertain whether that regime is compatible with Article 102 TFEU.

1 Original language: Spanish.

2 From 1 October 2006, the collection of taxes was entrusted exclusively to the 'Agenzia delle entrate', a State entity. The 'Agenzia delle entrate-Riscossione', a public body which took over tax collection functions and was empowered to act on behalf of local (regional, provincial and municipal) authorities, was created in 2017.

3 Poste Italiane SpA ('Poste Italiane') is a company governed by private law with a majority public shareholding that was formed as a result of the process of converting the Amministrazione autonoma delle Poste e delle Telecomunicazioni (Autonomous Post and Telecommunications Administration) into a public economic entity and, later, a public limited company.

I. Legislative framework

A. EU law

4. Article 14 TFEU states:

'Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services'.

5. Article 102 TFEU provides:

'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

6. Article 106(1) and (2) TFEU state:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'

7. Article 107(1) TFEU reads:

'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

8. Article 108(3) TFEU provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

B. National law

1. Rules applicable to post-office current accounts

(a) Law No 662 of 1996[4]

9. According to Article 2 thereof:

'18. … As from 1 January 1997, … Poste Italiane may lay down fees payable by post-office account holders. …

19. Post-office and payment services for which a statutory monopoly regime is not expressly provided for in the regulations in force shall be provided by the undertaking Poste Italiane and other operators on a freely competitive basis. … Poste Italiane shall be required to keep separate accounts, distinguishing in particular between costs and charges connected with services provided under a statutory monopoly regime and those relating to services provided on a freely competitive basis.

20. As from 1 April 1997, prices for the services referred to in paragraph 19 shall be fixed, including by contract, by the undertaking Poste Italiane, taking into account the requirements of customers, the characteristics of demand and the need to preserve and develop traffic volumes …'

(b) Decree of the President of the Republic No 144 of 2001[5]

10. In accordance with Article 3(1) thereof, 'unless otherwise provided for in this Decree, relations with customers and post-office current accounts shall be governed by contract, due regard being had to the provisions of the Civil Code and of special laws'.

4 Legge 23 dicembre 1996, n. 662 – Misure di razionalizzazione della finanza pubblica (Law No 662 on measures to rationalise public finances; GURI No 303 of 28 December 1996, Ordinary Supplement No 233; 'Law No 662/1996').

5 Decreto del Presidente della Repubblica 14 marzo 2001, n. 144 – Regolamento recante norme sui servizi di bancoposta (Decree of the President of the Republic No 144 on the rules relating to post-office banking services of 14 March 2001; GURI No 94 of 23 April 2001; 'Decree No 144/2001').

(c) Decision No 57/1996 of the Board of Directors of Poste Italiane

11. By that decision, the Board elected to charge a fee for each transaction relating to the management of post-office current accounts held by tax collection service agents. The amount of that fee was fixed at EUR 0.05 between 1 April 1997 and 31 May 2001 and at EUR 0.23 between 1 June 2001 and 31 December 2003.

2. Rules applicable to taxes levied by local authorities

(a) Legislative Decree No 504 of 1992[6]

12. In accordance with Article 10(3):

'The tax due under paragraph 2 shall be settled by direct payment to the agent responsible for its collection in the district of which the municipality referred to in Article 4 forms part or by payment into a post-office current account set up for that purpose in the name of the agent in question … . The agent's fee shall be payable by the municipality levying the tax and is fixed at 1% of the sums collected, ranging from a minimum of [EUR 1.75] and a maximum of [EUR 50] for each payment made by the taxpayer.'

(b) Decree of the Minister for Finance No 567 of 1993[7]

13. Articles 5 to 7 allow tax account holders to settle, by direct over-the-counter payment to the agent or by standing order set up with a credit institution in the name of the agent, amounts owed by way of personal income tax, corporation tax — including by proxy —, local income tax and taxes in replacement of the aforementioned taxes and VAT.

(c) Legislative Decree No 446 of 1997[8]

14. Article 59(1) reserves for municipalities the power to adopt rules governing the collection of local taxes, in order thereby to rationalise arrangements for making payments, providing for payment to be made not only to the agent but also into a post-office current account opened in the name of the Municipal Tax Administration, directly to the Municipal Tax Administration and through the banking system.

6 Decreto legislativo 30 dicembre 1992, n. 504 – Riordino della finanza degli enti territoriali, a norma dell'articolo 4 della legge 23 ottobre 1992, n. 421 (Legislative Decree No 504 reorganising the financing of local authorities in accordance with Article 4 of Law No 421 of 23 October 1992; GURI No 305 of 30 December 1992, Ordinary Supplement No 137; 'Legislative Decree No 504/1992').

7 Decreto del Ministro delle Finanze 28 dicembre 1993, n. 567 – Regolamento di attuazione dell'art. 78, commi da 27 a 38, della legge 30 dicembre 1991, n. 413, concernente l'istituzione del conto fiscale (Decree of the Minister for Finance No 567 – Regulation implementing Article 78(27) to (38) of Law No 413 of 30 December 1991 establishing the tax account (GURI No 306 of 31 December 1993).

8 Decreto legislativo 15 dicembre 1997, n. 446 – Istituzione dell'imposta regionale sulle attività produttive, revisione degli scaglioni, delle aliquote e delle detrazioni dell'Irpef e istituzione di una addizionale regionale a tale imposta, nonche riordino della disciplina dei tributi locali (Legislative Decree No 446 introducing the regional tax on productive activities, revising income tax brackets, rates and deductions and introducing a regional supplement to that tax, and reorganising the local taxation discipline of 15 December 1997 (GURI No 298 of 23 December 1997, Ordinary Supplement No 252).

(d) Decree Law No 70 of 2011[9]

15. Article 7(2)(gg-*septies*) provides:[10]

'Where the collection of receipts is entrusted to [agents], this shall be effected via one or more bank or post-office deposit-only current accounts opened in the name of the agent and earmarked for the collection of receipts accruing to the contracting authority, into which all sums collected shall be paid.'

II. Facts (according to the orders for reference), disputes and questions referred for a preliminary ruling

16. The activities of Poste Italiane came to be defined over the course of the process of its privatisation. In particular, national law gave it exclusive responsibility for providing certain services, subject to the obligation to keep separate accounts.

17. Article 10(3) of Legislative Decree No 504/1992 introduced as methods of paying the ICI either 'direct payment to the collection agent in whose district the municipality [of the taxed property] is located' or payment 'into the relevant post-office current account in the name of the agent'. The agent was therefore obliged to open a post-office current account in order to meet the obligation entered into with the local authority levying the tax.

18. In the view of the referring court, up until 2011 that obligation was not affected by the subsequent reforms that extended the methods of paying local taxes (bank standing order, over-the-counter payment to the local council or payment into accounts in the name of the municipal treasury). It was not until then that local tax collection agents were given the option of simply opening a single current account at a bank, rather than having a post-office account.

19. The criteria for fixing the charges for post-office and payment services also evolved during the process of privatising the Amministrazione delle Poste.[11] In particular:

— In 1996, it was decided that [the Amministrazione delle Poste] would charge a fee for each transaction performed in connection with the management of post-office current account relations with tax collection service agents.

— In 2001, it was decided to apply to customer relations and to post-office current accounts the civil-law contract regime already applicable to bank accounts.

9 Decreto legge 13 maggio 2011, n. 70 – Semestre Europeo – Prime disposizioni urgenti per l'economia (Decree-Law No 70 on the European semester – first urgent provisions in favour of the economy of 13 May 2011) (GURI No 110 of 13 May 2011). This became (with amendments) legge 12 luglio 2011, n. 106 (Law No 106 of 12 July 2011) (GURI No 160 of 12 July 2011), subsequently amended by decreto legge 6 dicembre 2011, n. 201 (Decree-Law No 201 of 6 December 2011), which itself became (with amendments) legge 22 dicembre 2011, n. 214 (Law No 214 of 22 December 2011); 'Decree-Law No 70/2011').

10 As amended by Article 5(8 *bis*) of decreto legge 2 marzo 2012, n. 16 (Decree-Law No 16) of 2 March 2012, which became (with amendments) legge 26 aprile 2012, n. 44 (Law No 44 of 26 April 2012).

11 This led to a prohibition on the provision of free services by the public authorities and public bodies, a reorganisation of the process of consulting the competent ministries and the removal, in the case of services provided on a freely competitive basis, of all charging and social obligations.

20. The disputes underlying these references for a preliminary ruling have arisen between Poste Italiane and two agents [12] from which Poste Italiane is claiming payment of the fees owed for every ICI credit made to those agents' post-office current accounts between 1997 and 2011:

— On the one hand (Case C-434/19), Poste Italiane sought an order requiring Riscossione Sicilia to pay it the contested fee. Its action having been dismissed at first instance, the appeal court recognised Post Italiane's entitlement to the fee for the period after 1 June 2006.

— On the other hand (C-435/19), a similar claim brought by Poste Italiane against the Agenzia was also dismissed at first instance and upheld on appeal.

21. Those cases having been brought before the Corte suprema di cassazione (Supreme Court of Cassation), that court has made two identical references for a preliminary ruling which are worded as follows.

'(1) Is a rule such as that provided for in the combined provisions of Article 10(3) of Legislative Decree No 504/1992 and Article 2(18) to (20) of Law No 662/1996, under which reserved services (statutory monopoly) in favour of Poste Italiane … are set up and maintained – even following the privatisation of the 'bancoposta' postal banking services provided by Poste Italiane … – in relation to the management of the postal current account intended for the collection of the local municipal real estate tax (ICI), incompatible with Articles 14 TFEU … and 106(2) TFEU … and with classification as a service of general economic interest (SGEI), bearing in mind developments in State rules governing tax collection which, since 1997 at least, has allowed taxpayers and local tax authorities freely to use methods of payment and tax collection (including local taxes) through the banking system?

(2) If the answer to the first question is that the establishment of the statutory monopoly must be recognised as meeting the SGEI criteria, is a rule such as that resulting from the combined provisions of Article 10(3) of Legislative Decree No 504/1992, Article 2(18) to (20) of Law No 662/1996 and Article 3(1) of … Decree No 144/2001, which grants Poste Italiane … the power unilaterally to determine the level of the fee payable by the agent collecting the ICI that is applied to each management transaction carried out in the post current account in the name of the agent, incompatible with Articles 106(2) TFEU … and 107(1) TFEU …, according to the interpretation of such rules provided by the Court of Justice with reference to the requirements for distinguishing a lawful measure – providing compensation for the performance of public service obligations – from unlawful State aid (judgment … *Altmark* … C-280/00), bearing in mind that Poste Italiane …, by board decision No 57/1996, set that fee at ITL 100 for the period from 1 April 1997 to 31 May 2001 and at EUR 0.23 for the period from 1 June 2001?

(3) Is a set of rules such as that put in place by Article 2(18) of Law No 662/1996, Article 3(1) of … Decree No 144/2001 and Article 10(3) of Legislative Decree No 504/1992, under which the agent is necessarily required to pay the fee as unilaterally determined and/or varied by Poste Italiane …, incompatible with Article 102, first paragraph, TFEU …, as interpreted by the Court of Justice …, given that the agent is not otherwise able to withdraw from the postal current account contract without infringing the obligation laid down in Article 10(3) [of] Legislative Decree No 504/1992 and, as a consequence, infringing its ICI-collection obligations to the local tax authority?'

III. Procedure before the Court

22. The references for a preliminary ruling were received at the Court on 5 June 2019.

12 Riscossione Sicilia SpA agente riscossione per la provincia di Palermo e delle altre provincia siciliane ('Riscossione Sicilia') (Case C-434/19); and the Agenzia delle entrate – Riscossione ('the Agenzia') (Case C-435/19).

23. Written observations have been lodged by Poste Italiane, the Agenzia and the Commission, all of which replied in writing to the questions put by the Court in lieu of the hearing which was scheduled for 22 April 2020 but was later cancelled.

IV. Analysis

A. Preliminary observation

24. When adjudicating on a reference for a preliminary ruling, the Court must have regard to the facts and the account of the relevant domestic law provided to it by the referring court.[13]

25. In this case, the striking feature of that account is what the referring court calls the 'statutory monopoly' which Poste Italiane holds in relation to the provision of the service for the collection of the ICI via current accounts. That monopoly does not, however, prevent taxpayers from paying the tax directly to the agents without any involvement on the part of Poste Italiane, as is acknowledged in the orders for reference.

26. Poste Italiane, both in its written observations (paragraphs 12 to 15) and in answer to a specific question from the Court, submits that there are, in addition, alternative methods of paying the ICI which are not mentioned in the orders for reference.

27. In particular, it states that such payments could be made via 'credit institutions [other than Poste Italiane] affiliated to the agent',[14] as well as, following the entry into force of Legislative Decree No 446/1997, directly to the local authority levying the ICI or to some of the financial institutions designated by that authority.[15]

28. It is for the Corte suprema di cassazione (Supreme Court of Cassation) to rule on these claims, which, if found to be true, could to some extent weaken the premiss on which the reference for a preliminary ruling is made.

B. First question referred

29. By the first of its questions, the referring court wishes to ascertain whether entrusting responsibility for managing the service for the collection of the ICI via post-office current accounts to Poste Italiane alone exhibits the characteristics of a service of general economic interest.

1. Positions of the parties

30. Poste Italiane maintains that the first question is inadmissible, both in that it refers to Article 14 TFEU and in that it is for the national court to apply Article 106(2) TFEU directly.

31. In the alternative, it contends that Poste Italiane's statutory operating model does not give it an exclusive right to provide the ICI collection service, since agents can also use other methods. It states that, in any event, the conditions for classifying the management of post-office current accounts as a service of general economic interest are not met.

13 See, inter alia, the judgment of 2 April 2020, *Coty Germany* (C-567/18, EU:C:2020:267, paragraph 22).

14 It cites in this regard the Ministerial Decree of 12 May 1993 as amended by that of 10 December 2001, according to which 'taxpayers [liable for the ICI] may make payment via the credit institutions affiliated to the collection agent'.

15 In support of its argument, it cites Circular No 4 of the Ministry of Economic and Financial Affairs of 30 May 2002, entitled 'Clarifications with respect to payment of the ICI'.

32. The Agenzia submits that the relationship between the agents and Poste Italiane is in the nature of a monopoly. The former are unavoidably obliged to open a post-office current account with that institution, which can unilaterally amend the terms of the contract governing that account.

33. According to the Agenzia, the post-office current account service provided by Poste Italiane on the forgoing basis, which is financed by a compulsory fee, cannot be provided by other — national or European — bodies and this fact confers an advantage on a single undertaking. Furthermore, the fees were not fixed in an objective and transparent manner and agents are prevented from negotiating more favourable terms.

34. In the Commission's submission, Poste Italiane does not appear to be compelled by an act (within the meaning of the Court's case-law) to provide services pursuant to a public service obligation.

2. Admissibility

35. In my view, the mention, in the orders for reference, of Article 14 TFEU does not render the first question inadmissible. Notwithstanding that, as Poste Italiane argues, it is not easy to determine what kind of interpretative uncertainty that provision raises in this case, the fact remains that the first question is concerned, in essence, with Article 106 TFEU, the citation of Article 14 TFEU having been included because both provisions relate to 'services of general economic interest'.

36. Article 14 TFEU deals with services of general economic interest and provides in this regard that the Member States must take care that 'such services operate on the basis of principles and conditions … which enable them to fulfil their missions'. Article 106(2) TFEU provides that the fact that such services are subject to the rules contained in the Treaties — in particular, the rules on competition — must not prevent the undertakings entrusted with managing them from 'perform[ing] … the particular tasks assigned to them'.

37. Both provisions thus share the same purpose: to ensure that services of general economic interest are subject to the Treaties, while at the same time ensuring that this does not operate to the detriment of the particular tasks assigned to them.

38. As Poste Italiane states, it falls to the national court to assess whether the practices of undertakings responsible for the management of services of general economic interest are compatible with Article 106 TFEU. It is for the national courts to 'determine whether such practices …, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted'.[16]

39. The national court is at liberty, however, within the framework of Article 267 TFEU, to request the Court's assistance, if it sees fit to do so, by raising with it its uncertainties about the interpretation of Article 106 TFEU.[17] Those uncertainties may legitimately relate to the classification of an activity as a service of general economic interest.

16 Judgment of 18 June 1991, *ERT* (C-260/89, EU:C:1991:254, paragraph 34).

17 'It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court'. Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betani*a (C-74/16, EU:C:2017:496, paragraph 24).

40. In short, the Corte suprema di cassazione (Supreme Court of Cassation) raises a question on the interpretation of EU law to which the Court is in principle obliged to reply.[18] It could only refrain from replying if it were clear that the interpretation sought bore no relation to the dispute in the main proceedings, if it were hypothetical or if the Court did not have before it the factual or legal material necessary to reply to that question.[19] None of these scenarios applies in relation to the first question.

3. Substance

41. As I have just recalled, it is for the referring court to determine whether Poste Italiane was indeed entrusted with the discharge of clearly defined obligations.

42. Whatever that court's final determination may be, I agree with Poste Italiane and the Commission in that an analysis of the statutory regime at issue does not support the inference that the financial services provided by Poste Italiane to the ICI collection agents are classifiable as being of 'general economic interest'.

43. The power conferred on Member States to define services of general economic interest is not unlimited, but is subject to a number of conditions. These include, in the first place, the requirement that the undertaking in question must actually be responsible for discharging public service obligations and that those obligations must be clearly defined in national law.[20]

44. That condition is designed 'to ensure transparency and legal certainty, and thus requires that minimum criteria be met in relation to the existence of one or more acts of public authority defining, in a sufficiently precise manner, at least the nature, duration and scope of the public service obligations imposed on the undertakings entrusted with the performance of those obligations'.[21] Consequently, 'in the absence of a clear definition of such objective criteria, it is not possible to verify whether a particular activity may be covered by the concept of an SGEI'.[22]

45. Now, as far as its banking business is concerned, given that there is nothing to indicate that Poste Italiane is formally obliged to provide certain services pursuant to a public service obligation in a way that defines the nature and scope of that obligation with sufficient precision, the aforementioned objective of transparency and legal certainty is not achieved. This alone would be sufficient to support the conclusion that the service in question is not one of general economic interest.

46. The undisputed fact that Poste Italiane, acting as the body operating the universal postal service in Italy, performs a service of general economic interest within that very specific context is a different matter. However, as the Court has already held, the postal services envisaged in Directive 97/67/EC[23] do not include financial services provided by postal undertakings, nor financial services 'also … provided by postal service providers'.[24]

18 *Loc. ult. cit.*

19 Inter alia, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), apartado 25.

20 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; 'judgment in *Comunidad Autónoma del País Vasco and Others* v *Commission*', paragraph 72.

21 Judgment in *Comunidad Autónoma del País Vasco and Others* v *Commission*, paragraph 73.

22 *Loc. ult. cit.*

23 Directive of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3).

24 Judgments of 11 March 2004, *Asempre y Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería* (C-240/02, EU:C:2004:140, paragraph 31); and of 22 October 2015, *EasyPay and Finance Engineering* (C-185/14, EU:C:2015:716, paragraph 30).

47. In short, the financial services which Poste Italiane provides to its customers, through what the referring court calls the *capillarisation* of its network of branches in Italian territory, do not appear to constitute a service of general economic interest within the meaning of the Court's case-law.[25] Those services include making it possible for third parties (such as ICI collection agents) to open and manage current accounts, whether these are held with the post office or another institution.

C. Second question referred

48. The Corte di Cassazione (Supreme Court of Cassation) raises its second question in the event that '[Poste Italiane's] statutory monopoly [is] recognised as meeting the SGEI criteria'.

49. In keeping with their observations on the first question, both Poste Italiane and the Commission submit that there is no need to answer the second question: if it is not possible to establish the existence of a service of general economic interest, there is no need to answer a question which presupposes its existence.

50. The Commission nonetheless examines in the alternative whether this case meets the '*Altmark* conditions'.[26] It takes the view that, if it does not, the fees at issue will warrant classification as State aid incompatible with Article 107 TFUE.

51. As I see it, given the answer I am suggesting should be given to the first question, it would not be appropriate to embark upon an analysis of the second question, the very premiss for which is ruled out in the first.

52. In any event, I shall, like the Commission, look at the second question in the alternative. It is important to note, in my opinion, that what the referring court points out is the power conferred on Poste Italiane to fix the amount of the fee payable by the agent unilaterally. That factor is, in its thinking, decisive for the purposes of assessing the compatibility of the rules at issue with Articles 106(2) TFEU and 107(1) TFEU.

53. In order for a State measure to warrant classification as 'aid' within the meaning of Article 107 TFEU, the conditions which I shall analyse below must be cumulatively met.[27]

1. Intervention by the State or through State resources

54. Legislative Decree No 504/1992 imposed on agents the obligation to open post-office current accounts in order to collect ICI payments made by taxpayers. Poste Italiane was correspondingly entitled (pursuant to Law No 662/1996) to receive in return for managing those accounts a fee the amount of which was laid down in Decision No 57/1996.

55. The collection fees paid by agents to Poste Italiane might in principle meet the first *Altmark* condition if the funds of which they consisted could be classified as 'State' resources (that is to say resources of public origin).

25 See to this effect paragraphs 1 and 2 of the judgment of 2013, *Poste Italiane* v *Commission* (T-525/08, not published, EU:T:2013:481): 'Poste Italiane operates the universal postal service and performs banking activities throughout Italy … The applicant's [Poste Italiane's] banking activities do not form part of its obligations in connection with services of general economic interest'.

26 Judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415; 'judgment in *Altmark*').

27 Judgment of 9 November 2017, *Viasat Broadcasting UK* v *Commission*, C-657/15 P, EU:C:2017:837, paragraph 32); and judgment in *Altmark*, paragraph 75.

56. From the information contained in the documents before the Court, however, it is not clear who actually and ultimately pays those fees. Both Poste Italiane and the Agenzia replied to the Court's questions to the effect that payment falls in principle to the agents.

57. There are indications, however, that agents can offset against those payments a proportion of the sums which the local authorities pay them for collecting the ICI.[28] It is only logical that the municipality which entrusts the task of collection to them should remunerate them for that task. If agents allocate part of that remuneration, which is unquestionably public, to the payment of fees to Poste Italiane, the funds in question might be said to be State resources.

58. This would also be the case if the municipalities levying the tax defrayed the fees due to Poste Italiane; if the agents were themselves public bodies (as the Commission insists in its reply to the Court's questions); or, finally, if Poste Italiane had to manage the fees collected on terms prescribed by the public authority.

59. It is for the referring court to clarify these points and, consequently, to verify whether the first of the *Altmark* conditions is met.

2. Possible adverse effect on trade with Member States and distortion of competition

60. To the extent that, in providing the post-office current account service, Poste Italiane operates in a sector open to competition (banking), it also falls to the referring court to determine whether the charging of fees could have affected trade with other Member States and distorted competition.[29]

61. Subject to the foregoing,[30] if it is confirmed that, as from 1997, collection of the ICI was not governed by the national legislation allowing local taxes to be paid through a current account held at a bank instead of at a post office, the referring court will have to consider the impact of that exclusion on the activities of other banking institutions. Only in this way will it be possible to assess whether the contested measure was capable of distorting competition in the sector comprising the management of those taxes.

62. The referring court will also have to evaluate whether the advantages represented by the expansion of Poste Italiane's territorial network were a sufficient reason to entrust it with direct and exclusive responsibility for managing the post-office accounts of ICI collection agents. Organising a public procurement procedure open to participation by operators from other Member States would not, on the face of it, have been an inconceivable possibility.[31]

3. Conferment of an advantage

63. The provision of public resources must give rise to an economic advantage which the recipient undertaking would not have obtained under normal market conditions.[32]

28 Article 10(3) of Legislative Decree No 504/1992 fixed the remuneration thus payable to agents at 1% of the sums collected, ranging from a minimum of EUR 1.75 and a maximum of EUR 50 for each payment made by taxpayers.

29 Judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 140).

30 Points 24 to 28 of this Opinion.

31 Judgment of 29 July 2019, *Azienda Napoletana Mobilità* (C-659/17, EU:C:2019:633, paragraph 38).

32 Judgment in *Altmark*, paragraph 84.

64. The State aid with which Article 107 TFEU is concerned is therefore *advantageous* aid, not strictly compensatory aid. In order not to constitute 'State aid' within the meaning of Article 107 TFEU, the public resources provided must be aid in compensation for the discharge of public service obligations. [33]

65. Only in those circumstances is the recipient undertaking regarded as not enjoying 'a real financial advantage and the measure [as] thus … not hav[ing] the effect of putting [it] in a more favourable competitive position than the undertakings competing with [it]'. [34]

66. In order for that to be the case, four *specific* conditions, also set out in the judgment in *Altmark*, [35] must be met. That judgment thus envisages two groups of conditions:

— On the one hand, those required generally in order for aid to be classified as 'State' aid within the meaning of Article 107 TFEU. [36]

— On the other hand, those required in particular in order for the third general condition (advantageous aid) not to be regarded as being present.

67. To talk simply of the '*Altmark* conditions' can be confusing when there are in fact four conditions in each group. In order to avoid any confusion, I shall from now on refer to the 'general *Altmark* conditions' and the 'specific *Altmark* conditions', respectively.

68. The *specific Altmark* conditions are as follows:

— 'First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined'. [37]

— 'Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings'. [38]

— 'Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening the undertaking's competitive position'. [39]

— 'Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at least to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with … so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations'. [40]

33 Judgment in *Altmark*, paragraph 87.
34 *Loc. ult. cit.*
35 Judgment in *Altmark*, paragraphs 89 to 93.
36 Judgment in *Altmark*, paragraph 75.
37 Judgment in *Altmark*, paragraph 89.
38 Judgment in *Altmark*, paragraph 90.
39 Judgment in *Altmark*, paragraph 92.
40 Judgment in *Altmark*, paragraph 93.

69. The examination of classification as 'State' aid within the meaning of Article 107 TFEU must be carried out before it is ascertained whether that aid is necessary for the purposes of providing a service of general economic interest and whether the exception provided for in Article 106(2) TFEU is therefore applicable.

70. The Court has recognised, however, that the first of the specific *Altmark* conditions — that is to say, the existence of an actual and clear responsibility for discharging a public service obligation — 'also applies where the derogation laid down in Article 106(2) TFEU has been invoked'. [41]

71. It is at this point, therefore, that the first two questions raised by the referring court converge.

72. Accordingly, in order determine whether the fee charged by Poste Italiane constitutes *advantageous* aid (in other words, whether the third general *Altmark* condition is met), we must examine whether that fee is compensatory in nature.

73. In particular, given that the orders for reference cite Article 106(2) TFEU, it must be ascertained whether the national authorities imposed an obligation on Poste Italiane to provide a service of general economic interest.

74. I have already expressed my view in this regard, in the negative. In any event, the obligation assumed by Poste Italiane, so far as its banking business is concerned, went no further than to require it to open and manage post-office current accounts in the name of agents. There is nothing specific to indicate that those accounts were subject to particular terms as compared with those of other Poste Italiane customers. This was confirmed in answer to the question put by the Court in this regard.

75. It having thus been established that there is no genuine service of general economic interest, the fees at issue could not be classified as aid in compensation for the burdens inherent in providing that service.

76. Otherwise, it will be necessary to ascertain whether the other three specific *Altmark* conditions are met, a matter on which it is difficult for the Court to comment (other than to recall the general elements of each of those conditions), both because the examination of the facts of the dispute falls within the exclusive jurisdiction of the referring court, and because the documentation available to the Court does not contain the information material to that task.

77. The fact to which, as I noted previously, the referring court appears to attach greater importance (that Poste Italiane fixed the terms of payment for post-office current accounts unilaterally) does not in itself detract from what has been said.

78. The orders for reference contain no data to indicate whether the fees actually laid down in Decision No 57/1996 adequately reflect the management costs incurred in providing the post-office current account service.

79. According to the answers to the questions put by the Court, those fees are the same as those which Poste Italiane applied, without distinction, to its other customers, in a spirit of disclosure and transparency in relation to the current account service. [42] If that were the case, they would probably not be significantly different from those charged, by Poste Italiane or other banking institutions, in connection with other tax receipts. There is, moreover, nothing to indicate that that scheme contained contractual terms that were unjustifiably onerous on customers.

41 Judgment in *Comunidad Autónoma del País Vasco and Others* v *Commission*, paragraph 56.

42 See points 109 and 110 below.

80. In any event, as I have already said, those factors fall to be assessed by the referring court, whose proximity to the facts puts it in the best position to evaluate them in all their intricacy.

D. Third question referred

81. The third question seeks to ascertain, in essence, whether Poste Italiane's statutory operating model conferred on it a dominant position the abuse of which infringed Article 102 TFEU.

1. Positions of the parties

82. In the view of Poste Italiane, the third question is inadmissible, since the referring court does not explain why the legislation applied is incompatible with Article 102 TFEU. As well as being inadmissible, that question is wrong to state that Poste Italiane holds an exclusive or special right within the meaning of Article 106(1) TFEU, and does not make clear how it might be compelled to abuse its dominant position.

83. Poste Italiane has stated repeatedly that agents were free to use other credit institutions to provide the ICI payment services. [43]

84. According to the Agenzia, Poste Italiane holds a dominant position in the market segment represented by the ICI payment service and it abused that position in charging fees the amount of which it fixed unilaterally and without any objective basis.

85. The Commission considers that the relevant (product) market is the market for the provision, for consideration, of services for managing the current accounts used by agents to collect the ICI. Its size is limited, since taxpayers can opt to make payments directly to the agent.

86. In the view of the Commission, it is for the referring court to analyse the market concerned and to determine whether Poste Italiane occupied a dominant position on that market. Part of that analysis will be to ascertain whether other banking institutions were able to provide the same service as Poste Italiane.

87. The Commission notes that the ability to fix the contested fee unilaterally carries with it the potential risk that Poste Italiane will abuse its (alleged) dominant position. However, as taxpayers were free to choose to pay the ICI directly to the agents, the latter were in a position to create incentives to make the second option more attractive. They could have done that, in particular, in response to any policy on the part of Poste Italiane to impose excessive fees for use of the post-office current accounts.

88. In the opinion of the Commission, it does not therefore appear to have been demonstrated that market forces were insufficient to provide the services at issue as effectively as Poste Italiane.

2. Admissibility

89. It is the settled case-law of the Court that, irrespective of whether special or exclusive rights have been conferred on an undertaking, the referring court must indicate on what relevant market and in what way that undertaking holds a dominant position. [44]

43 See once again points 24 to 28 of this Opinion.

44 Judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others* (C-250/06, EU:C:2007:783, paragraph 21).

90. In particular, the Court has made it clear that, for the purposes of Article 102 TFEU, 'the relevant product or service market includes products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and the structure of supply and demand on the market in question'. [45]

91. Now, the orders for reference exhibit certain shortcomings in the account they provide in connection with this question that prevent the Court from giving a useful answer to it. It has not been possible to make good those shortcomings, notwithstanding the observations submitted by those who have participated in the preliminary ruling proceedings, who were asked by the Court to provide certain items of information to make it possible to determine the service market, the relevant geographic market and the existence of substitute services. [46]

92. The referring court should have provided the Court of Justice with precise information about the characteristics of the relevant market, its geographical size and the existence of any equivalent (substitutable) services. As it did not do so, the third question is inadmissible.

93. The same outcome is arrived at, from a different perspective, on the basis of the conclusion that the content of the orders for reference, in relation to the third question referred, does not make clear the meaning of that question.

94. At first reading, that question gives the impression that, in the view of the referring court, the mere fact that a 'statutory monopoly' was conferred on Poste Italiane necessarily gave rise to that undertaking's abuse of its dominant position. Poste Italiane *abuses* its dominant position because it has a statutory monopoly. [47]

95. If that were the correct interpretation of the orders for reference, it would have to be concluded that those orders are based on an erroneous premiss that is inconsistent with the Court's case-law, [48] inasmuch as they seem to equate the holding of a dominant position with the abuse of that position. Only the latter conduct is unlawful under Article 102 TFEU. [49]

96. Another reading of this part of the orders for reference would support the inference that the referring court considers it to be established not only that a dominant position exists but also that that position is abused by Poste Italiane because it charged agents collection fees in the amounts which the court itself reproduces. If that were the case, the question put to the Court would literally become superfluous since it would be asking about something which the referring court has already resolved.

97. Finally, the most meaningful reading of that (laconic) part of the orders for reference is that which emphasises the fact that the power to fix collection fees unilaterally may constitute a scenario of '*inevitable inducement to abuse*' prohibited by Article 102 TFEU. [50]

45 Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 32).

46 The Court asked them about, inter alia: i) services substitutable for that provided by Poste Italiane to ICI agents; ii) the terms on which those substitute services are provided; iii) the parts of the national territory in which Poste Italiane provided its services to ICI agents; and iv) any strategies employed by agents to incentivise payment to themselves rather than via Poste Italiane.

47 This is the view expressed by the Commission in paragraph 90 of its observations.

48 Judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 48): 'the mere creation or reinforcement of a dominant position through the grant of special or exclusive rights … is not in itself incompatible with Article [102 TFEU]'.

49 *Ibidem*, paragraph 49. It is essential for these purposes that, 'merely by exercising the special or exclusive rights conferred upon it, [the undertaking] *abuse[s]* its dominant position or [that] such rights are liable to create a situation in which that undertaking is led to commit such abuses'. Emphasis added.

50 Order for reference, Case C-435/19, page 19, *in fine*, of the original Italian. Emphasis in the original.

98. It would therefore be necessary to confirm whether that scenario is indeed plausible; in other words, whether the conditions are present to support the conclusion that the legislative regime at issue inevitably causes Poste Italiane to abuse its dominant position.

99. Much as this may be the most correct interpretation of the referring court's uncertainty, the fact remains that the Court continues to lack key data that would enable it to give a ruling with even a minimum degree of rigour on that uncertainty. That lack of data is apparent in particular in relation to the determination of whether the abuse was inevitable: i) in the context of a relevant market which has not been precisely specified; ii) given the competition between banking institutions; and iii) in the presence of services that may be substituted for those provided by Poste Italiane.

100. On that basis, I take the view that the third question referred is inadmissible. However, in the event that the Court thinks otherwise, I shall briefly set out my view on that question.

3. Substance

101. The Commission stated in its observations that, in the light of the legislative regime applicable, agents were able to avoid any abusive conduct on the part of Poste Italiane, and that, consequently, the scenario of inevitable inducement to abuse had not been confirmed.

102. Poste Italiane and the Agenzia commented on this issue at the Court's request: the former, by endorsing the Commission's position; the latter, by classifying the Commission's proposition as unrealistic.

103. There might be abuse of a dominant position, for the purposes of this case, if Poste Italiane had imposed on agents unfair prices which the latter were obliged to bear without having the option of using other methods of collecting the ICI. This would give Poste Italiane an unlawful advantage over its competitors.

104. According to the Commission, there would be no such abuse of a dominant position (if one exists) if taxpayers were free to pay the ICI directly to agents. Agents could offer taxpayers sufficiently attractive terms [51] to persuade them to opt for the latter option in preference to that of making payment into a post-office current account.

105. It is, once again, for the referring court to rule on these opposing positions, which it would be difficult for the Court assess in the absence of the evidence to which I have already referred.

106. In any event, it might be relevant to its assessment to consider whether the economic cost of the offers by agents to which the Commission refers would in fact — albeit under another name and another guise — be the same as that borne by them in paying the fee unilaterally fixed by Poste Italiane.

107. The referring court would also have to consider whether Poste Italiane's position on the banking market might have been enhanced, by comparison with that of its competitors, as from the point at which, in 1997, all local taxes other than the ICI could be paid via current accounts.

51 Paragraphs 110 and 111 of the Commission's observations. The 'strategies' thought up by the Commission to enable agents to deter Poste Italiane from the temptation to abuse its position by imposing excessive charges include creating a network of representatives authorised to take direct payment of the tax, or offering reductions (at its cost) to taxpayers taking up this option.

108. In particular, it would have to determine whether Poste Italiane, by virtue of holding a dominant position in relation to the payment of the ICI, was inevitably driven to extend the effects of that dominant position to the market for the payment of other local taxes, in particular, and to the market for banking as a whole, in general.

109. In making that assessment, it must not forget that, as the Agenzia itself conceded in answer to one of the Court's questions,[52] with the exception of the volume of collection transactions (in the tens of thousands), the post-office current account contract terms — including financial terms — by which ICI collection agents were bound were the same as those that were generally applicable to any legal person holding a current account.

110. If confirmed, this might be an indication that runs counter to the inevitability of abuse of a dominant position. On a market for liberalised banking services, Poste Italiane would have no incentive to impose on its current account holders in general (including agents, who are subject to the same regime as other account holders) collection fees which are significantly more onerous than those charged by other credit institutions.

111. Finally, it may be crucial to the adjudication on the abuse of a dominant position to ascertain whether other banking institutions offered agents similar (substitutable) services which the latter could use in order to enable taxpayers to make ICI payments. It will be for the referring court to determine whether or not this is the case.

V. Conclusion

112. In the light of the foregoing, I suggest that the Court reply to the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

(1) The current account service which, as part of its financial services business, Poste Italiane SpA provided to agents collecting the municipal tax on immovable property from 1992 to 2011 does not exhibit the characteristics of a service of general economic interest within the meaning of Article 106 TFEU, in so far as there is no formal act imposing clearly defined public service obligations, a matter which it is for the national court to determine.

(2) In the light of the answer to the first question, there is no need to answer the second.

(3) The third question is inadmissible.

52 Answer to the fourth question put by the Court.