Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

15 June 2017*

(Reference for a preliminary ruling — Directive 97/67/EC — Article 9 — Freedom to provide services — Postal services — Notions of universal service and essential requirements — General and individual authorisations — Authorisation to provide postal services under individually negotiated contracts — Conditions imposed)

In Case C-368/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 10 July 2015, received at the Court on 14 July 2015, in the proceedings brought by

Ilves Jakelu Oy,

intervening parties:

Liikenne- ja viestintäministeriö,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, A. Arabadjiev (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ilves Jakelu Oy, by H. Piekkala and I. Aalto-Setälä, asianajajat,

— the Finnish Government, by H. Leppo, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

— the Polish Government, by B. Majczyna acting as Agent,

— the Norwegian Government, by I. Thue and C. Rydning, acting as Agents,

* Language of the case: Finnish.

— the European Commission, by P. Costa de Oliveira and P. Aalto, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 97/67/EC 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) ('Directive 97/67').

2 The request has been made in proceedings brought by Ilves Jakelu Oy against the decision of the valtioneuvosto (Council of Ministers, Finland) of 30 January 2017, making a postal licence subject to compliance with certain requirements.

Legal context

EU law

3 Recital 15 of Directive 97/67 reads as follows:

'Whereas the provisions of this Directive relating to universal service provision are without prejudice to the right of universal service operators to negotiate contracts with customers individually'.

4 Under Article 2 of that directive:

'For the purposes of this Directive, the following definitions shall apply:

…

(13) universal service provider: the public or private postal service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with Article 4;

(14) authorisations: any permission setting out rights and obligations specific to the postal sector and allowing undertakings to provide postal services and, where applicable, to establish and/or operate their networks for the provision of such services, in the form of a general authorisation or individual licence as defined below:

— "general authorisation" means an authorisation, regardless of whether it is regulated by a "class licence" or under general law and regardless of whether such regulation requires registration or declaration procedures, which does not require the postal service provider concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation,

— “individual licence”: an authorisation which is granted by a national regulatory authority and which gives a postal service provider specific rights, or which subjects that undertaking’s operations to specific obligations supplementing the general authorisation where applicable, where the postal service provider is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority;

…

(19) essential requirements: general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners, in accordance with Community and national law and, where justified, data protection, environmental protection and regional planning. Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy;

…’

5 Chapter 2 of Directive 97/67 concerns universal service. Article 3 of that directive provides:

‘1. Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

…

4. Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

— the clearance, sorting, transport and distribution of postal items up to two kilograms,

— the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,

— services for registered items and insured items.’

6 Article 9 of that directive provides as follows:

‘1. For services which fall outside the scope of the universal service, Member States may introduce general authorisations to the extent necessary to guarantee compliance with the essential requirements.

2. For services which fall within the scope of the universal service, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service.

The granting of authorisations may:

— be made subject to universal service obligations,

— if necessary and justified, impose requirements concerning the quality, availability and performance of the relevant services,

— where appropriate, be subject to an obligation to make a financial contribution to the sharing mechanisms referred to in Article 7, if the provision of the universal service entails a net cost and represents an unfair burden on the universal service provider(s), designated in accordance with Article 4,

— where appropriate, be subject to an obligation to make a financial contribution to the national regulatory authority's operational costs referred to in Article 22,

— where appropriate, be made subject to or impose an obligation to respect working conditions laid down by national legislation.

Obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers.

Except in the case of undertakings that have been designated as universal service providers in accordance with Article 4, authorisations may not:

— be limited in number,

— for the same elements of the universal service or parts of the national territory, impose universal service obligations and, at the same time, financial contributions to a sharing mechanism,

— duplicate conditions which are applicable to undertakings by virtue of other, non-sector-specific national legislation,

— impose technical or operational conditions other than those necessary to fulfil the obligations of this Directive.

3. The procedures, obligations and requirements referred to in paragraphs 1 and 2 shall be transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria. Member States shall ensure that the reasons for refusing or withdrawing an authorisation in whole or in part are communicated to the applicant and shall establish an appeal procedure.'

7 Recital 33 of Directive 2008/6 states:

'Member States should be allowed to use general authorisations and individual licences whenever justified and proportionate to the objective pursued. …'

Finnish law

8 According to Article 1, first subparagraph, of the postilaki (415/2011), in the version in force at the material time ('Law 415/2011'), the objective of that law is to ensure that postal services, and in particular the universal service, are accessible under equal conditions throughout the country.

9 According to Article 3 of Law 415/2011, any postal activity concerning mail delivery is to be subject to licence. According to Article 4, first subparagraph, of that law, the postal service licence must be applied for from the valtioneuvosto. The granting of a licence does not entail an opinion.

10 Under Article 6 of Law 415/2011, the licence must be granted where:

'(1) the applicant is a company or an association with sufficient economic resources to meet the obligations of a postal undertaking;

(2) there is no justifiable reason to doubt the applicant's ability to abide by the provisions and requirements which apply to postal operations;

(3) the applicant has the capacity to provide a regular service in accordance with the licence;

(4) the territory covered by the licence applied for satisfies the conditions set out in Article 7;

(5) the Government has no particular reason to suspect that the granting of a licence may pose a clear risk to national security.'

11 Article 9 of Law 415/2011 concerns the content of the licence. According to Article 9, second subparagraph, point 5, the valtioneuvosto must make provision, in the licence, for obligations supplementing that law or the provisions adopted on the basis of that law and relating to any other requirement similar to those listed in Article 9, second subparagraph, points 1 to 4, which may be necessary in order to ensure the quality, availability and effectiveness of the services.

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

12 By decision of 30 January 2014, the valtioneuvosto granted Ilves Jakelu a licence allowing it to provide postal services relating to the delivery of mail as provided for in Article 3 of Law 415/2011. The first clause of that licence lists the municipalities in Finland covered by the licence applied for. According to the second clause of that licence, concerning the volume of activity, Ilves Jakelu is entitled to provide unlimited postal services to customers with whom it concluded a contract in Finland.

13 Clauses 4 to 8 of the licence aim to ensure the quality, availability and effectiveness of the postal services. Under Clause 4 of that licence, Ilves Jakelu must draw up the delivery conditions before starting to provide the services of distributing mail. According to clause 5 of the licence issued by the decision of 30 January 2014, Ilves Jakelu must ensure that its services are structured in such a way that undelivered mail is distributed at least once a week, with the exception of national holidays. According to clause 6 of that licence, Ilves Jakelu must provide a delivery-suspension service and a change-of-address service. Under clause 7 of the licence, Ilves Jakelu must mark its postal items in such a way that they can be distinguished and separated from similar mail delivered by other licence holders. According to clause 8 of the licence, in each municipality in Finland covered by the licence, Ilves Jakelu must equip at least one collection point so as to receive the mail referred to in Article 47 of Law 415/2011 and to return mail which was wrongly distributed.

14 Ilves Jakelu argues that Article 9 of Law 415/2011 infringes Directive 97/67 in that it makes no provision for a general authorisation procedure and it makes it possible for the granting of licences for services outside the scope of the universal service to be made subject to conditions other than those which meet essential requirements.

15 The action in the main proceedings concerns the issue whether the valtioneuvosto could make the granting of the licence to Ilves Jakelu subject to compliance with clauses 4 to 8. According to the Finnish Government, those clauses are necessary in order to ensure the quality, availability and effectiveness of the postal services covered by the licences.

16 In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) In interpreting Article 9 of [Directive 97/67/EC], is the distribution of postal items of customers with whom a contract has been concluded to be considered a service outside the scope of the universal service under Article 9(1) or a service within the scope of the universal service under Article 9(2), where the postal undertaking agrees with its customers on the conditions governing delivery and charges them an individually agreed fee?

(2) If such distribution of postal items of customers with whom a contract has been concluded involves a service outside the scope of the universal service, are Article 9(1) and Article 2(14) [of Directive 97/67] to be interpreted in such a way that the provision of such postal services, under circumstances similar to those in the main proceedings, can be made subject to an individual licence, as provided for in the national Postal Services Law?

(3) If such distribution of postal items of customers with whom a contract has been concluded involves a service outside the scope of the universal service, is Article 9(1) to be interpreted in such a way that a licence concerning such services can be made subject only to terms intended to guarantee compliance with the essential requirements under Article 2(19) [of Directive 97/67] and that licences concerning such services cannot be made subject to any terms with respect to the quality, availability or performance of the relevant services under Article 9(2) of that Directive?

(4) If licences concerning the distribution of postal items of customers with whom a contract has been concluded can be made subject only to terms intended to guarantee compliance with the essential requirements, can terms such as those at issue in the main proceedings — which relate to the postal service’s conditions governing delivery, the frequency of distribution of items, the change-of-address and delivery-suspension service, the labelling of items, and clearance locations — be considered consistent with the essential requirements under Article 2(19) [of Directive 97/67] and necessary in order to guarantee compliance with the essential requirements under Article 9(1) [of that directive]?’

Findings of the Court

The first and second questions

17 By its first and second questions, which it is appropriate to answer together, the referring court asks in essence whether Article 9(1) of Directive 97/67 must be interpreted to the effect that a postal items service such as the one at issue in the main proceedings does not fall within the scope of the universal service where the postal undertaking providing that service agrees detailed delivery arrangements with its customers which it invoices for an agreed amount. Subject to that, the referring court asks whether the provision of such postal services in circumstances such as those at issue in the main proceedings may be made subject to the granting of an individual licence.

18 In the first place, in order to determine whether the provision of a service for delivering postal items of customers with whom a contract has been concluded, such as the one at issue in the main proceedings, falls within the scope of that provision or, on the other hand, within the scope of Article 9(2) of that directive, it is appropriate to determine beforehand whether that service falls within the scope of the term ‘universal service’, for the purposes of Article 3 of that directive. It is for the referring court to examine whether the activities carried on by Ilves Jakelu, which are covered by its application for authorisation, meet the criteria laid down in that respect by Directive 97/67.

19 First, it is apparent from Article 2(13) of that directive that the universal service provider is the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission.

20 Secondly, under Article 3(1) of Directive 97/67 a universal service involves the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

21 The matters which may be taken into consideration in this connection include, the fact, noted by the referring court, that no obligation to provide a universal service was imposed on Ilves Jakelu. That is also apparent from the written observations of the Finnish Government, according to which Ilves Jakelu is not the universal service provider, for the purposes of Article 2(13) of Directive 97/67, whose name was communicated to the Commission.

22 The same applies to the fact that Ilves Jakelu applied for a postal licence in order to provide postal services locally in certain municipalities. As was recalled in paragraph 20 above, the universal postal service must be provided at all points in the territory.

23 Furthermore, the Finnish Government stated in its written observations that Ilves Jakelu offers its services solely to customers with whom it has concluded trade agreements. It is apparent from the request for a preliminary ruling that the amount due for the postal services offered by that company is negotiated separately and settled upon receipt of an invoice.

24 In that regard, it must be recalled that express postal services are distinguished from the universal postal service through the added value which they bring to the customers, for which the customers agree to pay more. These are specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service (see, to that effect, judgment of 19 May 1993, *Corbeau*, C-320/91, EU:C:1993:198, paragraph 19).

25 In addition, it is apparent from recital 15 of Directive 97/67 that the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of universal service provision (judgment of 23 April 2009, *TNT Post UK*, C-357/07, EU:C:2009:248, paragraph 48).

26 Therefore, Article 9(1) of that directive must be interpreted to the effect that an activity of distributing postal items such as that at issue in the main proceedings must be viewed as a service which does not fall within the scope of the universal service if it does not involve the permanent provision of a postal service of specified quality at all points in the territory at affordable prices for all users, that being a matter for the referring court to determine.

27 In the second place, as regards the question whether the activity at issue in the main proceedings may be made subject to the granting of an individual licence, it must be recalled that under Article 9(1) of that directive, Member States may make undertakings active in the postal sector subject to general authorisations with regard to services which fall outside the scope of the universal service, while Article 9(2), first subparagraph, of that directive provides that Member States may introduce authorisation procedures, including individual licences, with regard to services which fall within the scope of the universal service (see, to that effect, judgment of 16 November 2016, *DHL Express (Austria)*, C-2/15, EU:C:2016:880, paragraph 20).

28 It should be pointed out that, even though it is clear from recital 33 of Directive 2008/6 that Member States should be allowed to use general authorisations and individual licences whenever justified and proportionate to the objective pursued, the fact remains that Article 9(1) of Directive 97/67, unlike Article 9(2), does not allow for the provision of postal services to be made subject to the issuing of an individual licence.

29 In those circumstances, it is clear that the provision of such services may be subjected only to the issuing of a general authorisation, as provided for in Article 2(14) of that directive.

30 In the light of the foregoing considerations, the answer to the first and second questions is that Article 9(1) of Directive 97/67 must be interpreted to the effect that a postal items service such as the one at issue in the main proceedings does not fall within the scope of the universal service if it does not involve the permanent provision of a postal service of specified quality at all points in the territory at affordable prices for all users. The provision of a postal items service which does not fall within the scope of the universal service may be subjected only to the issuing of a general authorisation.

The third question

31 By its third question, the referring court asks in essence whether Article 9(1) of Directive 97/67 must be interpreted to the effect that the provision of postal services not falling within the scope of the universal service may be made subject to requirements such as those referred to in Article 9(2), second subparagraph, second indent, of that directive.

32 The Court has, however, already ruled on that question in the judgment of 16 November 2016, *DHL Express (Austria)* (C-2/15, EU:C:2016:880), and the answer given in that judgment also applies in the present case.

33 In paragraph 26 of that judgment the Court held that Article 9(2), second subparagraph, second indent, of that directive allows Member States to subject the granting of authorisations to compliance with requirements concerning the quality, availability and performance of the relevant services. It considered that, given the lack of precision as to which services this obligation applies to, it should be pointed out that it is clear from the preparatory work for Directive 2008/6 that the EU legislature intended to remove not only the remaining obstacles to full market opening for certain universal service providers but also all other obstacles to the provision of postal services. The Court concluded that, failing any indication to the contrary and taking into account the nature of the obligation at issue, it therefore appears that all postal service providers may be required to fulfil the obligation referred to in Article 9(2), second subparagraph, second indent, of Directive 97/67.

34 In those circumstances, the answer to the third question is that Article 9(1) of Directive 97/67 must be interpreted to the effect that the provision of postal services not falling within the scope of the universal service may be made subject to requirements such as those referred to in Article 9(2), second subparagraph, second indent, of that directive.

The fourth question

35 The fourth question must be understood as having arisen solely in the event that Article 9(1) of Directive 97/67 were interpreted to the effect that a licence for the provision of postal services not falling within the scope of the universal service can be subjected only to terms intended to guarantee compliance with the essential requirements under Article 2(19) of that directive. In view of the answer to the third question, it is unnecessary to reply to the fourth question.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Article 9(1) of Directive 97/67/EC 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, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, must be interpreted to the effect that a postal items service such as the one at issue in the main proceedings does not fall within the scope of the universal service if it does not involve the permanent provision of a postal service of specified quality at all points in the territory at affordable prices for all users. The provision of a postal items service which does not fall within the scope of the universal service may be subjected only to the issuing of a general authorisation.**

2. **Article 9(1) of Directive 97/67, as amended by Directive 2008/6, must be interpreted to the effect that the provision of postal services not falling within the scope of the universal service may be made subject to requirements such as those referred to in Article 9(2), second subparagraph, second indent, of that directive, as amended.**

[Signatures]