Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

16 November 2016*

(Reference for a preliminary ruling — Directive 97/67/EC — Article 9 — Postal services in the European Union — Obligation to make a financial contribution to the operational costs of the postal sector's regulatory authority — Scope)

In Case C-2/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 17 December 2014, received at the Court on 7 January 2015, in the proceedings

DHL Express (Austria) GmbH

v

Post-Control-Kommission,

Bundesminister für Verkehr, Innovation und Technologie,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, M. Berger, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— DHL Express (Austria) GmbH, by P. Csoklich, Rechtsanwalt,

— Post-Control-Kommission, by E. Solé,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Belgian Government, by J. Van Holm and S. Vanrie, acting as Agents,

— the Spanish Government, by A. Rubio González, acting as Agent,

* * Language of the case: German.

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Norwegian Government, by I. Thue and J.T. Kaasin, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 16 March 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 9 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 between DHL Express (Austria) GmbH ('DHL') and the Post-Control-Kommission (Commission monitoring postal services, Austria) concerning the latter's decision requiring DHL to make a financial contribution to the operational costs' of the Rundfunk und Telekom Regulierungs-GmbH (regulatory authority of the postal sector; 'RTR').

Legal context

EU law

3 Recitals 27 and 28 of Directive 2008/6 state:

'(27) Postal service providers may be required to contribute to the financing of the universal service in cases where provision is made for a compensation fund. In order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.

(28) In order to comply with the principle of proportionality when determining the contribution to be made to the costs of the provision of the universal service in a Member State required from these undertakings, Member States should use transparent and non-discriminatory criteria such as the share of these undertakings in the activities falling within the scope of the universal service in this Member State. Member States may require those providers which are required to contribute to a compensation fund to introduce appropriate accounting separation in order to ensure the functioning of the fund.'

4 Recital 47 of Directive 2008/6 is worded as follows:

'The role of national regulatory authorities is likely to remain crucial, in particular in those Member States where the transition to competition still needs to be completed. In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the

independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States and to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks.'

5 Article 2(14) of Directive 97/67 reads as follows:

'For the purposes of this Directive:

…

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": 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'.

6 Under Article 2(19) of Directive 97/67, 'essential requirements' are to mean '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'.

7 Article 7 of Directive 97/67 provides in paragraph 3 and 4:

'3. Where a Member State determines that the universal service obligations, as provided for in this Directive, entail a net cost, calculated taking into account Annex I, and represent an unfair financial burden on the universal service provider(s), it may introduce:

(a) a mechanism to compensate the undertaking(s) concerned from public funds; or

(b) a mechanism for the sharing of the net cost of the universal service obligations between providers of services and/or users.

4. Where the net cost is shared in accordance with paragraph 3(b), Member States may establish a compensation fund which may be funded by service providers and/or users' fees, and is administered for this purpose by a body independent of the beneficiary or beneficiaries. Member States may make

the granting of authorisations to service providers under Article 9(2) subject to an obligation to make a financial contribution to that fund or to comply with universal service obligations. The universal service obligations of the universal service provider(s) set out in Article 3 may be financed in this manner.'

8 Article 9 of Directive 97/67 provides:

'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.'

9 As set out in Article 22 of Directive 97/67:

'1. Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. Member States that retain ownership or control of postal service providers shall ensure effective structural separation of the regulatory functions from activities associated with ownership or control.

Member States shall inform the Commission which national regulatory authorities they have designated to carry out the tasks arising from this Directive. They shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities and national authorities entrusted with the implementation of competition law and consumer protection law on matters of common interest.

2. The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service. They may also be charged with ensuring compliance with competition rules in the postal sector.

The national regulatory authorities shall work in close collaboration and shall provide mutual assistance in order to facilitate the application of this Directive within the appropriate existing bodies.

3. Member States shall ensure that effective mechanisms exist at national level under which any user or postal service provider affected by a decision of a national regulatory authority has the right to appeal against the decision to an appeal body which is independent of the parties involved. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.'

Austrian law

10 Paragraph 34 of the Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria ('KommAustria') (Law on the establishment of a federal communications authority 'Austria' ('KommAustria') ('the KOG') on the financing of the Austrian regulatory authority provides:

'(1) The costs borne by RTR in the performance of the tasks referred to in Paragraph 17(2), (4) and (7) relating to the "telecommunications sector" shall be financed, on the one hand, by financial contributions and, on the other hand, by resources from the Federal budget. The grant from the Federal budget of an annual amount of EUR 2 million shall be paid to RTR in two equal instalments, on 30 January and 30 June respectively. Before 30 April of the following year, RTR shall deliver to the Federal Minister for Transport, Innovation and Technology, a report on the use of those resources and the settlement of the accounts. The total amount of the other costs borne by RTR and which must be covered by financial contributions may not exceed EUR 6 million per year. The amounts in question may decrease or increase from 2007 in accordance with changes to the consumer price index published in relation to 2005 by the Austrian federal statistical office or the index replacing it from the previous year.

(2) Financial contributions shall be paid by the "telecommunications sector". The "telecommunications sector" includes providers which, under Paragraph 15 of [the Telekommunikationsgesetz 2003 (Federal Law on Telecommunications 2003)], are subject to an obligation to report, in so far as they do not provide communication networks or communication services intended for broadcasting, or additional services related to broadcasting (liable to pay the contribution).

(3) Financial contributions shall be determined and collected on the basis of the relationship between the turnover of each contributor and the total turnover specific to the sector, in which respect the calculation shall be based on the turnover as a whole made in the country from the provision of telecommunications services.

…

(13) Where an undertaking fails to fulfil its obligation or fails to correctly fulfil its obligation to pay a financial contribution, the Telekom-Control-Kommission shall, by way of decision, order the payment of the financial contribution. Likewise, overpayments and reminders within the meaning of Paragraph 34(12) shall, upon request, be noted by way of decision.'

11 Under Paragraph 34a of the KOG:

'(1) The costs borne by RTR in the performance of the tasks referred to in Paragraph 17(3) and (4) relating to the "postal sector" shall be financed, on the one hand, by financial contributions and, on the other hand, by resources from the Federal budget. The grant from the Federal budget of an annual amount of EUR 200 000 shall be paid to RTR in two equal instalments, on 30 January and 30 June respectively. Before 30 April of the following year, RTR shall deliver to the Federal Minister for Transport, Innovation and Technology, a report on the use of those resources and the settlement of the accounts. The total amount of the other costs borne by RTR and which must be covered by financial contributions may not exceed EUR 550 000 million per year. The amounts in question may decrease or increase from 2012 in accordance with changes to the consumer price index published in relation to 2005 by the Austrian federal statistical office or the index replacing it from the previous year.

(2) Financial contributions shall be paid by the "postal sector". The "postal sector" includes those postal service providers which are subject to an obligation to report under Paragraph 25 of the Postmarktgesetz (Federal Law regulating the postal market) or which benefit from a concession under Paragraph 26 of that Law.

(3) Paragraph 34(3) to (15) shall apply *mutatis mutandis*, replacing "Telekom-Control-Kommission" with "Post-Control-Kommission".'

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

12 DHL is an undertaking operating in the field of express courier and postal services. On that basis, it provides, in particular, the collection, sorting, transport and distribution of parcels of up to 31.5 kg and of printed matter and documents. In addition, DHL offers a number of value-added services, such as parcel tracking and guaranteed observance of delivery times.

13 By decision of 23 April 2012, the Post-Control-Kommission ordered DHL to pay RTR financial contributions for the periods from 1 July to 30 September 2011 and 1 October to 31 December 2011.

14 That decision was taken on the basis of Paragraph 34(9) and (13) and Paragraph 34a of the KOG which provides that RTR's operations are to be financed, on the one hand, by financial contributions paid by postal service providers operating in the national market and, on the other hand, by resources from the Federal budget.

15 DHL contested that decision before the referring court.

16 In support of its claim, DHL submits that under Article 9(2), second subparagraph, fourth indent, of Directive 97/67, only those undertakings providing universal services may be required to contribute to the financing of RTR's operations. Thus, the KOG has infringed that article by imposing such an obligation both on undertakings providing services which fall within the scope of the universal service and on undertakings providing services which do not fall within that scope.

17 In that context, the Verwaltungsgerichtshof (Higher Administrative Court, Austria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Directive 97/67 …, in particular Article 9 thereof, preclude national rules under which postal service providers are obliged to contribute to the financing of the national regulatory authority's operational costs irrespective of whether they provide universal services?

2. If the first question is answered in the affirmative:

(a) Is it sufficient for a financing obligation to exist that the provider concerned provides postal services which are to be classified under the national rules as universal services, but which go beyond the mandatory minimum range of universal services under the directive?

(b) When determining an undertaking's share of the financial contributions, is one to proceed in the same way as when determining the financial contributions to the compensation fund under Article 7(4) of the directive?

(c) Do the requirement to respect the principles of non-discrimination and proportionality within the meaning of Article 7(5) of the directive and the "taking account of inter-changeability with the universal service" within the meaning of recital 27 of Directive 2008/6 … then mean that shares of turnover which are attributed to value-added services, hence postal services not assignable to the universal service but which are connected with the universal service, are excluded and are not taken into account when determining the share?'

The questions referred for a preliminary ruling

The first question

18 By its first question, the referring court asks, in essence, whether Article 9(2), second subparagraph, fourth indent, of Directive 97/67, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes on all postal service providers, including those which do not provide services falling within the scope of the universal service, the obligation to contribute to the financing of the regulatory authority responsible for that sector.

19 It should be noted at the outset that, when interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part. The background to a provision of EU law may also contain elements relevant to its interpretation (judgment of 2 September 2015, *Surmačs*, C-127/14, EU:C:2015:522, paragraph 28).

20 In that regard, it is appropriate to recall, in the first place, that under Article 9(1) of Directive 97/67, 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 with regard to services which fall within the scope of the universal service.

21 Article 9(2), second subparagraph, of Directive 97/67 lists the obligations to which the granting of authorisations may be made subject, without specifying which category of authorisations that subparagraph is referring to: whether authorisations solely regarding services falling within the scope of the universal service or authorisations regarding all postal services.

22 The wording of Article 9(2), second subparagraph, of Directive 97/67 does not in itself make it possible to determine whether the obligations it lists apply to all postal services or only to services falling within the scope of the universal service since the term 'authorisations', as used in this provision, makes no express reference to the regime referred to in Article 9(1) or to the regime referred to in Article 9(2), first subparagraph.

23 In the second place, it is clear from an analysis of the overall structure of Article 9(2), second subparagraph, of Directive 97/67 that the obligations laid down in that provision may, depending on the obligation, be imposed either solely on providers which supply services falling within the scope of the universal service, or services considered as such, or on all postal service providers.

24 On one hand, Article 9(2), third subparagraph, of Directive 97/67 expressly provides that the obligations and requirements referred to in Article 9(2), second subparagraph, first indent, may be imposed only on designated universal service providers within the meaning of Article 4 of that directive.

25 In addition, Article 9(2), second subparagraph, third indent, of Directive 97/67 allows Member States to subject the granting of authorisations to an obligation to make a financial contribution to the compensation fund provided for under Article 7(4) of that directive. As drafted, that provision does not expressly relate to universal service providers. Nevertheless, it is clear from Article 7(3) of that directive that the right of Member States to establish such a fund is linked to their right to introduce a mechanism for the sharing of the net cost of universal service obligations, where those costs represent an unfair financial burden for the providers. Above all, however, it is clear from recital 27 of Directive 2008/6, regarding the obligation for postal service providers to contribute to the financing of the universal service where provision is made for a compensation fund, that in order to determine which undertakings may be required to contribute to that fund, Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service.

26 On the other hand, Article 9(2), second subparagraph, second indent, of Directive 97/67 allows Member States to subject the granting of authorisations to compliance with requirements concerning the quality, availability and performance of the relevant services. Given the lack of precision as to which services this obligation applies to, it should be pointed out, as the Advocate General observed in point 42 of his Opinion, that it is clear from the *travaux préparatoires* 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. 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.

27 Likewise, Article 9(2), second subparagraph, fifth indent, of Directive 97/67 allows Member States to subject the granting of authorisations to an obligation to respect the working conditions laid down by national legislation. Nevertheless, as the Austrian Government correctly submits, a restrictive

interpretation of that provision — as applying only to universal service providers — cannot be upheld since Article 9(1) of that directive subjects the granting of general authorisations — for services which fall outside the scope of the universal service — to compliance with the essential requirements referred to in Article 2(19) of that directive, which includes the obligation to respect the working conditions laid down by national legislation.

28 Thus, it is clear from analysis of the overall structure of Article 9(2), second subparagraph, of Directive 97/67 that the term 'authorisations', as used in this provision, applies both to the authorisations referred to in Article 9(2), first subparagraph, and to the authorisations referred to in Article 9(1) of that directive.

29 In the third place, as regards the specific obligation, under Article 9(2), second subparagraph, fourth indent, of Directive 97/67, to contribute to the financing of the regulatory authority responsible for the postal sector, which is the subject of the first question referred, it should be noted that the activities for which national regulatory authorities are responsible relate to all postal services and not solely to the provision of postal services falling within the scope of the universal service.

30 Article 22(1) of Directive 97/67 provides that Member States are to designate one or more national regulatory authorities for the postal sector. Article 22(2) of that directive does indeed provide that those authorities have the task of ensuring compliance with the obligations arising from that directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service. However, that regulation also provides that those authorities may be charged with ensuring compliance with competition rules across the postal sector as a whole.

31 Accordingly, as noted by the Advocate General in point 46 of his Opinion, given that the EU legislature intended the role and tasks devolved to the national regulatory authorities to have to be of benefit to all operators in the postal sector, Article 9(2), second subparagraph, fourth indent, of Directive 97/67 must be interpreted as meaning that all postal service providers may, in return, be made subject to the obligation to contribute to the financing of the operations of those authorities.

32 Having regard to the foregoing, the answer to the first question is that Article 9(2), second subparagraph, fourth indent, of Directive 97/67 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which imposes on all postal service providers, including those which do not provide postal services falling within the scope of the universal service, the obligation to contribute to the financing of the national regulatory authorities responsible for that sector.

The second question

33 In view of the answer given to the first question, there is no need to answer the second.

Costs

34 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 (Fifth Chamber) hereby rules:

Article 9(2), second subparagraph, fourth indent, 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 as not precluding national legislation, such as that at issue in the main proceedings, which imposes on all postal service providers, including those which do not provide postal services falling within the scope of the universal service, the obligation to contribute to the financing of the national regulatory authorities responsible for that sector.

[Signatures]