

**Case C-434/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

5 June 2019

**Referring court:**

Corte suprema di cassazione (Italy)

**Date of the decision to refer:**

21 January 2019

**Appellant (and respondent in the cross-appeal):**

Poste Italiane SpA

**Respondent (and appellant in the cross-appeal):**

Riscossione Sicilia SpA — tax-collection agency for the province of Palermo and the other provinces of Sicily

**Subject matter of the action in the main proceedings**

Obligation to pay a fee to Poste Italiane spa for its management of the postal current account into which payments are made by taxable persons required to pay the municipal real estate tax (imposta comunale sugli immobili; ICI) — Obligation of the agent of the municipal tax collection service to open such a current account in order to collect ICI payments — Exclusive position of Ente Poste Italiane, latterly Poste Italiane spa (statutory monopoly) — Infringement of EU law — State aid — Unilateral determination of the fee — Abuse of a dominant position — Request by the Corte di Cassazione (Italy) for the Court of Justice to deliver a preliminary ruling

**Subject-matter and legal basis of the reference**

Interpretation of EU law under Article 267 TFEU.

## Questions referred

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 s.p.a. are set up and maintained — even following the privatisation of the ‘bancoposta’ postal banking services provided by Poste Italiane s.p.a. — 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 (formerly Article 7D of the Treaty, then Article 16 EC) and 106(2) TFEU (formerly Article 90 of the Treaty, then Article 86(2) EC) 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 Presidential Decree No 144/2001, which grants Poste Italiane s.p.a. 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 postal current account in the name of the agent, incompatible with Articles 106(2) TFEU (formerly Article 90 of the Treaty, then Article 86(2) EC) and 107(1) TFEU (formerly Article 92 of the Treaty, then Article 87 EC), 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 of the Court of Justice of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C 280/00), bearing in mind that Poste Italiane spa, 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) to (20) of Law No 662/1996, Article 3(1) of Presidential 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 s.p.a., incompatible with Article 102, first paragraph, TFEU (formerly Article 86 of the Treaty, then Article 82(1) EC), as interpreted by the Court of Justice (see judgments of 13 December 1991, Case C-18/88, *GB-Inno-BM*, of 25 June 1998, Case C-203/96, *Dusseldorp and Others*, and of 17 May 2001, Case C-340/99, *TNT TRACO*), 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)

Legislative Decree No 504/1992 and, as a consequence, infringing its ICI-collection obligations to the local tax authority?

### **Provisions of EU law and EU case-law relied on**

TFEU: Articles 14, 102, first paragraph, 106(2), 107(1) and 108

Judgments of the Court of 13 December 1991, *GB-Inno-BM* (C-18/88, EU:C:1991:474); of 25 June 1998, *Dusseldorp and Others* (C-203/96, EU:C:1998:316); of 17 May 2001, *TNT Traco* (C-340/99, EU:C:2001:281); and of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415)

### **Provisions of national law relied on**

Article 10(3) of decreto legislativo (Legislative Decree; ‘dlgs’) No 504 of 30 December 1992

Article 2(18) to (20) of legge (Law) No 662 of 23 December 1996

Article 3, first paragraph, of decreto del Presidente della Repubblica (Presidential Decree; ‘DPR’) No 144 of 14 March 2001, and

other provisions cited as necessary in the summary

### **Succinct presentation of the facts and the main proceedings**

- 1 Poste Italiane s.p.a. is a private-law company with a majority public shareholding, formed as a result of the conversion, initially, of the Amministrazione autonoma delle Poste e delle Telecomunicazioni into the public economic entity ‘Poste Italiane’ and, subsequently, of the Ente Poste into a public limited company, as provided for by decreto legge (Decree Law; ‘DL’) 487/93. The services and activities to be performed were established over time as the privatisation progressed. It is clear from the wording of Article 2(19) of legge 662/96 (‘Postal and payment services for which a system of statutory monopoly is not expressly provided by the legislation in force shall be performed by the Ente Poste Italiane and by other operators under the rules of free competition ...’) that other services were exclusively reserved for the Ente, with an obligation to keep separate accounts (Article 2(20) of legge 662/96).
- 2 In reorganising the finances of regional bodies, Article 10(3) of dlgs 504/92 provided that the only methods of paying the ICI were either ‘direct payment to the agent of the tax collection service in whose district the municipality [of the real estate taxed] is located’ or payment ‘into a special postal current account in the name of the aforementioned agent’. The agent was therefore obliged to open a

postal current account to fulfil his obligation to the taxing authority (the municipality).

- 3 The abovementioned obligation for the purposes of collecting the ICI was not repealed by the reforms of the rules on tax collection (decreto del ministro delle Finanze (Decree of the Minister for Finance) 567/93, dlgs 241/97, dlgs 300/99 and dlgs 446/97), all of which were designed to extend the methods of paying other taxes and charges, including local ones (irrevocable authorisation to banks, payment at the Municipality's counters or into accounts in the name of the municipal finance department). Only in 2011 was the local tax collection agent expressly granted the right to open just one single bank current account instead of a postal one (DL 70/2011).
- 4 Like the services and activities to be performed, the criteria for determining the tariffs for postal and payment services were also amended in the course of the privatisation of the Amministrazione delle Poste: a prohibition on free services being provided to public authorities and public bodies was introduced (DPR 256/89); the requirements for consultation with competent ministers were reduced (DPR 256/89, DL 487/93); in respect of the services governed by the rules on competition, 'every tariff obligation or social obligation ... as well as every form of preferential tariff' was abolished — in order to take into account, instead, with effect from 1 April 1997, 'the requirements of customers and the characteristics of demand, as well as ... the volume of traffic' (Article 2(20) Law 662/96); and fees were charged to current account holders (Article 2(18) Law 662/96). In particular, a fee was charged on every transaction carried out in connection with the management of funds collected in postal current accounts by the agents of the tax collection service (tariff decision No 57/96 of the Administrative Board). Lastly, DPR 144/2001 established that relationships with clients and postal current accounts would be governed 'on a contractual basis, in accordance with the provisions of the Civil Code and special laws' (Article 3(1)), as was previously the case with bank accounts.
- 5 The parties — Poste Italiane spa and Riscossione Sicilia spa, tax-collection agency for the province of Palermo and the other provinces of Sicily — disagree as to whether there is an obligation to pay the fees at issue for the period 1997–2011. The appeal judges, varying the judgment at first instance in part, recognised Post Italiane's right to the payment, but only for the period after 1 January 2001. The case is now pending before the Corte di Cassazione

### **The main arguments of the parties to the main proceedings**

- 6 Riscossione Sicilia claims that it is unlawful to charge a fee for a management service that is imposed by statute. The requirement to have a postal current account in order to collect the ICI on behalf of municipalities creates a statutory monopoly for Poste Italiane, which profits from the consequent dominant position in order unilaterally to determine all the contractual conditions, including fees,

and confers on it an undue advantage over other economic operators, since it does not, in Riscossione Sicilia's opinion, actually perform public tasks justifying compensation. The aid that Poste Italiane receives in this way from the State, notification of which was not given to the Commission, is prohibited under Articles 107 TFEU and 108 TFEU, or alternatively, Articles 102 TFEU and 106 TFEU and Article 4 TEU.

- 7 Poste Italiane contends, in summary, that: (1) even if provided as part of a statutory monopoly, postal current account services cannot be provided free of charge; (2) in any event, the agent could seek from the municipalities reimbursement of the fees paid for the compulsory requirement to open an account; (3) the fees were determined in compliance with the criteria of uniformity and equal treatment of agents and in any event by means of the charges laid down in the Condizioni Economiche Bancoposta, and (4) the same disputed tax law made provision for alternative methods of payment (in particular, payment directly to the agent).

#### **Succinct presentation of the grounds for the request for a preliminary ruling**

- 8 The Joint Chambers of the Corte di Cassazione have already ruled, recently, on the obligation to pay the fee at issue, noting that no provision states that management of the postal current account intended for the collection of the ICI should be provided free of charge, and therefore that service it is to be paid for, even if that requirement is imposed, as are postal current account services operated under the rules on free competition. The logic in, and justification for, reserving activities for Poste Italiane reside in the objective of maximising tax collection by means of the widespread distribution of post offices which are easily accessible across the whole of Italy. However, the present Chamber now entertains doubts, in the light of the possibility of using the banking system introduced in 2011, as to the lawfulness of Poste Italiane's statutory monopoly, and is uncertain whether this does not, in fact, amount to non-notified State aid.
- 9 The referring court begins with an examination: (1) of the contract-based relationship between the municipal tax authority and the tax collection agent, the purpose of which is the pursuit of an economic activity aimed at the collection of fiscal revenues, which can be defined as a service of general economic interest within the meaning of Article 106(2) TFEU, and (2) of the private-law contractual relationship relating to the management of the postal current account, which is established between the agent and Poste Italiane, in accordance with Article 10(3) of dlgs 504/1992.
- 10 The latter relationship differs from the current-account relationships between Poste Italiane and its other clients owing simply to the limitations on the contractor's power to choose, since the statutory monopolist is obliged to enter into a contract with a person requesting its services (Article 2597 of the Civil Code). However, Poste Italiane does not enter into a mandatory relationship

governed by public or private law with the municipal tax authority. Therefore, a reservation of activity with respect to the other economic operators in the sector (banks which also offer current account services) is compatible with EU law only to the extent that the service offered by Poste Italiane is a service of general economic interest, or only if Poste Italiane has been entrusted with a ‘particular task’ for the purposes of Articles 14 and 106 TFEU.

- 11 The referring court nonetheless entertains doubts as to the lawfulness of the status conferred on Poste Italiane, observing, on the one hand, that there is no provision, for the ICI, similar to that in Article 10(3) dlgs 504/92, in the rules governing the collection of other local taxes, and, on the other hand, by contrast, that since 1997 the payment of taxes, including local taxes, has been permitted by way of the banking system.
- 12 If, nevertheless, the statutory monopoly as regards the postal current account services for the collection of the ICI is regarded as a service of general economic interest, there arises the further question as to the lawfulness of the unilateral power granted to the company holding a monopoly to determine the fee to be paid by the agent. In the first place, the fee is not in fact determined in a clear and transparent way that does not go beyond what is necessary and is based on the costs and profits of an average well-managed undertaking, as is required, by contrast, in the absence of a competitive tendering procedure. In the second place, the statutory monopolist is necessarily led to abuse its dominant position, given that the agent may not terminate the contract without, by doing so, defaulting as regards the contracting local authority (contractor).