

**Case C-419/19**

**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:**

29 May 2019

**Referring court:**

Tribunale Amministrativo Regionale per il Lazio (Italy)

**Date of the decision to refer:**

6 March 2019

**Applicant:**

Irideos S.p.A.

**Defendant:**

Poste Italiane S.p.A.

**Other parties to the proceedings:**

Fastweb S.p.A.

Tim S.p.A.

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

Action seeking annulment of the decisions by which, on 22 October 2018, Poste Italiane S.p.A. ('Poste Italiane') notified IRIDEOS S.p.A. of the award of Batch 1 and Batch 2 of the tender procedure concerning 'Contract pursuant to Legislative Decree No 50/2016 — Electronic open call for tenders for DWDM (MAN) fibre-optic high-speed urban telecommunication services', to Fastweb S.p.A. and Tim S.p.A., respectively, and seeking an order that Poste Italiane should pay compensation for the damage that the applicant claims to have incurred. Cross-claim lodged by Tim S.p.A. seeking, inter alia, that Poste Italiane be ordered to reopen the tender procedure.

### Subject matter and legal basis of the reference

- 1 Compatibility with EU law (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU) of the national legislation set out in Article 3(1)(e) of decreto legislativo 18 aprile 2016, n. 50, Codice dei contratti pubblici (the Public Contracts Code; ‘Legislative Decree No 50/2016’, ‘the Code’, or the ‘Public Procurement Code’) insofar as that provision is understood, according to the interpretation of the Corte di Cassazione (Supreme Court of Cassation, Italy) (Order No 4899/2018, which is binding in domestic law with regard to jurisdiction), as providing a derogation, for undertakings operating in the special sectors set out in Part II of the Code, from the general principles laid down in Article 1 and Article 3(1)(a) of the Code, insofar as concerns the obligation to hold competitive tendering procedures when the contract to be awarded does not relate to activities specific to the special sectors.
- 2 In the present proceedings, the referring court must also address a twofold problem: the first relates to the binding force in Italian procedural law of decisions concerning jurisdiction given by the Supreme Court of Cassation ruling as combined chambers; the second relates to the potential development of Court of Justice case-law, as certain legal entities, established as bodies governed by public law, are gradually turning into fully fledged undertakings which seek to make a profit, bear losses, and which operate for the most part in a competitive environment (see recital 21 and Article 16 of Directive 2014/23/EU).
- 3 With reference to the first question, the referring court notes that the Supreme Court of Cassation is required to establish, in a definitive and binding manner, whether, under the Italian procedural system, the court seised of the case has jurisdiction to hear it. The Court of Justice has, however, expressed the general principle that EU law prevents a national court from being bound by a rule of internal procedure, according to which it should abide by the assessments carried out by a national court of higher rank, if it appears that the latter’s assessments do not comply with EU law, as interpreted by the Court of Justice (see judgment of 20 October 2011, C-396/09, *Interedil s.r.l. in liquidation*).
- 4 There is therefore the option (or the obligation, for courts of last instance) to turn to the Court of Justice when there is a ‘reasonable doubt’ about the correct application of EU law, regardless of any conflicting decision on jurisdiction by the Supreme Court of Cassation, or by the Consiglio di Stato (Council of State, Italy) sitting in plenary session — which is binding on the ordinary chambers of the Council of State (see, among others, Court of Justice judgments of 5 April 2016, C-689/13, *Puligienica Facility*, and of 6 October 1982, C-283/81, *Cilfit*).

### Questions referred

1. Should the company Poste Italiane s.p.a., on the basis of characteristics set out above, be classified as a ‘body governed by public law’ within the meaning of

Article 3(1)(d) of Legislative Decree No 50 of 2016 and of the relevant EU directives (2014/23/EU, 2014/24/EU and 2014/25/EU)?

2. Is that company required to conduct competitive tendering procedures only when awarding contracts which relate directly to activities in the special sectors referred to in Directive 2014/25/EU, under which the very nature of a body governed by public law must be regarded as being contained in the rules laid down in Part II of the Public Procurement Code — whilst, on the other hand, having unfettered freedom and being subject only to private-sector rules for contracts not, strictly speaking, connected to such sectors, bearing in mind the principles set out in recital 21 and Article 16 of Directive 2014/23/EU (judgments of the Supreme Court of Cassation, ruling as combined chambers, No 4899 of 2018, cited above and, for the last part, judgment of the Council of State, sitting in plenary session, No 16 of 2011, as cited above).

3. With regard to contracts considered not to be directly connected with the specific activities covered by the special sectors, is that company, where it meets the requirements for being classified as a body governed by public law, subject to the general Directive 2014/24/EU (and therefore to the rules governing competitive tendering procedures), even when performing primarily entrepreneurial activities in competitive market conditions, having developed from when it was originally established, as may be inferred from the judgment of 10 April 2008, C-393/06, *Ing. Aigner*, since Directive 2014/24/EC precludes any other interpretation for contracts concluded by contracting authorities, bearing in mind that recital 21 and Article 16 of Directive 2014/23/EU set out a mere presumption for the purpose of precluding undertakings which operate in normal market conditions from being deemed bodies governed by public law, although it is clear that, on the basis of those provisions read together, priority consideration is given to the stage at which the body was established, where that body is intended to meet ‘*needs in the general interest*’ (which continue to exist in the present case)?

4. In any event, in the case of offices in which activities connected to the universal service and activities unrelated to it are both performed, must the concept of ‘*a functional link*’, in connection with a service which is specifically in the public interest, be interpreted in a non-restrictive manner (as has been held to date in the national case-law, in accordance with judgment No 16 of 2011 of the Council of State, sitting in plenary session), at odds, in that regard, with the principles set out in recital 16 and Articles 6 and 13 of Directive 2014/25/EU, which refer to the concept of the ‘*intended purpose*’ of one of the activities governed by the Public Procurement Code for the purpose of identifying the applicable rules? It must therefore be clarified whether all the operational activities in a relevant special sector can be ‘intended’ for that sector - including under the less stringent binding conditions specific to excluded sectors, in accordance with the intentions of the contracting authority (including contracts relating to ordinary and extraordinary maintenance, cleaning, furnishing, caretaking and storage services for such offices, or other forms of use of the latter if intended as a service for customers)

while only the ‘unrelated’ activities remain effectively privatised, activities which the public or private entity can carry out freely in entirely different areas, exclusively under the rules of the Civil Code and the jurisdiction of the ordinary courts. (It is true that, for present purposes, the banking services carried out by Poste Italiane are an example of this type but the same cannot be said for the supply and use of electronic communication tools, where they are used to cover the scope of activities of the Group, even though they are particularly necessary for the banking activity.) However, it seems necessary to point out the ‘imbalance’ prompted by the current restrictive interpretation, which introduces completely different rules to the management of comparable or adjacent sectors, for the award of works or service contracts: on one hand, the detailed safeguards imposed by the Public Procurement Code for the purpose of identifying the other party to the contract, and on the other hand the complete freedom to negotiate on the part of the contractor, which is free to make agreements solely in accordance with its own economic interests, without any of the transparency guarantees required for the special and excluded sectors;

5. Finally is the launch of a public procurement procedure under the Public Procurement Code - using forms of publicity determined at both national and EU level - relevant for the purposes of identifying the intended purpose of the contract, where it is linked to the relevant special sector, within the meaning of the broad concept of ‘*a functional link*’, referred to in the above question No 4, or - in the alternative - can an objection concerning the jurisdiction of the administrative courts, raised by the entity which launched the tendering procedure or by the parties which were successful in the procedure, be regarded as an abuse of rights within the meaning of Article 54 of the Charter of Fundamental Rights, in so far as it is conduct which - while not being capable, as such, of affecting the allocation of jurisdiction (see judgment of the Council of State, sitting in plenary session, No 16 of 2011) - is relevant at least for the purposes of compensation and legal expenditure, since it is detrimental to the legitimate expectations of the participants in that tendering procedure where they are unsuccessful and applicants in legal proceedings?

### **Provisions of EU law cited**

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in particular recital 21 and Article 16

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in particular recital 16 and Articles 7 and 8

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy,

transport and postal services sectors and repealing Directive 2004/17/EC, in particular recital 16, Article 5(5), Article 6(2) and Article 13(1)(b)

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Commission Decision 2008/383/EC exempting express and courier services in Italy from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

### **Provisions of national law invoked**

Legge 4 agosto 2017, n. 124 — Legge annuale per il mercato e la concorrenza (Law No 124 of 4 August 2017 — Annual law on markets and competition)

Decreto Legislativo 18 aprile 2016 n. 50, attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 of 18 April 2016 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement procedures of entities operating in the water, energy, transport and postal services sectors, and restructuring the provisions applicable to public works contracts, public service contracts and public supply contracts) ('Legislative Decree No 50/2016'), in particular Articles 4, 8 and 10; Article 14(2), Article 15, Articles 115 to 121 and, notably Article 120

Decreto legislativo 12 aprile 2006, n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006, Code on public works contracts, public service contracts and public supply contracts, implementing Directives 2004/17/EC and 2004/18/EC), in particular Article 3(26) and (29), Article 27 and Annex VI F

Decreto legislativo 22 luglio 1999, n. 261 — Attuazione della direttiva 97/67/CE concernente regole comuni per lo sviluppo del mercato interno dei servizi postali comunitari e per il miglioramento della qualità del servizio (Legislative Decree No 261 of 22 July 1999 — implementing Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service), Article 1, Article 23(2), Article 3(12)

Decreto legislativo 31 marzo 2011, n. 58 — Attuazione della direttiva 2008/6/CE che modifica la direttiva 97/67/CE, per quanto riguarda il pieno completamento del mercato interno dei servizi postali della Comunità (Legislative Decree No 58 of 31 March 2011 — implementing Directive 2008/6/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services), Article 1

Decreto legge 1° dicembre 1993, n. 487, Trasformazione, dell'Amministrazione delle poste e delle telecomunicazioni in ente pubblico economico e riorganizzazione del Ministero (Decree-Law No 487 of 1 December 1993 — Conversion of the Post and Telecommunications Office into a public economic entity and reorganisation of the Ministry), Article 4

Supreme Court of Cassation Order No 4899 of 1 March 2018

Council of State: judgment No 16 of 1 August 2011, judgments Nos 13, 14, 15 and 16 of 2016

### **Succinct presentation of the main proceedings and main arguments of the parties**

- 5 By its application, Irideos contested the decisions taken in the tendering procedure launched by Poste Italiane — ‘pursuant to Legislative Decree No 50 of 2016’ for DWDM (MAN) fibre-optic high-speed urban telecommunication services using technology. The objective of those services was to create an electronic network for the secure and fast transmission of data between the various offices of the body, using a particular telecommunication technology – Dense Wavelength Division Multiplexing (DWDM) – which allows for transmission, on a single optical fibre, of a greater number signals using different wavelengths independently, with the possibility of increasing the bandwidth available on the same optical fibre channel and the consequent possibility of increasing the quantity of data transmitted, as well as the provision of DWDM equipment needed for the implementation of the services. The abovementioned elements corresponded to two batches of equal value, amounting to EUR 10 220 000,00 in total.
- 6 The applicant disputed, in particular, the parameters for assessment of the technical tender, based on a formula whose implementing methods involved awarding the maximum score to any person who offered to carry the project in under 45 days, thereby effectively removing the selection criterion based on speed of completion of the operation, so that all the tenderers obtained the maximum number of points, whereas the applicant offered implementation times of 21 days compared with the 44 days offered by the other parties to the main proceedings.
- 7 In that context, the tender was awarded, in practice, on the sole basis of the financial offer. The entire procedure was therefore criticised for breach of law and abuse of power in various ways.

- 8 The other parties to the main proceedings contested the applicant's arguments. Tim S.p.A. also submitted a cross-claim seeking that the tender procedure be reopened.
- 9 In addition, Fastweb S.p.A. raised the objection of lack of jurisdiction of the administrative courts. The services in question do not have a close link with the postal services as such and therefore fall outside the scope of the 'special sectors', referred to in Article 120 of Legislative Decree No 50/2016.
- 10 According to Fastweb S.p.A., the choice to make the contract subject to public tendering procedures was accordingly not necessary: the telecommunications infrastructure in question supports the various activities of Gruppo Poste, under the specific legal regime for the activities for which the infrastructure itself must be regarded as principally intended, as provided for in Article 5(5), Article 6(2) and recital 16 of Directive 2014/25/EU and does not have as its primary consideration the postal service, which accounts merely for 30% of the turnover of Poste Italiane. The voluntary decision of the contracting authority was not sufficient to establish the jurisdiction of the administrative courts, given that case law has on several occasions upheld the jurisdiction of the ordinary courts for disputes not specifically related to the special sector, and Poste Italiane cannot be defined as a body governed by public law, since it operates in normal market conditions, pursuing profit and sustaining losses.
- 11 Subsequently, on 19 February 2019, Tim S.p.A. raised an objection of lack of jurisdiction of the administrative court, stating that only contractual procedures strictly concerning postal services should be deemed to be subject to the public tendering procedure.
- 12 It claims that the lack of jurisdiction is confirmed by Article 10 of Legislative Decree No 50 of 2016, which, in accordance with Article 7 of Directive 2014/24/EU - excludes from the scope of the Public Procurement Code contracts attributable to a '*contracting authority which provides postal services*' with reference to '*added value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail*'.
- 13 Article 15 of Legislative Decree No 50, in accordance with Article 8 of Directive 2014/24/EU, also excludes the application of the Public Procurement Code 'for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communications services'.
- 14 In turn, Article 8 of the Public Procurement Code — in accordance with Article 13 of Directive 2014/25/EU — excludes from its scope of application the performance of the activity of a postal service activity, '*if the activity is directly exposed to competition*'.

- 15 Moreover, in the light of the relevant changes, the postal service operator can no longer be referred to as a ‘*body governed by public law*’, in the absence of the requirement to ‘*meet general requirements, not having an industrial or commercial character*’.
- 16 Even if that legal nature were to be recognised, the obligation to apply the public tendering procedures would in any case be precluded by the abovementioned Article 8, Article 10(b) and Article 15 of Legislative Decree No 50/2016; ultimately, including for bodies governed by public law, those procedures would only be required for supplies and services which are strictly relevant to the special sectors (judgment of the Supreme Court of Cassation, ruling as combined chambers, No 4899 of 2018).
- 17 TIM S.p.A. also asked that if the court hearing had doubts about the interpretations summarised above, it should refer the question to the Court of Justice, pursuant to Article 267 TFEU.
- 18 In its final statement, lodged on 18 February 2019, Poste Italiane reiterated the legitimacy of the criterion and the correctness of the mathematical formula used. None of its arguments in defence, however, concerned the question of jurisdiction raised by one of the other parties to the main proceedings and, on that basis, the case was reserved for judgment.

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

- 19 As regards the question of jurisdiction, raised from the perspective that Poste Italiane is generally not subject to the Public Procurement Code - for contracts not strictly related to the postal service - doubts concerning compliance with EU law, on the basis of the directives in force and previous rulings of the Court of Justice have already been submitted to that Court by order No 7778 of 12 July 2018 (Case C-521/18).
- 20 In the present situation, however, wider issues have arisen which must be addressed by the referring court and which accordingly justify a new order which overlaps only partially with that referred to above.
- 21 According to the referring court, the issue of the jurisdiction raised requires assessment of the following:
- (I) the legal nature of Poste Italiane, taking account of the changes in the postal services sector, which have taken place under an increasingly broad competition regime;
- (II) definition of the concept of ‘*a functional link*’ based on which the scope of Article 114 *et seq.* of the Public Procurement Code must be established in order to limit the jurisdiction of the administrative courts (at least for companies, which, according to their prevailing approach, are not bodies governed by public law);

- (III) assessment of the legitimate expectations of participants in a tender procedure, launched without there being any obligation to conduct such a procedure in sectors that are deemed to be outside the public tendering rules, or only excluded from the full application of the Public procurement code, but not from the principles thereof.
- 22 With regard to the nature of a body governed by public law, recognition of that body, within the meaning of Article 3(1)(c) of Legislative Decree No 50/2016, is based on the following criteria:
- 1) it must be established for the specific purpose of meeting needs in the general interest that are not industrial or commercial in nature;
  - 2) it must have legal personality (without distinction between public or private bodies);
  - 3) it must be financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or be subject to management supervision by those bodies, or have an administrative, managerial or supervisory body, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.
- 23 With regard to ‘contracting entities’, these may be ‘contracting authorities’, as specified above, or public undertakings which carry out one of the activities referred to in Articles 115 to 121 of the Public Procurement Code, or which — though not falling within those categories — carry out the activities specified in the abovementioned legal provisions ‘on the basis of special or exclusive rights granted by a competent authority’. These activities include, in accordance with Article 120 of that Code, postal services.
- 24 According to the referring court, the classification of Poste Italiane S.p.A. as a body governed by public law appears irrefutable. This company, in fact, took over from the pre-existing central administration, which was established after Italy’s unification, in order to make the service more efficient. Currently, whilst also operating under competitive market conditions in the financial, insurance and mobile phone sectors, Poste Italiane still holds the concession for the universal postal service, which, with state disbursements partially covering the costs, entails the mandatory provision of essential services for the delivery to all Italian municipalities of letters and parcels at a controlled price, as demonstrated by the infringement proceedings which the European Commission has indicated it intends to launch in connection with the decision to no longer deliver mail to 4 000 municipalities on the ground that such service is deemed unprofitable. It must necessarily be concluded therefore that this company, which has legal personality, has been established to meet general interests that are not industrial or commercial in nature, and are directly linked to the freedom of correspondence and of all other forms of communication (requirements for bodies governed by public law, as indicated in subparagraphs 1 and 2 of paragraph 20 above).

- 25 As regards the requirement set out in subparagraph 3 of paragraph 20 above, it should be noted that the majority shareholding of Poste Italiane is held by the Ministry of Economic Affairs, which appoints the Board of Directors, and that Poste Italiane s.p.a. is subject to the oversight and supervision of the Ministry of Economic Development and the Corte dei Conti (Court of Auditors, Italy); its Board of Auditors is made up of three regular members and three substitutes, all of whom are appointed by the aforementioned authorities. AGCOM, moreover, is tasked with adopting regulatory measures concerning the quality and features of the universal service, which is governed by a programme contract under which the postal services operator's counterparty is the Ministry of Economic Development.
- 26 The cornerstone of a body governed by public law is the importance of the general interests pursued, which, even if the operation yields profits, cannot be devoid of administrative oversight as to whether quality of service targets are attained. It is in fact the duty of administrative authorities to actively look after the interests of the general public which the State considers are represented by services to be rendered to citizens; these services, therefore, must satisfy the criteria of impartiality, sound administration and transparency, even when they are entrusted to entities which lie outside the administrative machinery proper.
- 27 Therefore, in terms of the status of the entity, there is sufficient evidence for it to be possible to classify the company Poste Italiane as a body governed by public law, within the meaning of Article 3(1)(d) of Legislative Decree No 50/2016, a view which is also endorsed by the Council of State's case-law.
- 28 However, a different approach emerges from the recent order of the Supreme Court of Cassation, ruling as combined chambers, No 4899, issued on 1 March 2018 and relied on in the present proceedings by the other parties to the main proceedings in support of the objection alleging lack jurisdiction. That order sets out the following principles:
- (a) Poste Italiane, while responsible for providing the 'universal postal service', currently also engages in financial activities, or in any event activities unrelated to the provision of mail delivery services, which are now exposed to competition;
  - (b) Directive 18/2004/EC 'explicitly excluded' Poste Italiane s.p.a. from the categories of bodies governed by public law; Poste Italiane has now been structured as a contracting entity, within the meaning of Article 3(29), and Annex VI F of Legislative Decree No 163 of 2006, because it did not fulfil the 'requirement of meeting needs in the general interest that are not industrial or commercial in nature, which means that the entity concerned must be entrusted solely with meeting such needs and is not allowed to carry out other activities';
  - (d) 'Any classification of Poste Italiane as a body governed by public law' would in any event be 'irrelevant', because the question whether an entity is subject to rules on competitive tendering procedures must be resolved in accordance with

the provisions governing the special sectors, on the basis of Poste Italiane's status as contracting entity.

- 29 The Supreme Court of Cassation's reasoning, in particular that set out under (b) and (d) above, appears to be in conflict with the judgment of the Court of Justice of 10 April 2008, C-393/06, *Ing. Aigner*, which reaches the opposite conclusions, as summarised below:

(I) Directive 2004/17/EC (now 2014/25/EU) regulates procurement by entities operating in the so-called 'special sectors' (water, energy, transport and postal services sectors), in which the 'contracting entities' are not limited to the 'contracting authorities' (as now defined by Article 3(1)(a) of Legislative Decree No 50/2016), but may also be 'public undertakings', or 'undertakings enjoying special or exclusive rights granted by a competent authority of the Member State', insofar as such entities are engaged in one of the activities covered by that sector. The provisions of this directive are to be interpreted restrictively, and therefore only with regard to contracts connected to the sector concerned, the 'contagion theory' referred to in the judgment of 15 January 1998, C-44/96, *Mannesmann* thus being abandoned (see also, to that effect, judgment of 16 June 2005, [joined cases] C-462/03 and C-463/03, *Strabag and Kostmann*).

(II) As regards bodies governed by public law (as defined by Directives 2014/24/EU and 2014/25/EU, and as transposed in Article 3(1)(d) of Legislative Decree No 50/2016), the interpretation, instead, should not be restrictive, but functional, and therefore based on ascertaining whether the entity was established for the purpose of meeting needs in the general interest 'that are not industrial or commercial in nature'. In that regard, according to the *Ing. Aigner* judgment, '[i]t is immaterial that such needs are also met or can be met by private undertakings. It is important that they should be needs which, for reasons in the general interest, the State or a regional authority generally chooses to meet itself or over which it wishes to retain a decisive influence. (...) It must be borne in mind that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity is free to carry out other profit-making activities, provided that it continues to attend to the needs which it is specifically required to meet. The proportion of [profit-making] activities actually pursued by that entity as part of its activities as a whole is also irrelevant for its classification as a body governed by public law.

(III) Directive 2004/18/EC, which has now been replaced, without amendments, by Directive 2014/24/EU, is applicable to contracts awarded by bodies governed by public law falling outside the scope of the special sectors, in which such bodies nonetheless operate, and which remain subject to the specific rules laid down in that regard in respect of activities directly connected to those sectors. Indeed, the *Ing. Aigner* judgment of the Court of Justice cited above reaches the following conclusion: 'All contracts awarded by an entity which is a body governed by public law, within the meaning of Directive 2004/17 or Directive 2004/18, which relate to activities carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of Directive 2004/17 must be subject to the procedures laid down

in that directive. However, all other contracts awarded by such an entity in connection with the exercise of other activities are covered by the procedures laid down in Directive 2004/18. Each of these two directives applies without distinction between the activities carried out by that entity to accomplish its task of meeting needs in the general interest and activities which it carries out under competitive conditions, and even where there is an accounting system intended to make a clear internal separation between those activities in order to avoid cross financing between those sectors’.

- 30 Accordingly, Directive 2004/18/EC (now 2014/24/EU), which covers ordinary sectors, is applicable to all bodies governed by public law, even when they are operating in special sectors, where the purpose of the activities to be performed under the contract is unrelated to those sectors.
- 31 According to the referring court, therefore, under no circumstances can administrative courts be denied jurisdiction over matters relating to procurement by bodies governed by public law, jurisdiction that is applicable in connection with public procurement procedures both in the ordinary and special sectors.
- 32 The legal classification of Poste Italiane s.p.a. and of that company’s subsidiary, Poste Tutela s.p.a., as bodies governed by public law cannot therefore be deemed ‘irrelevant’, as stated by the Supreme Court of Cassation.
- 33 The referring court also points out that the Supreme Court of Cassation’s reasoning referred to in paragraph 28(b) above, is not supported by legislative provisions. While it is true that, under Directive 2004/18/EC (now 2014/24/EU), contracting entities include contracting authorities, which in turn include bodies governed by public law, as defined in Article 3(1)(d) of Legislative Decree No 50/2016, this simply means that contracting entities also include bodies governed by public law, without being ‘excluded’ as a matter of course from the category of contracting authorities, as referred to in Article 3(1)(a) of Legislative Decree No 50/2016, which are indisputably subject to the provisions of the Public Procurement Code for ordinary sectors. Moreover, the classification of contracting entities as defined in Article 3(29) of Legislative Decree No 163 of 2006 (now Article 3(1)(e) of Legislative Decree No 50/2016) does not constitute a derogation, but simply provides for a broader spectrum of entities involved in special sectors, whereas Annex VI to Legislative Decree No 163 of 2006 contains only a non-exhaustive list of entities entrusted with tasks in the special sectors. Therefore, no relevance attaches to the fact that Poste Italiane is mentioned as a contracting entity in that context as regards derogations.
- 34 Moreover, Commission Decision [2008/383] of 30 April 2008 exempted Poste Italiane’s domestic and international express and courier services from procurement procedure requirements, while Decision 2010/12/EU of 5 January 2010 exempted the financial services managed by BancoPosta (collection of savings, lending on behalf of banks and other accredited financial intermediaries,

investment and supplementary pensions services, payment and money transfer services) from the application of Directive 2004/17/EC on special sectors.

- 35 However, the fact that the entity operates under competitive market conditions is merely one indicator suggesting that the requirement of meeting needs in the general interest is not met. In order for it to be said that this requirement is not in any way satisfied, purely financial aims also need to be pursued, with business risks being fully borne; that is not the case with the universal postal service, which has been entrusted to Poste Italiane s.p.a. until 30 April 2026 under Article 23(2) of Legislative Decree No 261 of 1999. Article 3(12) of that decree provides that the costs of the provision of the universal service are to be financed via transfers charged to the State budget. Consequently, the business risk is greatly reduced.
- 36 Taking into account the abovementioned Commission Decision [2008/383], an outline has been given of the scope of the sectors in which Poste Italiane may operate in accordance with rules derogating from the general rules in force regarding public procurement, including for the purpose of Art. 14(2) of the Public Procurement Code. In connection with these general rules, the contagion theory has been hitherto deemed superseded with regard to public undertakings, but not with regard to bodies governed by public law, the latter being obliged — when operating in special sectors — to follow the relevant rules only for activities that are instrumental to those sectors, but they are not exempted from the rules regulating ordinary sectors for all other activities because of important matters of interest for the general public that are nevertheless entrusted to them.
- 37 It is therefore necessary to ascertain whether the principles set out in the *Ing. Aigner* judgment may be superseded in view of the predominance of the interests of an industrial and commercial nature over the interests of the general public, which justified the original establishment of the body governed by public law, or whether the reference to that institution — formally referred to in Article 3(1)(d)(1) of Legislative Decree No 50/2016 — should be regarded as indicating that those principles cannot be superseded, even for undertakings which operate under fully competitive market conditions.
- 38 However, in the present situation, broader issues are called into question. In the first place, it is necessary to assess the relevance of the purpose of the contract in question not so much to the sectors currently defined as ‘special’ and governed by Article 114 *et seq.*, of the Public Procurement Code (Part II, Title VI, Chapter I), but rather to the sectors which continue to be ‘excluded ... from the objective scope’ of that Code (Part I, Title II, Article 4 *et seq.*, but which must act, within the meaning of Article 4 as cited, ‘in accordance with the principles of economy, effectiveness, impartiality, equal treatment, transparency, proportionality, publicity, protection of the environment and energy efficiency’.
- 39 In the present case, the sector in question is electronic communications, defined as excluded from Article 15 of Legislative Decree No 50 of 2016, in accordance with

Articles 7 and 8 of Directive 2014/24/EU and, as such, covered by the Framework Directive for electronic communications networks and services 2002/21/EC.

- 40 The relevance of the tender procedure in question to a sector which is formally ‘*excluded*’, but not ‘*unrelated*’ to the Public Procurement Code, does not, however, have repercussions on the jurisdiction of the administrative courts, since Article 4 of Legislative Decree No 50/2016, involves a negotiated procedure that ensures compliance with the criteria set out, against which legitimate interests are involved, falling within the jurisdiction of those courts.
- 41 The referring court considers that the reference to the concept of ‘*a functional link*’ - with regard to the subject matter of the special sectors - as a limit on the jurisdiction of the administrative courts should be differently expressed, including where a possible change may be observed from the concept of a ‘*body governed by public law*’ to that of a ‘*public undertaking*’, based on certain features of the ‘*excluded*’ sectors, specifically ‘*activities directly exposed to competition*’ (Article 8 of Legislative Decree No 50 of 2016, cited above). This is because the current competitive character of the postal service, although being decisive in itself, as regards the issue of jurisdiction (as for all the excluded sectors, as referred to in Articles 4 to 20 of the Code) — could, however, be relevant for the purpose of overruling the classification of Poste Italiane as a body governed by public law, in so far as it is a body operating in normal market conditions, pursuing profits and incurring losses for activities — now in the majority — directly exposed to competition (Directive 2014/23/EU, point 21 of the recitals and Article 16 cited above).
- 42 In that regard, the referring court has doubts as to whether the recognition of Poste Italiane as a ‘*public undertaking*’ (if deemed admissible by the EU Court) requires — in accordance with the abovementioned judgment of Council of State, sitting in plenary session, No 16 of 2011 — a restrictive assessment of the relevance of the contract to subject matter which is specific to the relevant special sector. However, the limits of that assessment are still relevant for the purpose of defining the specific legal framework for an individual procurement procedure, including where it is launched by an entity which may be classified as a body governed by public law and which operates in one of the special sectors.
- 43 While the view, according to which undertakings (whether public or private, the latter if they hold a special or exclusive right) fall within the scope of the Public Procurement Code ‘*in respect of the special sectors and not in general terms .... with the “contagion theory” referred to in Mannesmann consequently being inapplicable*’ (judgment No 16 of the Council of State, sitting in plenary session, No 16/2011) appears to be tenable, EU law (Directive 2014/25/EU) does not contain any precise reference to the concept of ‘*a functional link*’, in the sense of direct relevance of the service to the special activity, as limiting the provisions referred to in Article 114 *et seq.* of the Public Procurement Code and the jurisdiction of the administrative courts.

- 44 As a general rule, *recital* 16 of Directive 2014/25/EU, referring specifically to the special sectors, recognises the possibility of awarding contracts for ‘*several activities*’ subject to ‘*different legal regimes*’, with in every case the rules relating to the sector for which the contract is ‘*principally intended*’ being applicable, as apparent from the tender documents or to be specified by the contracting authority.
- 45 The principle is reiterated in Article 6 of the same directive, which, in the event of failure to specify, sets out in the third subparagraph clear priority parameters, where the subject matter of the contract relates to matters covered by more than one Directive.
- 46 The concept of the ‘*intended purpose*’ for a given activity, by decision of the contracting entity, appears in any case much wider than that acknowledged by the ruling of the Council of State, sitting in plenary session, No 16 of 2011 (which considered a security service to be relevant to the special sector only if it was acquired for an energy network operated by ENI but not for the supervision of the related administrative offices). It should rather be asked - in the light of EU law - whether a contract, which is to be deemed ‘*unrelated*’ to the system of special sectors, should not rather relate to any activity that the public undertakings - or private entities with an exclusive right - are free in practice to undertake, which are clearly outside the sectors in question, in accordance with the principle of ‘*extraneousness*’, so as to remove the contractual activity from the public tendering rules.
- 47 In fact, Article 13(1)(b) of Directive 2014/25/EU outlines the scope of applicability of that directive to postal services, as covering ‘*other services than postal services, on condition that such services are provided by an entity which also provides postal services*’, including ‘*services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC*’ (Article 13(2)(b)).
- 48 It has already been pointed out, lastly, that *recital* 16 of Directive 2014/24/EU requires specification of the activity for which a contract — which is in theory subject to the rules governing the special sectors, but sometimes also intended to regulate other activities — is in fact intended. The above requires awareness of the applicable legal regime, with the obligations of transparency and legal certainty, which constitute principles for the whole sector of public contracts (including the sectors defined in Legislative Decree No 50 of 2016 as ‘*excluded*’).
- 49 Finally, the referring court asks whether the practice, which is increasingly frequent in the national legal system, of challenging the jurisdiction of the administrative court only after the initial decisions, including interim decisions, of the latter, for tender procedures launched under the rules of the Public Procurement Code, with calls for tender published in the Official Journals of the Italian Republic and of the European Union, complies with EU law covering the concept of abuse of rights (judgment of the Court of Justice of 5 July 2007, C-

321/05, *Kofoed*), without any clarification, in that place, of the voluntary nature of the decision made by the contracting authority, a decision whose legitimacy and effects should be submitted to the ordinary court required to rule on the basis solely of the provisions of the Civil Code, without the Public Procurement Code being applicable in any way (although expressly referred to and, accordingly, contrary to what the tenderers were entitled to expect).

WORKING DOCUMENT