

**Case C-785/23****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:**

19 December 2023

**Referring court:**

Varhoven administrativen sad (Bulgaria)

**Date of the decision to refer:**

18 December 2023

**Appellant in the appeal on a point of law:**

Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Sofia pri Tsentralno upravlenie na Natsionalna agentsia za prihodite

**Respondent in the appeal on a point of law:**

‘Bulgarian Posts’ EAD

**Subject matter of the main proceedings**

Proceedings following the appeal on a point of law lodged by the Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ Sofia pri Tsentralno upravlenie na Natsionalna agentsia za prihodite (Director of the Appeals and Tax and Social Security Practice Directorate of Sofia within the National Revenue Agency, Bulgaria; ‘the appellant in the appeal on a point of law’) against the judgment of the Administrativen sad Sofia-grad (Administrative Court, Sofia), which, on the application of ‘Bulgarian Posts’ EAD, annulled an additional assessment to value added tax (VAT) in relation to that company for the tax period from 1 January to 31 December 2015.

**Subject matter and legal basis of the request**

Request pursuant to Article 267 TFEU concerning the interpretation of Article 132 of Directive 2006/112 and Article 12 of Directive 97/67.

## Questions referred for a preliminary ruling

1. Are services provided by the licensee for the provision of the universal postal service in the territory of the Republic of Bulgaria on the basis of individual contracts with users of postal services to be regarded as services which are provided by a ‘public postal service’ within the meaning of Article 132 of Chapter 2 of Title IX of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and are ‘in the public interest’, where those individual contracts provide that the service must fulfil one or all of the following conditions, namely: collection of items is effected outside the access points (collection and delivery are effected at the customer’s address); the collection and delivery are effected at a time agreed in advance with the customers; the frequency of collection and delivery exceeds the frequency in the standards for the quality of the universal postal service and efficiency of service laid down by law, with provision made for additional collections at the request of the customer beyond the frequency expressly agreed for in the contract outside the opening hours of the post office branches; the service is provided at a lower price than that authorised by the KRS (Komisia za regulirane na saobshteniata, the national regulatory authority which authorises the prices for the universal postal service in Bulgaria) or with higher discounts than those authorised by the KRS?
2. Does it follow from the second indent of Article 12 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 that the services provided by a person who is a licensee of the universal postal service do not have the status of a universal postal service within the meaning of the directive if they are provided in accordance with an individual contract at a lower price than that authorised for the corresponding type of universal postal service and it has not been demonstrated that the price thus agreed covers the costs of provision?
3. Is the principle of transparency and non-discrimination enshrined in the fourth indent of Article 12 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 infringed if a person who is a licensee for the provision of the universal postal service concludes individual contracts for the provision of the universal postal service in which it lays down other conditions for the provision of the service which are more favourable than those which are published and publicly available?
4. If the answer to that question is in the affirmative, does that constitute a ground for not treating the transactions as exempt within the meaning of Article 132 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?

### **Provisions of European Union law and case-law**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Article 132

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: recital 15 and Articles 3, 4, 5, 6 and 12

Judgment of 16 October 2019, *Winterhoff and Eisenbeis* (C-4/18 and C-5/18, EU:C:2019:860)

Judgment of 23 April 2009, *TNT Post UK* (C-357/07, EU:C:2009:248)

Judgment of 6 March 2008, *Deutsche Post and Others* (C-287/06 to C-292/06, EU:C:2008:141)

Judgment of 11 February 2015, *bpost* (C-340/13, EU:C:2015:77)

Opinion of Advocate General Wahl in *Sandd* (C-256/17, EU:C:2018:474)

### **Provisions of national law and case-law**

Zakon za danak varhu dobavenata stoynost (Law of value added tax; ‘the ZDDS’): Article 49(2)

Pravilnik za prilagane na Zakona za danak varhu dobavenata stoynost (Regulation implementing the Law on value added tax; ‘the PPZDDS’): Article 43(2)

Zakon za poshtenskite uslugi (Law on postal services; ‘the ZPU’): Articles 15, 21, 24, 32, 33, 34, 36, 38, 66 and the supplementary provisions (DR)

Zakon za izmenenie i dopalnenie na Zakona za poshtenskite uslugi (Law amending and supplementing the Law on postal services, DV No 102 of 2010, in force since 30 December 2010): Paragraph 70 of the transitional and final provisions

Naredba za opredelyane na pravila za obrazuvane i prilagane na tsenata na universalnata poshtenska usluga (Regulation laying down the rules for setting and implementing the price for the universal postal service; ‘the Regulation’): Articles 4 and 14

Normativi za kachestvo na universalnata poshtenska usluga i efikasnostta na obsluzhvane (Standards for the quality of the universal postal service and the efficiency of services): Articles 8 and 9

Judgment No 4655 of the Administrativen sad Sofia-grad of 12 July 2021 in administrative case No 1814/2021

Judgment No 4745 of the Varhoven administrativen sad (Supreme Administrative Court) of 18 May 2022 in administrative case No 8582/2021

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

- 1 In the course of a tax audit of ‘Bulgarian Posts’ EAD it was discovered that that company holds an individual licence for the provision of the universal postal service (UPS) in the territory of the Republic of Bulgaria. However, Bulgarian Posts EAD declared as exempt transactions under Paragraph 49(2) of the ZDDS (‘The provision of universal postal services under the conditions and in accordance with the provisions of the Law on postal services shall be an exempt transaction’) services which, in the view of the tax auditors, do not have the status of universal postal services.
- 2 First, the services at issue were not provided on the basis of the General Terms and Conditions for the users of ‘Bulgarian Posts’ EAD, which were agreed with the KRS, but on the basis of contracts concluded individually by ‘Bulgarian Posts EAD’, in particular with the Public Prosecutor’s Office of the Republic of Bulgaria, the Agentsia za sotsialno podpomagane (Social Welfare Agency), the Municipality of Varna, the company Vodospodstavane i kanalizatsia Varna OOD (literally: ‘Water Supply and Sewerage Varna’ plc) and others. Furthermore, in some of those individual contracts, lower prices were agreed for the services than those authorised by the KRS for the universal postal service. The company under audit did not provide any evidence concerning price setting or evidence that those prices are not below the cost of the service, as required by Article 14(2) of the Regulation. In some individual contracts, discounts were agreed for a certain monthly quantity (for example, 10% discount for more than 10 000 postal items), with those discounts being significantly higher than the bulk discounts published on the Bulgarian Posts EAD website for universal postal services provided (maximum discount of 8% for a quantity of more than 50 000 items).
- 3 Second, in some of the individual contracts it was agreed that the services would be provided directly from or to the corresponding organisational units of the customer, that is to say collection and delivery at the customer’s address (office). The tax auditors assumed that the service thus provided is a courier service and not a universal postal service since the collection of postal items in the universal postal service is effected at ‘access points’ which, according to the definition laid down (Paragraph 1(4) of supplementary provisions of the ZPU), requires a separate space belonging to the postal network or an organised workplace where other public services are also provided (which means that the customer’s office cannot be considered to be an ‘access point’).
- 4 Third, in some of the individual contracts, it was agreed that the collection of postal items is to be effected more frequently than the minimum frequency of

collection and delivery provided for in Article 33(2) of the ZPU (at least one collection every working day), but also more frequently than under the standards for the quality of the universal postal service and efficiency of services adopted by the KRS pursuant to the powers conferred on it by the ZPU.

- 5 Fourth, in some of the individual contracts, the receiving of postal items after the end of the opening hours of the post office branches for the cities concerned was agreed. However, under Article 32 of the ZPU, the universal postal service is to be a service which is provided continuously during the opening hours (laid down by 'Bulgarian Posts' EAD and published on the company's website). In addition, the provision of the service at the 'required time' under Paragraph 1(18)(f) of the Supplementary Provisions of the ZPU is one of the criteria for its categorisation as a courier service.
- 6 For the reasons set out above, the auditing authority assumed that the services under the individual contracts of 'Bulgarian Posts' EAD did not fall under the exemption laid down in Article 49 of the ZDDS since they did not meet the definition of universal postal service set out in Article 32 of the ZPU ('A universal postal service is a service which is provided continuously during specified opening hours, at a quality meeting the standards set out in Article 15(1)(7), at affordable prices and available to any user in the territory of the country, irrespective of his or her geographical location'). In addition, those contracts contained clauses which took into account the specific needs of the customer: place of collection of items, place of delivery, frequency of collection, opening hours and prices lower than those authorised by the KRS. Under those circumstances, a tax adjustment notice was issued on 3 August 2021 by which the VAT owed by 'Bulgarian Posts' EAD under the ZDDS was assessed additionally at BGN 1 761 876.89, plus interest of BGN 1 055 768.83, for the tax period from 1 January to 31 December 2015.
- 7 'Bulgarian Posts' EAD contested that tax adjustment notice before the Administrativen sad Sofia-grad. The application alleges that the contested decision is unlawful on the ground of incorrect application of substantive law. It was pointed out that the conclusion of individual contracts is not effected outside the universal postal service and that many of those contracts were concluded with judicial or administrative authorities, and there are no contracts in which the prices are higher prices than those authorised by the KRS.
- 8 By judgment of 7 April 2023, the Administrativen sad Sofia-grad annulled the tax adjustment notice with reference to the judgment of 16 October 2019, *Winterhoff and Eisenbeis* (C-4/18 and C-5/18, EU:C:2019:860), according to which providers of services consisting in the service of items of correspondence, such as those at issue in the main proceedings, who, in their capacity as holders of a national licence permitting them to supply that service are required to effect, in accordance with the provisions of national law, the formal service of court or administrative authority documents, must be regarded as 'universal service providers'.

- 9 The main proceedings were brought on an appeal by the appellant against the judgment of the Administrativen sad Sofia-grad in question. In order to be able to rule on the case, the referring court must clarify whether the services under the individual contracts of ‘Bulgarian Posts’ EAD constitute universal postal services.

### **The essential arguments of the parties in the main proceedings**

- 10 The appellant in the appeal on a point of law contests the judgement as incorrect. In addition, he requests that the proceedings be stayed and a request be made to the Court of Justice pursuant to Article 267 TFEU.
- 11 The respondent in the appeal on a point of law, ‘Bulgarian Posts’ EAD, considers that the appeal on a point of law is unfounded. At the public hearing, it took the view that the application to stay the proceedings and make a reference to the Court of Justice for a preliminary ruling was unfounded.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 12 First of all, the referring court refers to another judgment of the Varhoven administrativen sad which upholds a judgment of the Administrativen sad Sofia-grad annulling another additional assessment to VAT in relation to ‘Bulgarian Posts’ EAD. The grounds of that judgment of the Varhoven administrativen sad also mention the judgment of 16 October 2019, *Winterhoff and Eisenbeis* (C-4/18 and C-5/18, EU:C:2019:860), according to which operators providing all or part of the universal postal service are subject to a special legal regime with specific obligations and therefore the difference between ‘public postal services’ and other operators depends not on the nature of the services provided, but on the fact that they are subject to such a regime.
- 13 In that regard, the referring court observes that German law, to which the judgment of 16 October 2019, *Winterhoff and Eisenbeis* (C-4/18 and C-5/18, EU:C:2019:860) refers, provided that a licensee providing services consisting in the service of items of correspondence is to be obliged to effect the formal service of documents, irrespective of their weight, in accordance with the provisions of the rules of court procedure and of the laws governing service in administrative procedures. However, the subject matter of the individual contracts in the present case is not the service of judicial or administrative decisions and, moreover, the rules of court procedure of the Republic of Bulgaria provide for a different procedure for the service of such decisions. Furthermore, the individual contracts concluded by ‘Bulgarian Posts’ EAD are not only with judicial and administrative authorities or other public bodies, which is why it cannot be assumed that the service ensures the proper functioning of public authority and therefore constitutes a service in the public interest.
- 14 The referring court also refers to the judgment of 23 April 2009, *TNT Post UK* (C-357/07, EU:C:2009:248), according to which services supplied by the public

postal services for which the terms have been individually negotiated cannot be regarded as exempted under Article 13A(1)(a) of the Sixth Directive and, by their very nature, those services meet the special needs of the users concerned. However, that judgment does not answer the question whether the fact that the individual contract provides for one of the following conditions – collection of the items is effected outside the access points (collection and delivery are effected at the customer's address); collections and deliveries are effected more frequently than laid down by law in the standards for the quality of the universal postal service with provision also made for additional collections at the request of the customer beyond the frequency expressly provided for in the contract outside the opening hours of post office branches; the prices for the services are lower than those authorised by the KRS for the universal postal service and it has not been demonstrated that the costs of the service are covered; and discounts are applied in the pricing which do not comply with the generally applicable conditions for discounts – constitutes a sufficient criterion for assuming that the service is specific and meets the particular needs of economic operators.

- 15 The referring court also takes account of other decisions of the Court of Justice: judgment of 6 March 2008, *Deutsche Post and Others*, C-287/06 to C-292/06, EU:C:2008:141 (concerning access points), judgment of 11 February 2015, *bpost*, C-340/13, EU:C:2015:77 (concerning discounts), and the Opinion of Advocate General Wahl in *Sandd*, C-256/17, EU:C:2018:474 (cost orientation of prices), and concludes that there is no case-law of the Court of Justice which answers all the questions of interpretation of EU law relevant to the decision in the main proceedings. The grounds of those judgments of the Court of Justice contain valuable interpretative guidance, but the facts of the main proceedings in those cases are different from the those of the present case and there are also differences in the applicable legal orders.
- 16 Since the referring court is examining the dispute as the court of [last] instance, whose decision is not subject to appeal, it considers that, where there are difficulties in interpreting the relevant provisions of EU law, it is obliged to make a reference for a preliminary ruling to the Court of Justice in order to avoid misapplication of EU law and contradictory case-law.