

**Case C-476/23**

**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:**

25 July 2023

**Referring court:**

Varhoven administrativen sad (Supreme Administrative Court, Bulgaria)

**Date of the decision to refer:**

14 July 2023

**Appellant:**

‘STAR POST’ EOOD

**Defendant**

Komisia za regulirane na saobshteniyata (Communications Regulation Commission, Bulgaria)

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**Subject matter of the main proceedings**

Appeal by ‘STAR POST’ OOD against the decision of the Administrativen sad Sofia-grad (Administrative Court, City of Sofia) (‘the ASSG’) dismissing that company’s action against a decision by the Komisia za regulirane na saobshteniyata (Communications Regulation Commission) (‘the KRS’) as regards the recognition of the value of the net costs for the provision of a universal postal service by the provider of the universal postal service (a different company) and as regards the finding that those costs constituted a disproportionate financial burden as a result of providing the universal service, due to a lack of legal interest in bringing proceedings.

## **Subject matter and legal basis of the request for a preliminary ruling**

Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 22(3) of Directive 97/67 as amended by Directive 2008/6 and of Article 47 of the Charter of Fundamental Rights

## **Questions referred for a preliminary ruling**

1. How is the expression ‘postal service provider who is affected by a decision of a national regulatory authority’, and in particular the term ‘affected’ within the meaning of Article 22(3) of Directive 2008/6/EC of the European Parliament and of the Council amending Directive 97/67/EC to be interpreted with regard to the full accomplishment of the internal market of Community postal services? Is the term ‘affected’ to be interpreted as meaning that the decision of the regulatory authority must be specifically made against the postal service provider? Is a company, which operates as a postal service provider within the meaning of Article 22(3) of Directive 2008/6/EC of the European Parliament and of the Council amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, ‘affected’ where that company is in competition with the provider of the universal postal service in procedures concerning the awarding of public contracts and, when challenging decisions in those procedures, submitted arguments in connection with the cross-subsidising of the universal postal service provider which were rejected by the court on account of decisions by the national regulatory authority which recognised the value of the net costs for the provision of the universal postal service by the universal postal service provider and which found that those costs to a certain extent constituted a disproportionate financial burden as a result of providing the universal postal service?

2. Do Article 22(3) of Directive 2008/6/EC of the European Parliament and of the Council amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services and Article 47 of the Charter of Fundamental Rights of the European Union preclude a situation such as that at issue in the main proceedings, where a postal service provider who is in competition with the provider of the universal postal service cannot challenge before an independent body a decision by the national regulatory authority which recognised the value of the net costs for the provision of the universal postal service by the universal postal service provider and which found that those costs to a certain extent constituted a disproportionate financial burden as a result of providing the universal postal service?

## **Provisions of European Union law relied on**

Treaty on the Functioning of the European Union (TFEU): Article 106.

Charter of Fundamental Rights of the European Union: Articles 47 and 51

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 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services: Articles 1, 4, 14 and 22

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

Zakon za poshtenskite uslugi (Law on postal services) ('the ZPU'): Paragraphs 15, 24, 29, 29a, 34, 36b and 39

Zakon za izmenenie i dopalnenie na Zakona za poshtenskite uslugi (Law amending and supplementing the law on postal services) (DV No 87 from 2009, in force since 3 November 2009) – Supplementary provision subparagraph 110

Zakon za izmenenie i dopalnenie na Zakona za poshtenskite uslugi (Law amending and supplementing the law on postal services (DV No 102 from 2010, in force since 30 December 2010)): Subparagraph 70

Administrativnoprotsesualen kodeks (Code of Administrative Court Procedure) ('the APK'): Paragraphs 60, 147, 159 and 166

Metodika za izchislyavane na netite razhodi ot izvarshvane na universalnata poshtenska usluga i za opredelyane na kriterii za nalichie na nespravedлива finansova tezhest (Metodikata) (Method for the calculation of the net costs of providing the universal postal service and defining the criteria for the existence of a disproportionate financial burden) ('the Method'): Paragraphs 5 and 14

### **Succinct presentation of the facts and procedure**

- 1 Under Paragraph 24 of the ZPU, with which the provisions of Directive 2008/6 amending Directive 97/67 are transposed into Bulgarian law, the universal postal service is to be provided by a postal operator who is required by law to offer that service nationwide by means of a postal network organised and managed by that operator. In Bulgaria, that postal operator is the 'Balgarski poshti' EAD ('BP'). The universal postal service is a service of general interest, which is provided at regulated prices and under the conditions laid down in the ZPU and specified in BP's individual licence.
- 2 Pursuant to Paragraph 29 of the ZPU, the postal operator responsible for providing the universal postal service (namely BP) is to receive compensation from the national budget if the obligation to provide the universal postal service entails net costs and those constitute a disproportionate financial burden for that operator. The amount of the disproportionate financial burden as the result of providing the

universal postal service is determined by the KRS based on the net costs calculated using ‘the Method’. Paragraph 14 of that method contains criteria for establishing the presence and the amount of the disproportionate financial burden, which must be met simultaneously: (i) the amount of net costs must be a positive number; (ii) the balance from the financial accounts settlements with other postal administrations cannot cover the amount of net costs; (iii) the proportional amount of net costs must be more than 3% of the total revenue from the universal postal service; (iv) the analysis of the financial and economic situation of the responsible operator must show that there is a ‘disproportionate financial burden’ within the meaning of the supplementary provisions of the ZPU.

- 3 By Decision No 332 of 13 October 2022 the KRS found inter alia that (i) the amount of net costs for the provision of the universal postal service by ‘Balgarski poshti’ EAD amounted to Bulgarian leva (BGN) 28 456 000 for 2021 and (ii) those net costs totalling BGN 28 456 000 constituted a disproportionate financial burden resulting from the provision of the universal postal service. Prior to taking that decision, pursuant to Paragraph 29a(4) of the ZPU, the KRS had an audit of the documents pertaining to the calculation of the net costs of the universal postal service performed by a registered auditor (‘KPMG Audit’ OOD) engaged by it, who, moreover, issued an evaluation that the total amount of net costs for 2021 resulting from the provision of the universal postal service constituted a disproportionate burden. The KRS had no objections to the analysis undertaken and supported the assessment issued by the ‘KPMG Audit’ OOD regarding the evaluation of the disproportionate burden. The regulatory authority acknowledged that, as a result of the obligation to provide the universal postal service, the operator bound by that obligation had suffered a financial burden, evidence of which was furnished by the indicators examined, as referred to in Paragraph 14 of ‘the Method’. At the same time, in view of its poor financial situation, the company was unable to bear the financial burden incurred without receiving compensation for the disproportionate financial burden.
- 4 However, under Paragraph 29a of the ZPU, the KRS is not to make the decision regarding the amount of compensation, but to refer its decision and the associated documents to the deputy minister commissioned by the Council of Ministers for the implementation of state policy in the postal services sector (that is to say, the Deputy Prime Minister for Economic Policies and Minister for Transport and Communications). Within the framework of the budgetary procedure, the latter must provide the Finance Minister with a proposal for the inclusion of the amount of funds for compensation for the disproportionate financial burden in the draft legislation on the national budget of the Republic of Bulgaria for the following year.
- 5 ‘STAR POST’ OOD is one of the undertakings in Bulgaria with a licence for the provision of ‘services falling within the scope of the universal postal service’ under Paragraph 39 of the ZPU. However, the referring court notes that, in the context of an ex officio audit, ‘STAR POST’ OOD’s individual licence for the provision of such services in the territory of the Republic of Bulgaria was revoked

by Decision No 289 of the KRS of 18 August 2022, while the referring court has been unable to find whether a provisional enforcement of that decision had been allowed. That decision was challenged by ‘STAR POST’ OOD and the case is currently pending before the Varhoven administrativen sad (Supreme Administrative Court) (‘the VAS’) as the court of cassation (Administrative Law Case 3682/2023).

- 6 ‘STAR POST’ OOD brought an action before the ASSG against the contested Decision No 332/13.10.2022 of the KRS (‘contested decision of the KRS’) in the main proceedings. That court dismissed the action by Decision No 9872 of 15 December 2022 in Administrative Law Case 10456/2022 and closed the proceedings in that case on the basis of Paragraph 159(4) of the APK (lack of legal interest in bringing proceedings). In support of that legal outcome, the court of first instance stated that ‘STAR POST’ OOD was not the addressee of the contested legal act and that this neither constituted direct and immediate rights and obligations for that undertaking, nor did it impair its rights, freedoms or legitimate interests (Paragraph 147 of the APK).
- 7 ‘STAR POST’ OOD lodged an appeal before the referring court against the decision of the ASSG.

#### **Essential arguments of the parties in the main proceedings**

- 8 As one of the undertakings in Bulgaria holding a licence for the provision of ‘services falling within the scope of universal postal service’ and a licence for the provision of services that are not part of the universal postal service, ‘STAR POST’ OOD was in competition in both markets (universal postal services and non-universal postal services) with BP, which was entrusted with the provision of the universal postal service and which was awarded the total amount of the net costs in the contested decision of the KRS; for that reason, it was recognised (in the contested decision) that those costs constituted a ‘disproportionate financial burden’. On the basis of that decision, BP therefore allegedly received state aid (a subsidy). For ‘STAR POST’ OOD, as a participant in various public procurement procedures the competition with BP was felt most acutely. The abnormally low prices offered by BP in that procedure had given reasonable grounds to suspect that the subsidies which BP received universal postal service for the operation of the universal postal service entrusted to it were used to cover the costs of the postal services and other activities falling outside of the universal postal service, and that this had led to distortions of competition. In other judicial proceedings, the appellant has already contended that BP was in receipt of unlawful state aid, but that argument has never been examined by the adjudicative bodies on the grounds that the cost of the universal postal service is approved by the KRS each year in an administrative procedure initiated at the request of BP ‘in order to compensate for the disproportionate financial burden resulting from the provision of the universal postal service’. Accordingly, the appellant has not yet had an opportunity to prove its allegation of alleged unlawful cross-subsidising. It

therefore deliberately contested the decision of the KRS to recognise the value of the total amount of the net costs of BP's provision of the universal postal service in 2021, but the proceedings were wrongly closed by the court of first instance on the grounds that the appellant had no interest in bringing proceedings. According to the appellant, the position of the court of first instance is, however, inconsistent with substantive law (the objectives and provisions of Directive 97/67). The contested decision of the KRS was one of the decisions taken by the national regulatory authority under Article 14, in conjunction with Article 22(3), of Directive 97/67 (another such decision is the decision to coordinate the results of the implementation of the cost allocation system of the 'Balgarski poshti' EAD). Therefore, that decision can be challenged by 'any user' of the universal postal service and by 'any postal service provider affected by it'; the right of 'STAR POST' OOD to challenge the decision of the KRS stems directly and expressly from Article 22(3) of Directive 97/67: first, in view of the ineffective control exercised over BP by the national regulatory authority, competing undertakings could challenge the decisions of the regulatory authority if they breached the principle of ensuring a competitive environment; secondly, the appellant is also a user of the universal postal service and, in that capacity – and not only as a postal service provider affected by a decision of a national regulatory authority – is entitled to the right to a legal remedy. The close of the proceedings therefore constituted a violation of the right to an effective remedy for the purposes of Article 22 of Directive 97/67 and within the meaning of Article 47 of the Charter of Fundamental Rights.

- 9 Furthermore, the appellant asks the referring court, in case of doubt, to refer three questions to the Court of Justice for preliminary ruling on the interpretation of the terms ('affected' and 'user') used in Article 22(3) of Directive 97/67.
- 10 The defendant contends that the appeal and the request for preliminary ruling are unfounded. Article 22(3) of Directive 97/67 guarantees those affected by the decisions of the regulatory authority an effective remedy before an independent body. At national level, that mechanism was implemented through the complaints procedure under the APK. However, the class of eligible appellants is not unlimited, but depends on whether the persons are affected by the contested decision. According to the defendant, 'affected persons' in procedural terms are those persons who bear the material consequences of the authority's expression of will. The negative effect (in the sense of an impairment) is a legal consequence of the legal act and may consist in the suspension or limitation of existing subjective rights, or in the creation of new ones, or the extension of existing legal obligations. In any event, the existence of a subjective right or an interest protected by law must be demonstrated. In the present case, according to the defendant, the annulment of the legal act would not lead to any change in the legal situation of 'STAR POST' OOD. If the appellant's argument were to be followed, this would also result in extreme legal uncertainty.

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

- 11 The subject matter of the main proceedings is whether the appellant has a legal interest in challenging the decision of the KRS as regards the recognition of the value of the total amount of the net costs for the provision of the universal postal service by BP in 2021.
- 12 In order to justify its legal interest, the appellant argues that it has a licence for the provision of services falling within the scope of the universal postal service and submits that competing undertakings could challenge the regulatory authority's decisions if those decisions were to breach the principle of ensuring a competitive environment.
- 13 The decision of the KRS in question is one of the decisions taken by the national regulatory authority under Article 14, in conjunction with Article 22(2), of Directive 97/67 (as amended by Directive 2008/6). The provisions of the directive require compliance with the competition rules in the postal sector. The freedom of action of the Member States is also limited by the application of the TFEU and its provisions on competition and the freedom to provide services. In addition, the state aid rules of EU law ensure that universal service providers do not receive undue advantages over their competitors.
- 14 In order to answer the question of whether the appellant has a legal interest in challenging the decision of the KRS, the term 'postal service provider who is affected by a decision of a national regulatory authority', within the meaning of Article 22(3) of Directive 97/67 (as amended by Directive 2008/6), needs to be interpreted in the context of the facts of the main proceedings (according to the findings of the referring court, the Court has not yet given such an interpretation).
- 15 In the light of the foregoing, the referring court, having regard to the principle of the primacy of EU law over national law and taking into account the obligation to comply with that directive, considers that it must refer two of the questions put by the appellant (the first and the third questions) to the Court of Justice for a preliminary ruling.
- 16 As regards the second question put forward by the appellant (whether it can bring proceedings against the decision of the KRS as a 'user' of the universal postal service), the referring court considers that this question should not be referred to the Court of Justice, since the appellant merely submitted in both courts that it was operating as a provider of 'postal services falling within the scope of the universal postal service', which was in competition with BP in the postal services market, and did not submit any facts showing that it was a user of the universal postal service.