

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?

(¹) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

(²) 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 (OJ 2014 L 94, p. 65).

(³) 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 (OJ 2014 L 94, p. 243).

Appeal brought on 5 June 2019 by Inpost Paczkomaty sp. z o.o. against the judgment of the General Court delivered on 19 March 2019 in Joined Cases T-282/16 and T-283/16 Inpost Paczkomaty and Inpost v Commission

(Case C-431/19 P)

(2019/C 328/07)

Language of the case: Polish

Parties

Appellant: Inpost Paczkomaty sp. z o.o. (represented by: D. Doktor, radca prawny)

Other parties to the proceedings: European Commission, Republic of Poland

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court;
- annul the decision;
- order the Commission to pay the costs of the present proceedings and of the proceedings before the General Court.

Grounds of appeal and main arguments

First ground of appeal, alleging infringement of Article 106(2) TFEU, in so far as the General Court incorrectly held that the requirements set out in point 19 (Section 2.6) of the [European Union] framework [for State aid in the form of public service compensation (2011)] had been met, infringement of the Treaty principles on public procurement (principles of non-discrimination, equal treatment and transparency) and incorrect interpretation of Article 7(2) of Directive 97/67/EC ('the Postal Services Directive').

The methods of financing the provision of universal services applied by the Member States must be consistent with the principles of non-discrimination, transparency and equal treatment (including the choice of the provider of universal postal services by way of competition) arising from the provisions of the TFEU on internal market freedoms, and also with Article 106(2) TFEU, which is not the case in the present dispute.

Second ground of appeal, alleging infringement of Article 106(2) TFEU, in so far as the General Court incorrectly held that the requirements set out in points 14 (Section 2.2) and 60 (Section 2.10) of the [European Union] framework [for State aid in the form of public service compensation (2011)] had been met. Even supposing that the public service obligation conferred on Poczta Polska fulfils the requirements set out in the Postal Services Directive, that does not preclude the obligation to carry out a public consultation or use some other appropriate means to take into account the interests of users and service providers in order to demonstrate that the universal service requirements have been considered.

Third ground of appeal, alleging infringement of Article 106(2) TFEU, in so far as the General Court incorrectly held that the requirements set out in point 52 (Section 2.9) of the framework had been met and infringement of Article 7(1), (3) and (5) of Directive 97/67/EC. The General Court was wrong to consider that the compensation fund fulfilled the non-discrimination requirement as regards the uniform contribution rate, which amounts to a maximum of 2 % of the revenue received by the providers of universal services or equivalent services required to contribute, with the result that that rate applies in a uniform way to all market operators, which is discriminatory since the situation of the providers of universal services and that of the providers of equivalent services are not the same. The General Court was also wrong to consider that the compensation fund satisfied the principle of proportionality.

During the consultations on amending the legislation, the provisions of the compensation fund were very different from those ultimately implemented in the postal legislation, which means that it cannot be considered that the establishment of the fund was the subject of consultations. The financing conditions for the universal service do not require examination of whether the net cost incurred constitutes an unfair burden for the appointed universal service provider. The automatic link between the financing of the service and an account loss resulting from providing the universal service cannot be regarded as satisfying the requirements of the Postal Services Directive.

Fourth ground of appeal, alleging infringement of Article 7(1) of the Postal Services Directive, in so far as the General Court accepted the financing of the cost of the universal service by a certain number of exclusive and special rights conferred on Poczta Polska. Under Article 7(1) of the Postal Services Directive, Member States are not to grant or maintain in force exclusive or special rights for the establishment and provision of postal services. The exclusive and special rights conferred on Poczta Polska, contrary to the view of the General Court, are manifestly not included in the list of exceptions laid down in the Postal Services Directive.

Appeal brought on 5 June 2019 by Inpost S.A. against the judgment of the General Court delivered on 19 March 2019 in Joined Cases T-282/16 and T-283/16 Inpost Paczkomaty and Inpost v Commission

(Case C-432/19 P)

(2019/C 328/08)

Language of the case: Polish

Parties

Appellant: Inpost S.A. (represented by: W. Knopkiewicz, radca prawny)

Other parties to the proceedings: European Commission, Republic of Poland

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court;
- annul the decision;