

JUDGMENT OF THE COURT (Second Chamber)

22 October 2015 (*)

(Reference for a preliminary ruling — Money order service — Directive 97/67/EC — Scope — National legislation granting an exclusive right to provide a money order service — State aid — Economic activity — Services of general economic interest)

In Case C-185/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 9 April 2014, received at the Court on 14 April 2014, in the proceedings

‘EasyPay’ AD,

‘Finance Engineering’ AD

v

Ministerski savet na Republika Bulgaria,

Natsionalen osiguritelen institut,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça (Rapporteur), A. Arabadjiev, C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2015,

after considering the observations submitted on behalf of:

- ‘EasyPay’ AD, by B. Grigorov, Director,
- the Natsionalen osiguritelen institut, by B. Petkov, Director,
- the Bulgarian Government, by E. Petranova and D. Drambozova, acting as Agents,
- the European Commission, by G. Koleva, R. Sauer and C. Vollrath, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3; 'Directive 97/67'), and of Articles 106 TFEU and 107 TFEU.

2 The request has been made in proceedings between 'EasyPay' AD and 'Finance Engineering' AD and the Ministerski savet na Republika Bulgaria (Council of Ministers of the Republic of Bulgaria; 'the Council of Ministers') and the Natsionalen osiguritelen institut (National Social Security Institute; 'the Institut') seeking the annulment or repeal of certain articles of the Order on pensions and periods of insurance (Naredba za pensiite i osiguritelniya stazh; 'the Order on pensions').

Legal context

EU law

3 Under Article 1 of Directive 97/67:

'This directive establishes common rules concerning:

- the conditions governing the provision of postal services,
- the provision of a universal postal service within the Community,
- the financing of universal services under conditions that guarantee the permanent provision of such services,
- tariff principles and transparency of accounts for universal service provision,
- the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,
- the harmonisation of technical standards,
- the creation of independent national regulatory authorities.'

4 Article 2 of that directive provides:

'For the purpose of this Directive, the following definitions shall apply:

1. postal services: services involving the clearance, sorting, transport and distribution of postal items;

...

4. clearance: the operation of collecting postal items by a postal service provider;

5. distribution: the process from sorting at the distribution centre to delivery of postal items to their addressees;

6. postal item: an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, such items also include for instance books,

catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value;

7. items of correspondence: a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;

...'

5 Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012 L 7, p. 3; 'the SGEI decision') provides, in Article 2:

'1. This Decision applies to State aid in the form of public service compensation granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) [TFEU], which falls within one of the following categories:

(a) compensation not exceeding an annual amount of EUR 15 million for the provision of services of general economic interest in areas other than transport and transport infrastructure;

...

2. This Decision only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years. Where the period of entrustment exceeds 10 years, this decision only applies to the extent that a significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles.

...'

6 Under Article 3 of that decision, concerning compatibility and exemption from notification:

'State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the internal market and shall be exempt from the prior notification obligation provided for in Article 108(3) [TFEU] provided that it also complies with the requirements flowing from the [FEU] Treaty or from sectoral Union legislation.'

7 Article 10 of the SGEI decision, concerning the transitional provisions, provides:

'This Decision shall apply to individual aid and aid schemes as follows:

(a) any aid scheme put into effect before the entry into force of this Decision that was compatible with the internal market and exempted from the notification requirement in accordance with [Commission Decision 2005/842/EC of 28 November 2005 on the application of the provisions of Article [106(2) TFEU] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67)] shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years;

...'

8 Under Article 11 of that decision, 'Decision 2005/842/EC is hereby repealed'.

9 Article 12 of the SGEI decision provides that '[t]his decision shall enter into force on 31 January 2012'.

Bulgarian law

10 In accordance with Article 106 of the Social Security Code (Kodeks za sotsialno osiguriavane), the application of Chapter 6 of that code, entitled 'Compulsory pension insurance', and the payment of retirement pensions are governed by an act adopted by the Council of Ministers.

11 Under Article 50 of the Order on pensions, adopted by Decree No 30 of 10 March 2000 of the Council of Ministers, '[p]ensions and supplements shall be paid by the territorial divisions [of the Institut] through post offices and domestic banks ...'.

12 Article 51 of the Order on pensions states that '[p]ensions and supplements shall be paid by post offices at the permanent or current address of pensioners in accordance with the procedures laid down in the Order'.

13 Under Article 54(1) of the Order on pensions, '[t]he territorial division [of the Institut] shall draw up for each pensioner a payment slip on the basis of which the post office shall pay him the pension (or pensions) and supplements. The payment slip, signed in each case by the pension recipient, shall constitute evidence of the payments made'.

14 Article 58 of the Order on pensions provides:

'The [Institut] shall transfer the sums of money required to pay pensions and supplements at regular intervals to the territorial division of the ["Balgarski poshti" EAD ("Balgarski poshti")] so as to guarantee their timely payment. ...'

15 Article 92 of the Order on pensions provides:

'(1) The territorial division [of the Institut] shall transfer the sums of money for the payment of pensions to a central account of the territorial division of the "Balgarski poshti". The accounting processes between the territorial division [of the Institut] and the territorial division of the "Balgarski poshti" relating to the pensions paid in any month shall be settled at the end of that month.

(2) The [Institut] shall pay through its territorial divisions to the territorial divisions of the "Balgarski poshti" 8.5 thousandths of the pensions payable in the month in question for the work performed in connection with the payment of pensions through the postal network. That sum shall be transferred by the seventh day of the following month.

(3) The value added tax payable on the sum referred to in paragraph (2) shall be transferred by the territorial division [of the Institut] to the territorial division of the "Balgarski poshti" together with the sum referred to in paragraph 2.

(4) The transfers referred to in paragraphs (2) and (3) shall be made on the basis of an invoice which the territorial division of the "Balgarski poshti" shall issue after payment of the pensions during the month.

(5) In the event that a post office employee is responsible for undue payment of pension, it shall be reimbursed to the territorial division [of the Institut] by the territorial division of the "Balgarski

poshti”. ...’

16 Under Article 4 of the Postal Services Act (Zakon za poshtenske usluge), as amended (‘the PSA’), ‘[p]ostal services comprise the universal postal service and the non-universal postal ones’.

17 Article 25(2) of the PSA provides:

‘The postal operator obliged to provide the universal postal service may provide other postal services as well according to the procedure set forth in this Act. The main postal operator is also entitled to carry out other activities within its registered scope of activities as a commercial company.’

18 Article 29b of the PSA states:

‘The postal operator obliged to provide the universal postal service shall organise and carry out accounting of its activity in compliance with the applicable accounting standards and by applying a system for distribution of the expenses both generally for the company and also analytically and separately for:

1. the universal postal service according to types of services;
2. the postal money orders;
3. the non-universal postal services under Article 38, points 1 to 3;
4. other trade activities.’

19 It follows from Article 38 of the PSA that the non-universal postal services comprise:

- ‘1. receipt, transfer and delivery of direct postal advertising;
2. the services under Article 3, point 2;
3. courier services;
4. postal money orders.’

20 Under Article 39, point 3 of the PSA, an individual licence under that Act is an individual administrative document which is issued, inter alia, for money orders.

21 Paragraph 1, point 9 of the additional provisions to the PSA provides that “‘Postal money orders” are postal services for transferring sums of money from the sender to the beneficiary on the basis of a paper order through post offices of a postal operator, licensed for provision of services under Article 39, point 3’.

22 Under Paragraph 70 of the transitional and concluding provisions of the PSA, ‘[t]he postal operator obliged under Article 24 to provide the universal postal service shall be the company [“Balgarski poshti”] for a term of 15 years as from the day of promulgation of this Act in the *Darzhaven vestnik* (State Gazette No 102 of 2010, in force since 30 December 2010)’.

The facts in the main proceedings and the questions referred for a preliminary ruling

23 By a decree of 10 March 2000, the Council of Ministers adopted the Order on pensions, which entered into force on 1 January 2000. That Order provides that retirement pensions are to be paid by the territorial divisions of the Institut through the domestic banks and the post offices of

the national postal operator 'Balgarski poshti', a single-member commercial company wholly owned by the State. Those postal money orders include the payment of retirement pensions at both the post offices and the address of the beneficiary by a postal worker. When the Order on pensions was adopted, 'Balgarski poshti' was the only body authorised under the PSA to provide the universal postal service, which included postal money orders.

24 Following an amendment to the PSA, postal money orders have no longer been included in the universal postal service since 3 November 2009. 'EasyPay' AD and 'Finance Engineering' AD are undertakings which hold a licence issued by the Bulgarian Communications Regulation Commission entitling them to offer postal money order services. Accordingly, those undertakings are of the view that the Order on pensions, by conferring an exclusive right on 'Balgarski poshti' to pay retirement pensions by postal money order, restricts their rights as postal operators and is detrimental to free competition.

25 The Council of Ministers argue that the granting and payment of pensions form part of the exercise of State social security functions, which cannot be qualified as an economic activity. 'Balgarski poshti' was entrusted under a regulatory act with a public service activity which does not fall within the scope of competition law. The Council of Ministers adds that only that company has a branch network covering all of the territory of Bulgaria, including sparsely populated areas.

26 The court of first instance held that Article 106 of the Social Security Code allowed the Council of Ministers discretion in selecting the company which best met the public needs and deduced therefrom that the action brought by 'EasyPay' and 'Finance Engineering' must be dismissed as unfounded. The parties then brought an appeal in cassation before the referring court.

27 It is on that basis that the Varhoven administrativen sad (Supreme Administrative Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a postal service such as the money order service by which sums of money are transferred from the sender, which in this case is the State, to the recipients, namely persons entitled to social security payments, to be regarded as not being covered by the scope of Directive 97/67, such that it is subject to the provisions of Articles 106 TFEU and 107 TFEU?

(2) If the first question is answered in the affirmative, are Articles 106 TFEU and 107 TFEU to be interpreted as meaning that they do not permit a restriction of free competition in the provision of a postal service such as that described if that is justified by compelling considerations relating to the guarantee of a constitutional right of citizens and the social policy of the State and if at the same time the service, by its nature, may be qualified as a service of general economic interest, provided that the compensation received by the service provider is public service compensation which does not exceed the sum laid down in Article 2(1)(a) of the SGEI decision?'

Consideration of the questions referred

The first question

28 By its first question, the referring court asks, in essence, whether Directive 97/67 must be interpreted as meaning that a money order service by which the sender, in this case the State, transfers sums of money to a beneficiary through the postal operator entrusted with providing the universal postal service falls within the scope of that directive.

29 It must be borne in mind that Article 2, point 1 of Directive 97/67 gives an exhaustive list of the services included in the concept of 'postal service', which are the clearance, sorting, transport and distribution of postal items. In addition, point 6 of that article describes in detail what is to be understood by 'postal item' for the purposes of that directive.

30 However, neither Article 2 nor any other provision of Directive 97/67 mentions financial services, including those provided as an additional service by the postal services providers (see, to that effect, judgment in *Asempre and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería*, C-240/02, EU:C:2004:140, paragraph 31).

31 It must also be stated that, in the light of the precise and exhaustive character of that provision of Directive 97/67, a wide interpretation thereof, which would extend the scope of that directive to situations which do not in fact fall within its scope, cannot be accepted (see, to that effect, judgment in *Asempre and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería*, C-240/02, EU:C:2004:140, paragraph 32).

32 It has thus been held that money order services, which consist in making payments through the public postal network to natural or legal persons on behalf of and on the order of others, are not within the scope of Directive 97/67 (see judgment in *Asempre and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería*, C-240/02, EU:C:2004:140, paragraph 34).

33 Accordingly, the answer to the first question is that Directive 97/67 must be interpreted as meaning that a money order service by which the sender, in this case the State, transfers sums of money to a beneficiary through the postal operator entrusted with providing the universal postal service does not fall within the scope of that directive.

The second question

34 By its second question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as precluding a Member State from granting an undertaking, such as that at issue in the main proceedings, the exclusive right to pay retirement pensions by money order.

35 As a preliminary point, it must be borne in mind that classification as State aid requires all the conditions laid down in Article 107(1) TFEU to be satisfied. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 74 and the case-law cited).

36 Thus, for the purpose of a classification as State aid, Article 107(1) TFEU presupposes in particular that there is an advantage conferred on an undertaking.

37 In that regard, firstly, it must be pointed out, on the one hand, that, for the purposes of the application of EU competition law, an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. On the other, any activity consisting in offering goods and services on a given market is an economic activity (see judgment

in *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 35).

38 Furthermore, it has been held that the organisations involved in the management of the public social security system fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions (see, to that effect, judgment in *Poucet and Pistre*, C-159/91 and C-160/91, EU:C:1993:63, paragraph 18).

39 It is for the referring court to ascertain whether or not the money order operations carried out by 'Balgarski poshti', enabling the payment of retirement pensions at issue in the main proceedings, is involved in the functioning of the public social security service and, accordingly, must or must not be regarded as an economic activity falling within the scope of Article 107(1) TFEU.

40 In that context, it must be recalled that, in order to avoid classification as an economic activity, that activity must, by its nature, its aim and the rules to which it is subject, be inseparably connected with the national pensions system (see, by analogy, judgment in *Aéroports de Paris v Commission*, C-82/01 P, EU:C:2002:617, paragraph 81). Thus, in the main proceedings, any inseparable connection thereto of the activity of money order operations must be taken into consideration.

41 In that regard, it is apparent, in particular, from Articles 50, 54(1) and 58 of the Order on pensions that the old-age benefits granted in the State social security system form part of the task of the Institut which, in carrying out that task, uses 'Balgarski poshti' solely to handle the payments of retirement pensions.

42 In addition, Article 50 of the Order on pensions provides that payment of retirement pensions may also be made through banks. Thus, according to the information provided by the Institut to the Bulgarian Government and cited by that Government in the oral procedure, at 1 May 2015 approximately 53% of the total number of retirement pensions were paid by bank transfer. Accordingly, the money orders used by 'Balgarski poshti' are not actually the sole method of payment of the retirement pensions.

43 Those elements constitute an indication enabling the view to be taken that the activity of money order operations enabling the payment of retirement pensions may be separable from the national pensions system. It is for the national court to assess the relevance of those elements, in particular in the light of the other factual and legal elements before it.

44 Secondly, if the activity of money order operations enabling the payment of retirement pensions at issue in the main proceedings is separable from the public social security service and is to be regarded as an economic activity, the question arises as to whether the measure by which a Member State grants an undertaking an exclusive right to pay retirement pensions by money order is to be regarded as an advantage within the meaning of Article 107(1) TFEU.

45 In that regard, it must be borne in mind that a State measure regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them is not caught by Article 107(1) TFEU (see judgments in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 84, and *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87).

46 However, for such compensation to escape classification as State aid in a particular case, a

number of conditions must be satisfied (judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 88).

47 Firstly, it is clear from paragraph 89 of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) that the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined in order for such compensation to escape classification as State aid.

48 In the present case, the referring court must examine whether ‘Balgarski poshti’ actually has public service obligations to discharge and whether those obligations are clearly defined in the national legislation at issue in the main proceedings.

49 Secondly, it follows from paragraph 90 of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) that it is for the referring court to determine whether the parameters on the basis of which the compensation is calculated are established in advance in an objective and transparent manner.

50 In that regard, it can be noted that Article 92(2) of the Order on pensions states the base amount on the basis of which the compensation for the public service obligation is calculated.

51 Similarly, it is for the referring court to ascertain if, on application of the third condition laid down in paragraph 92 of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), the compensation exceeds what is necessary to cover all or part of the costs incurred in the payment by money order of retirement pensions, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

52 Where the undertaking which is to discharge the service of general economic interests as in the main proceedings, is not chosen pursuant to a public procurement procedure, it is also for the referring court to make sure, in accordance with the fourth condition laid down in paragraph 93 of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), that the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

53 Thirdly, while the referring court points out that the remuneration received by ‘Balgarski poshti’ represents compensation not exceeding the amount laid down in Article 2(1)(a) of the SGEI decision, it must none the less be stated that that decision concerns measures constituting State aid within the meaning of Article 107 TFEU (see, to that effect, judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 102). It is only if the criteria referred to in paragraphs 47 to 52 of the present judgment are not complied with and if the conditions for Article 107(1) TFEU to apply are satisfied that the referring court may apply that decision in order to determine whether the measure at issue in the main proceedings, which can be classified as State aid within the meaning of Article 107 TFEU, is compatible with the internal market, in accordance with Article 106(2) TFEU and may be exempt from the prior notification requirement provided for in Article 108(3) TFEU.

54 In that regard, it must be recalled that it is clear from Articles 11 and 12 of the SGEI decision that it repeals Decision 2005/842 and enters into force on 31 January 2012. As the Commission points out, Article 10 of the SGEI decision provides that any aid scheme put into effect before the entry into force of that decision that was compatible with the internal market and exempted from the notification requirement in accordance with Decision 2005/842 is to continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2

years, that is to say until 31 January 2014. With effect from that date, a State aid scheme must comply with the conditions of the SGEI decision in order to be exempted from the notification requirement.

55 In addition, in so far as, as is apparent from paragraph 23 of the present judgment, the Order on pensions entered into force during the month of January 2000, it must be stated that, in accordance with Article 2(2) of the SGEI decision, where a service provider has managed a service of general economic interest for more than 10 years, that decision applies only to the extent that a significant investment is required from the service provider in order that it may discharge its obligation to perform the service of general economic interest, which it is for the referring court to ascertain.

56 Having regard to the foregoing, the answer to the second question is that Article 107(1) TFEU must be interpreted as meaning that, if the activity of money order operations enabling the payment of retirement pensions constitutes an economic activity, the grant by a Member State of an exclusive right to pay retirement pensions by money order to an undertaking such as that at issue in the main proceedings is not, however, caught by that provision, in so far as that service constitutes a service of general economic interest, the remuneration for which represents compensation for the services carried out by that undertaking to discharge its public service obligation.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. 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, must be interpreted as meaning that a money order service by which the sender, in this case the State, transfers sums of money to a beneficiary through the postal operator entrusted with providing the universal postal service does not fall within the scope of that directive.

2. Article 107(1) TFEU must be interpreted as meaning that, if the activity of money order operations enabling the payment of retirement pensions constitutes an economic activity, the grant by a Member State of an exclusive right to pay retirement pensions by money order to an undertaking such as that at issue in the main proceedings is not, however, caught by that provision, in so far as that service constitutes a service of general economic interest, the remuneration for which represents compensation for the services carried out by that undertaking to discharge its public service obligation.

[Signatures]

* Language of the case: Bulgarian.