Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 23 March 2023 [1]

Case C-226/22

Nexive Commerce Srl,
Nexive Scarl,
Nexive Services Srl,
Nexive Network Srl,
Nexive SpA,
BRT SpA,
A.I.C.A.I. Associazione Italiana Corrieri Aerei Internazionali,
DHL Express (Italy) Srl,
TNT Global Express Srl,
Federal Express Europe Inc. Filiale Italiana,
United Parcel Service Italia Srl,
General Logistics Systems Enterprise Srl,
General Logistics Systems Italy SpA,
Fedex Express Italy Srl
v
Autorità per le Garanzie nelle Comunicazioni,
Presidenza del Consiglio dei ministri,
Ministero dell'Economia e delle Finanze,
Ministero dello Sviluppo Economico,
intervener:
Nexive SpA

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Postal services in the European Union – Financing of the regulatory authority for the postal sector – Need for public funding – Obligation for undertakings in the sector to contribute to the operational costs of the regulatory authority for the postal sector – Financial burden borne exclusively by postal service providers, without distinguishing between universal service providers and express mail service providers)

[1] Original language: Spanish.

1. In Italy, private economic operators in the postal sector are required to defray the costs of the national regulatory authority ('NRA') without any public co-financing. That obligation falls on both express mail service providers and universal service providers.

2. In this reference for a preliminary ruling, the Court is asked, in essence, whether the national legislation applied in the main proceedings is compatible with Directive 97/67/EC, as amended by Directive 2008/6/EC, [2] and with the principles of proportionality and non-discrimination.

I. Legislation

A. European Union law. Directive 97/67 (as amended)

3. Article 9 provides:

'1. For services which fall outside the scope of the universal service, Member States may introduce general authorisations to the extent necessary to guarantee compliance with the essential requirements.

2. For services which fall within the scope of the universal service, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service.

The granting of authorisations may:

…

— where appropriate, be subject to an obligation to make a financial contribution to the national regulatory authority's operational costs referred to in Article 22,

…

Obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers.

…

3. The procedures, obligations and requirements referred to in paragraphs 1 and 2 shall be transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria. …'

4. Article 22 provides:

'1. Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. …

[2] Directive 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 amending Directive 97/67 with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3).

…

2. The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service. They may also be charged with ensuring compliance with competition rules in the postal sector.

…'

B. National law

5. Directive 97/67 was transposed into Italian law by Legislative Decree No 261 of 22 July 1999,[3] Article 2(1) of which provided that 'the regulatory authority for the postal sector shall be the Ministry of Communications'.

6. Article 1 of Legislative Decree No 58 of 31 March 2011[4] amended Article 2 of Legislative Decree No 261 of 22 July 1999 and made provision for the following:

– 'The National Agency for regulating the Postal Sector … is hereby established and is designated as national regulatory authority for the postal sector within the meaning of Article 22 of Directive 97/67/EEC and subsequent amendments thereto' (paragraph 1);

– 'The tasks … performed by the Ministry of Economic Development …, with the relevant human, financial and operational resources, shall be transferred to the Agency' (paragraph 12);

– 'The Agency's operating expenses shall be met: (a) by a specific fund included in the budget of the Ministry of Economic Development, to which the financial resources referred to in paragraph 12 shall be allocated; (b) by a contribution not exceeding 0.1% of the previous financial year's earnings relating to the postal sector, payable by all economic operators in the sector …' (paragraph 14);

– 'The amount of the financial resources referred to in paragraph 12 are to be established by decree of the Ministry of Economic Affairs and Finance (paragraph 18).

7. The activities and powers of the National Agency for regulating the Postal Sector were transferred to the Autorità per le garanzie nelle comunicazioni (Communications Regulatory Authority; 'AGCOM')[5] by Decree-Law No 201 of 6 December 2011.[6] However, the rules in force on the financing of that agency remained unchanged.

[3] 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 servicio (Legislative Decree No 261 of 22 July 1999 implementing Directive 97/67/EC …) (GURI No 182 of 5 August 1999).

[4] Decreto Legislativo 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 transposing Directive 2008/6/EC …) of 31 March 2011 (GURI No 98 of 24 April 2011).

[5] AGCOM was established by Article 1(1) of legge n. 249, di Istituzione dell'Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo (Law No 249 of 13 July 1997 establishing the Communications Regulatory Authority and laying down rules relating to the telecommunications and radiotelevision systems) (GURI No 177 of 31 July 1997).

[6] Decreto-legge 6 dicembre 2011, n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici, convertito con modificazioni dalla legge 22 dicembre 2011, n.º214 (Decree-Law No 201 of 6 December 2011 laying down urgent provisions relating to growth, fairness and the consolidation of public accounts) (GURI No 284 of 6 December 2011), converted into law, with amendments, by Law No 214 of 22 December 2011 (GURI No 300 of 27 December 2011).

8. Article 1(65) and (66) of Law No 266 of 23 December 2005[7] provided:

– '65. From 2007 onwards, the operating expenses … of the Communications Regulatory Authority … shall, in so far as they are not covered by funding from the State budget, be financed by the relevant sector in the manner laid down in the rules in force. The amount of the contributions shall be determined by decision of the Authority, within the limits provided for by law. The contributions shall be paid directly to that Authority. …'

– '66. For the first year of application, 2006, the amount of the contribution to be paid by the economic operators in the communications sector … shall be 0.15% of earnings as recorded in the last set of approved company accounts before the entry into force of this law. For subsequent years, [AGCOM] may vary the amount and manner of payment of the contribution in accordance with Article 1(65), up to a maximum of 0.2% of earnings as recorded in the last set of approved company accounts before the adoption of the decision.'

9. Changes in AGCOM's funding arrangements were implemented by Article 65 of Decree-Law No 50 of 24 April 2017[8] as follows:

'1. From 2017 onwards, the operating expenses of the Communications Regulatory Authority in respect of its tasks as national regulatory authority for the postal sector shall be met in full in accordance with the rules laid down in Article 1(65) and the second sentence of Article 1(66) of Law No 266 of 23 December 2005, on the basis of the earnings obtained by postal sector operators. The provisions of Article 2(6) to (21) and of Article 15(2-*bis*) of Legislative Decree No 261 of 22 July 1999 are repealed.'

10. That amendment abolished the hybrid public-private system for financing the regulatory authority and brought the contributions of postal sector operators to AGCOM into line with the contributions of the other economic sectors under AGCOM's supervision.

II. Facts, dispute and questions referred for a preliminary ruling

11. In 2017 and 2018, AGCOM adopted decisions No 182/17/CONS, No 427/17/CONS and No 528/18/CONS ('the decisions') establishing the amount and terms of the contribution payable to it by private economic operators in the postal services sector for 2017, 2018 and 2019 respectively. Specifically, AGCOM set the contribution at 0.14% (of earnings recorded by each operator) for 2017 and 2018 and at 0.135% for 2019.

12. The decisions:

– identified universal service providers and other private economic operators in the postal services sector in possession of an authorisation as the parties liable for payment of that contribution;

[7] Legge n. 266, recante «Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (finanziaria 2006)» (Law No 266 of 23 December 2005 laying down provisions for drawing up the annual and multiannual State budget (2006 Budget Law)) (GURI No 302 of 29 December 2005).

[8] Decreto-legge 24 aprile 2017, n. 50 – Disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo (GURI, general series No 95 of 24 April 2017, ordinary supplement No 20) (Decree-Law No 50 of 24 April 2017 laying down urgent provisions on financial matters, initiatives to assist regional or local authorities, further action to support areas affected by earthquakes and development measures), convertito con modificazioni dalla legge 21 giugno 2017, n. 96 (converted into law, with amendments, by Law No 96 of 21 June 2017) (GURI No 144 of 23 June 2017).

– quantified the liability, so that the contribution from economic operators would enable the costs of AGCOM's activities in that sector to be met in full, without any public co-financing.

13. Those costs were calculated having regard not only to the activities directly related to the regulation of the postal services market, but also to the services common to the different areas within AGCOM's remit, such as the use of buildings and secretariat activities. The indirect costs arising from common services were shared between the various markets regulated by AGCOM on a proportional basis.

14. A number of private economic operators in the field of express mail, not included within the scope of the universal service, challenged the decisions before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

15. In particular, they objected to:

– the fact that the agreements established a system of contributions payable entirely by market operators, excluding any State co-participation;

– the fact that the financed costs were higher than the costs of AGCOM's regulatory activities in the postal services market;

– the fact that express mail service providers and universal service providers were to be treated in the same way.

16. The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) dismissed the actions on the ground, in essence, that:

– the national legislation applicable *ratione temporis* does not impose any obligation on the State to co-finance AGCOM's activities, nor does it empower AGCOM to set a contribution rate payable by the State, in the absence of a provision to that effect in the annual budget law;

– the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67 allows Member States to cover the costs of the NRA by means of funding from operators in the market regulated by that NRA;

– the services referred to in Article 9(2) of Directive 97/67 are not limited to the universal service;

– costs relating to express mail services and indirect operational costs, shared on a proportional basis, also constitute costs that can be financed.

17. The applicants lodged an appeal against the first instance judgment before the Consiglio di Stato (Council of State, Italy), which has referred the following questions to the Court of Justice:

'(1) Must the fourth indent of the second subparagraph of Article 9(2), Article 9(3) and Article 22 of [Directive 97/67], as amended by [Directive 2008/6], be interpreted as meaning that they preclude national legislation, such as that laid down in Italian law (in Article 1(65) and (66) of [Law No 266 of 23 December 2005] and Article 65 of … Decree-Law No 50 of 24 April 2017, converted into law, with amendments, by Law No 96 of 21 June 2017), that makes it possible to place the obligation to contribute financially to the operating costs of the regulatory

authority for postal services exclusively on postal service providers, including those not providing services falling within the scope of the universal service, thereby allowing the possibility of excluding any form of public co-financing from the national budget?

(2) Must the fourth indent of the second subparagraph of Article 9(2) and Article 22 of [Directive 97/67], as amended by [Directive 2008/6], be interpreted as meaning that they make it possible to include, in the costs that can be financed by postal service operators, costs to be incurred for regulatory activities concerning postal services outside the scope of the universal service, and costs for administrative and [policymaking] structures ("cross-sector" structures) whose activity, although not directly aimed at regulating the postal services markets, nevertheless contributes to the performance of all the Authority's institutional tasks, with the consequent possibility that they might be indirectly and partially (pro rata) allocated to the postal services sector?

(3) Do the principles of proportionality and non-discrimination, the fourth indent of the second subparagraph of Article 9(2), Article 9(3) and Article 22 of [Directive 97/67], as amended by [Directive 2008/6], preclude national legislation, such as the Italian provisions (laid down in Article 1(65) and (66) of Law No 266 of 23 December 2005 and Article 65 of Decree-Law No 50 of 24 April 2017, converted into law, with amendments, by Law No 96 of 21 June 2017), imposing an obligation on postal sector providers to contribute to the financing of the regulatory authority for the postal sector, without any possibility of distinguishing the position of express courier service providers from that of universal service providers and, therefore, without any possibility of appreciating the different intensity of the regulatory activities carried out by the national regulatory authority in relation to the different types of postal services?'

III. Proceedings before the Court

18. The request for a preliminary ruling was received at the Court on 31 March 2022.

19. Written observations were submitted by General Logistic System Enterprises Srl and General Logistic System Italy SpA, BRT SpA, Associazione Italiana Corrieri Aerei Internazionali (A.I.C.A.I.) and Others, the Belgian, Greek, Italian, Lithuanian, Norwegian and Portuguese Governments, and the European Commission.

20. It was not considered necessary to hold a hearing.

IV. Assessment

A. Preliminary remarks

21. Directive 97/67, as amended by Directive 2008/6, allows Member States to make the grant of licences to postal operators subject, 'where appropriate', 'to an obligation to make a financial contribution to the [NRA]'s operational costs'.[9]

[9] Fourth indent of the second subparagraph of Article 9(2) of Directive 97/67. Under Article 22(1) of that directive, Member States are to designate NRAs.

22. Advocate General Mengozzi previously warned of the difficulties in interpreting Article 9(2) of Directive 97/67 because of its opaque wording. [10] Those warnings are borne out by this case.

23. In dealing with the questions submitted by the Consiglio di Stato (Council of State), I consider it preferable to begin with the second question in order to determine what types of expenditure incurred by NRAs in the postal sector must be funded by that sector's operators. [11] I will then examine whether a minimum level of financing of NRAs using public funds is mandatory under Directive 97/67. Lastly, I will explore whether all postal sector operators are required to make contributions on the basis of their earnings, or whether a distinction must be drawn between universal service providers and express mail providers.

B. Second question referred

24. The referring court enquires whether the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67, read in conjunction with Article 22 thereof, includes the following costs under the operational costs of NRAs financed by postal service providers:

– costs incurred in respect of regulatory activities concerning postal services falling outside the scope of the universal service;

– 'costs for administrative and policymaking structures ("cross-sector" structures) whose activity, although not directly aimed at regulating the postal services markets, nevertheless contributes to the performance of all the Authority's institutional tasks, with the consequent possibility that they might be indirectly and partially (pro rata) allocated to the postal services sector'.

1. Costs incurred in respect of NRAs' regulatory activities concerning postal services falling outside the scope of the universal service

25. With respect to this category, the case-law of the Court seems to me to be conclusive: 'as regards the specific obligation, under Article 9(2), second subparagraph, fourth indent, of Directive 97/67, to contribute to the financing of the regulatory authority responsible for the postal sector …, it should be noted that the activities for which national regulatory authorities are responsible relate to all postal services and not solely to the provision of postal services falling within the scope of the universal service'. [12]

26. In the manner in which it is framed, that obligation is consistent with the tasks of NRAs in the postal sector, which are charged with ensuring compliance with the obligations arising from Directive 97/67 and ensuring that the competition rules in that sector are observed. Those tasks thus benefit all postal operators, not just a particular category of such operators.

[10] Opinion of Advocate General Mengozzi of 16 March 2016 in *DHL Express (Austria)* (C-2/15, EU:C:2016:168, point 22).

[11] It will be necessary to specify whether all expenses are covered, including general (common) expenses, or only expenses strictly related to the NRA's tasks in the postal sector. To that end, the interpretation of the opaque concept of 'operational costs' used in Directive 97/67 will be crucial.

[12] Judgment of 16 November 2016, *DHL Express (Austria)* (C-2/15, EU:C:2016:880, paragraph 29).

27. The fourth indent of the second subparagraph of Article 9(2) of Directive 97/67 must therefore be interpreted as meaning that all postal service providers may, in return for the benefits which they derive from the actions of NRAs, 'be made subject to the obligation to contribute to the financing of the operations of those authorities'. [13]

28. The obligation covers, in short, the costs associated with the activities of NRAs relating to *all* postal services, both those excluded from and included in the scope of the universal service.

2. Costs for administrative and policymaking structures

29. The answer to the question whether the *operational costs* mentioned in the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67 include the 'costs for structures and cross-sector services' ('cross-sector services') [14] of the NRA, mentioned by the referring court, seems to me to be less straightforward.

30. Directive 97/67 does not define the concept of 'operational costs', the interpretation of which is disputed by the parties which participated in this preliminary ruling procedure.

– The Commission submits that that concept includes cross-sector costs incurred by NRAs as a result of their administrative and institutional activities, costs which are closely linked to and precede the regulatory activities those NRAs are required to carry out.

– BRT SpA, on the other hand, claims that if the legislature's intention had been to have postal operators defray the cross-sector costs of NRAs, it would have used a broader concept than that of 'operational costs'. According to BRT SpA, the word 'operational' refers to the taking of specific action and concerns the stage of practical implementation.

31. Recourse to the different language versions does not assist in providing a literal interpretation clarifying the provision. [15] It is therefore necessary, in accordance with the case-law of the Court, [16] to have regard to the systematic and purposive interpretation of that provision.

32. Directive 97/67, on its own, also does not provide any indications enabling a systematic interpretation to be carried out which would shed further light on the meaning of 'operational costs'. [17]

[13] Judgment of 16 November 2016, *DHL Express (Austria)* (C-2/15, EU:C:2016:880, paragraph 31), and Opinion of Advocate General Mengozzi in that case (EU:C:2016:168, point 46).

[14] As defined by the referring court.

[15] 'Operational costs' is translated in the French-language version of Directive 97/67 as 'coûts de fonctionnement'; in the Italian-language version as 'costi operativi'; in the German-language version as 'betrieblichen Aufwendungen'; in the Spanish-language version as 'costes operativos'; in the Portuguese-language version as 'custos de funcionamento'; and in the Romanian-language version as 'costurile operaționale'.

[16] Judgment of 12 November 2019, *Haqbin* (C-233/18, EU:C:2019:956, paragraph 42).

[17] The imprecise wording of Article 9 of Directive 97/67 in that respect contrasts with the detailed rules on the (direct or common) costs which universal service providers must record in their accounting systems (Article 14).

33. It is true, however, that other provisions of EU law relating to electronic communications (in particular, Directive 2002/21/EC[18] and Directive 2002/20/EC,[19] or their predecessors) could provide, from a systematic point of view, useful guidance for this reference for a preliminary ruling.

34. That would be the case if those other provisions,[20] already interpreted by the Court, had introduced similar concepts which could be extrapolated to the postal sector.[21]

35. In the field of electronic communications, as in the postal sector, provision is made requiring private operators to finance the relevant NRAs. To that end, Directive 2002/20 uses the concept of 'administrative costs' of NRAs. Like the postal sector authority, those authorities must be impartial and independent and must receive appropriate funding.[22]

36. The rules governing the financing of NRAs in the electronic communications sector specifically provide that operators' contributions (the charges payable to maintain the NRA) are limited to covering certain *actual administrative costs* associated, in particular, with the management of authorisations or rights of use.[23]

37. Under Article 12(1) of Directive 2002/20, any administrative charges imposed on undertakings to finance the NRA's activities must 'in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 6(2)'.[24]

38. Charges in the electronic communications sector cannot therefore be intended to cover even expenditure relating to tasks other than those listed in that provision, and in particular no other kinds of administrative costs incurred by the NRA.[25]

[18] Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009 L 337, p. 37).

[19] Directive of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21), as amended by Directive 2009/140.

[20] Directives 2002/20 and 2002/21 were in force at the material time, but were repealed with effect from 20 December 2020 by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36).

[21] There is some overlap between the postal sector and the electronic communications sector (in some Member States, like Italy, the same NRA oversees both sectors), but there are also significant differences. Care must therefore be exercised when transposing approaches taken in directives from one sector to another.

[22] It is apparent from Article 3(3) and (3a) of Directive 2002/21, according to the judgment of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni* (C-240/15, EU:C:2016:608, paragraph 36), that 'Directive [2002/21] now imposes the requirement that, in order to guarantee the independence and the impartiality of NRAs, the Member States are to ensure, in essence, that the NRAs, as a whole, *are to have adequate financial and human resources to enable them to carry out the tasks assigned to them* …'. Emphasis added.

[23] According to Recital 30 of Directive 2002/20, 'administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority in managing the authorisation system and for the granting of rights of use. Such charges should be limited to cover the actual administrative costs for those activities. …'. Recital 31 adds that 'systems for administrative charges should not distort competition or create barriers for entry into the market'.

[24] Those costs 'may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection'.

[25] Judgments of 18 July 2013, *Vodafone Omnitel and Others* (C-228/12 to C-232/12 and C-254/12 to C-258/12, EU:C:2013:495, paragraphs 38 to 40 and 42), and of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni* (C-240/15, EU:C:2016:608, paragraph 45).

39. According to the Court, it follows from Article 12(2) of Directive 2002/20, read in conjunction with recital 30 thereof, that charges levied on electronic communications operators:

– must cover the actual administrative costs relating to the activities listed in Article 12(1)(a) and must be in balance with those costs; thus, the totality of the income obtained from those charges cannot exceed the total costs relating to those activities; [26]

– may cover the costs associated with all of the NRA's activities mentioned in that article, not only those relating to the activity of *ex ante* market regulation. [27]

40. The applicants in the main proceedings who submitted observations are in favour of transposing to the postal sector both the approach taken in the electronic communications sector by Article 12 of Directive 2002/20 and the case-law of the Court interpreting that provision.

41. The proposed interpretation may, at first sight, be attractive, [28] but it is not appropriate. Despite the similarities in the requirements of independence for NRAs in the electronic communications sector and in the postal sector, the specific rules on their financing differ:

– as I have just indicated, the charges imposed on operators in the electronic communications sector finance certain *administrative costs*, listed in Article 12 of Directive 2002/20, associated with managing authorisations or rights of use, but not other kinds of costs incurred by NRAs beyond those mentioned in that article;

– by contrast, in the fourth indent of the second subparagraph of Article 9(2) and Article 22 of Directive 97/67, the EU legislature did not limit the costs that could be financed by private operators to those of a purely administrative nature, let alone to those associated with authorisations or rights of use.

42. A teleological interpretation of the fourth indent of the second subparagraph of Article 9(2) and Article 22 of Directive 97/67 leads to the view that those provisions enable NRAs in the postal sector to carry out their general tasks, namely to ensure compliance with the obligations arising from Directive 97/67. [29] To that end, they must receive appropriate funding covering the cross-sector costs of their functioning, without which they would simply be unable to take action.

43. There is therefore no reason why cross-sector costs of NRAs in the postal sector (that is, common costs, not specifically earmarked for regulatory or supervisory activities), incurred in the performance of their institutional tasks, should not be considered to be operational costs. In that respect, I agree with the Commission's position when it draws attention to the close link between that category of costs, preceding any other activity, and the NRA's specific tasks.

[26] Judgments of 18 July 2013, *Vodafone Omnitel and Others* (C-228/12 to C-232/12 and C-254/12 to C-258/12, EU:C:2013:495, paragraphs 41 and 42), and of 28 July 2016, *Autorità per le Garanzie nelle Comunicazioni* (C-240/15, EU:C:2016:608, paragraph 46).

[27] Order of 29 April 2020, *BT Italia and Others* (C-399/19, EU:C:2020:346, paragraph 43): 'Article 12(1)(a) of [Directive 2002/20] must be interpreted as meaning that the costs which may be covered by a charge imposed under that provision on undertakings providing electronic communications networks and services are only those relating to the three categories of NRA activities referred to in that provision, including regulatory, supervisory, dispute-resolution and penalty-imposing tasks, and are not limited to costs arising from the activity of *ex ante* market regulation'.

[28] Indeed, other aspects of the case-law of the Court concerning NRAs in the electronic communications sector can be easily applied to the postal sector. See points 72 and 79 of this Opinion.

[29] In particular, to establish supervisory and regulatory procedures to ensure provision of the universal service and compliance with competition rules in the postal sector (Article 22(2) of Directive 97/67).

44. Finally, as the referring court rightly points out, if an NRA (such as AGCOM) performs tasks in areas other than the postal sector, the indirect costs are apportioned pro rata between all the sectors involved.

C. First question referred

45. The referring court enquires whether Directive 97/67 precludes national legislation which places the burden of financing the NRA in the postal sector solely on private service providers, to the exclusion of any form of public funding from the State budget.

46. The answer to the first question referred is implicit in my suggested answer to the second, based on the fourth indent of the second subparagraph of Article 9(2) and Article 22 of Directive 97/67.

47. If the operational costs of NRAs in the postal sector encompass both those arising directly from their regulatory and supervisory activities and those originating from their administrative and decision-making structures, private operators must, in principle, cover the NRA's funding in full.

48. The referring court's question (can the burden of covering all the costs of NRAs be placed on private operators, excluding public funding?) can thus be answered in the affirmative.

49. That answer is not affected by the fact that the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67 uses the words 'where appropriate' when referring to the mechanism for financing NRAs. Such wording respects the possibility which Directive 97/67 affords to Member States of choosing different methods. [30]

50. It is therefore necessary to clarify the scope of the obligation 'to make a financial contribution' provided for in the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67.

51. The wording of that expression could support a restrictive interpretation: operators are required only to make a financial contribution to cover *part* of the operational costs of NRAs, but *not all* of those costs.

52. Since a literal interpretation is not decisive, recourse must again be had to a systematic and purposive interpretation of the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67.

53. Assuming that the concept of operational costs includes all the costs incurred by NRAs in the postal sector in the performance of their tasks, it may be argued that Member States retain the possibility of choosing between the following:

– a strictly private system of financing by means of charges imposed on postal operators;

– a public system of financing from the State budget;

[30] Like any other levy, charges established to defray the costs of performing public tasks clearly have an element of political assessment. It does not appear that a charge based on the earnings of postal operators, such as that imposed by Italy, set at 0.*x*% of their earnings, affects the competitiveness of operators in the sector or threatens their survival.

– a hybrid system of public (from the State budget) and private (contributions from postal sector operators) co-financing. Under this model, there is nothing to prevent cross-sector costs being covered by public funding and regulatory and supervisory costs being covered by private operators.

54. According to data provided by the Commission based on a recent study, [31] 15 Member States have chosen a wholly private system of financing, 6 prefer a public system and 5 have opted for a hybrid system (in 4 of those Member States, the lion's share of the funding is provided by postal operators).

55. In my view, Article 9 of Directive 97/67 neither requires a choice to be made between the different NRA financing models nor prevents such a choice being made. Paragraph 3 of that article merely requires that, once the independence and functioning of those authorities has been ensured, the elements of the system adopted should be 'transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria'.

56. There is nothing, I repeat, to prevent a Member State from establishing a public system or a hybrid system: both are consistent with the purpose of Directive 97/67, which makes provision for the existence of NRAs that are independent of postal sector operators [32] in order to ensure the proper performance of their regulatory and supervisory duties. I consider the two systems to be compatible with the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67, as they safeguard the independence of NRAs vis-à-vis postal sector operators and ensure their proper functioning.

57. The same holds for the compatibility of strictly private systems of financing (such as the Italian system), provided that they ensure, first, the independence of the NRA and, second, that the NRA has, in practice, the necessary resources to perform its tasks. [33]

58. The truth of the matter is that the source of an NRA's funding does not necessarily determine its independence. [34] What must be ensured is that the NRA has the necessary financial resources to be able to shield itself from any undue influence from the main market players and other public authorities. [35]

[31] Peter Dunn, *Postal operators contribute to NRAs' costs but at very different levels*, 2021, available at https://www.cullen-international.com/news/2021/04/Postal-operators-contribute-to-NRAs–costs-but-at-very-different-levels.html.

[32] Recital 47 of Directive 2008/6 places emphasis on the independence and autonomy of NRAs: '… In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions …'.

[33] Recital 47 of Directive 2008/6 states that 'national regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks'.

[34] OECD, *The Governance of Regulators – Being an independent Regulator*, OECD Publishing, Paris, 2016, available at https://read.oecd-ilibrary.org/governance/being-an-independent-regulator_9789264255401-en#page4, pp. 79 and 80, and OECD, *Creating a Culture of Independence: Practical Guidance against Undue Influence*, OECD Publishing, Paris, 2017, available at https://www.oecd-ilibrary.org/fr/governance/creating-a-culture-of-independence_9789264274198-en, pp. 27 and 28.

[35] OECD, *The Governance of Regulators – Equipping Agile and Autonomous Regulators*, OECD Publishing, Paris, 2022, available at https://read.oecd-ilibrary.org/governance/equipping-agile-and-autonomous-regulators_7dcb34c8-en#page52, p. 50: 'Appropriate funding mechanisms should ensure that regulators receive sufficient funds for an effective and efficient execution of their activities, and should contain adequate safeguards that prevent undue influence in the work of regulators through the appropriation or restriction of funds'.

59. It is true that the possibility of an NRA's activity being 'obstructed' is greater when its funding depends exclusively on the contributions of postal sector operators. The situation in Italy, as the referring court points out,[36] is a good example of this: according to AGCOM itself, since becoming the Italian NRA in the postal sector in 2012, it has failed to collect any contributions from private postal operators and has had to draw on financial resources from other sectors or from its reserves to perform its regulatory and supervisory tasks. AGCOM states that the impossibility of collecting contributions from operators will result in it being unable to perform its tasks in the Italian postal sector.[37]

60. However, that situation seems to be the result of a specific (and unforeseen) issue with the Italian system of financing, rather than a structural deficiency in the chosen model. The remedy may lie in strengthening the NRA's own collection powers.

61. In short, my view is that the fourth indent of the second subparagraph of Article 9(2) of Directive 97/67, read in conjunction with Article 22 thereof, gives Member States the freedom to choose the system for financing NRAs in the postal sector. Where a Member State opts for a strictly private system of financing, by means of charges imposed on postal operators, it must take the necessary measures to ensure, in any event, the independence and functioning of the NRA. Those measures must be sufficiently effective to prevent the NRA's activities being obstructed.

62. If, contrary to my proposed interpretation, the Court were to find that the concept of operational costs is confined to costs arising from the regulatory and supervisory activities of NRAs, their cross-sector costs would have to be borne by the State through public funding, to ensure the functioning of the NRA.

D. Third question referred

63. The referring court enquires whether the principles of proportionality and non-discrimination and the fourth indent of the second subparagraph of Article 9(2) and Article 22 of Directive 97/67 permit a system for financing NRAs based on charges imposed on postal operators which:

– does not take account of the intensity of the regulatory and supervisory tasks carried out in relation to the different types of postal services; and

– does not distinguish, for that purpose, between universal service providers and express mail operators.

64. Directive 97/67 does not make provision for a specific method for calculating the charges applicable to postal operators in order to finance NRAs. As I have already made clear, Article 9(3) of that directive merely requires that calculation factors are established that are 'transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, [which are] made public in advance and based on objective criteria'.

[36] Paragraph 78 of the order for reference.

[37] The economic impasse of an NRA financed by private contributions may occur, despite collecting the charges by way of enforcement, where recovery is halted by time-consuming legal proceedings. In that context, in the absence of other measures, the obstructive conduct of postal sector operators – which are the NRA's only source of funding – could make it more difficult for the NRA to perform its regulatory and supervisory tasks or even prevent it from doing so altogether (see paragraph 78 of the order for reference).

1. Principle of equality

65. Equality requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. [38]

66. The Italian express mail operators argue that they should not be required to pay contributions to the NRA on the same terms as universal service operators because their situation is different. They submit that the NRA's regulatory and supervisory activities in respect of universal service operators are much more extensive.

67. I recall that, under Article 9(1) of Directive 97/67, Member States may make undertakings active in the postal sector subject to general authorisations for the provision of services falling outside the scope of the universal service. The first subparagraph of Article 9(2) of that directive provides that Member States may introduce authorisation procedures with regard to services falling within the scope of the universal service. [39]

68. In accordance with recital 18 of Directive 97/67, the essential difference between express mail services and the universal postal service lies in the value added (whatever form it takes) provided by express mail services and perceived by customers. These are specific services, dissociable from the service of general interest, which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service. [40]

69. The considerable differences between express mail services and universal postal services [41] do not, however, place operators of the respective services in different situations as regards their obligation to defray the costs of the NRA. Put another way, there is no reason why those differences should result in a higher or lower contribution to the financing of the NRA.

70. The regulatory and supervisory activities of an NRA are carried out for the postal sector as a whole, both as regards the universal service and the express mail service. [42]

71. The method for calculating the charges in order to finance the NRA does not contain any discriminatory elements because it is based on a percentage factor which is the same for all postal operators and is applied to the earnings obtained by each of them. The Court has already

[38] Judgments of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 51); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 35); and of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 41).

[39] Judgment of 16 November 2016, *DHL Express (Austria)* (C-2/15, EU:C:2016:880, paragraph 20).

[40] Judgments of 31 May 2018, *Confetra and Others* (C-259/16 and C-260/16, EU:C:2018:370, paragraph 38), and of 21 November 2019, *Deutsche Post and Others* (C-203/18 and C-374/18, EU:C:2019:999, paragraph 65).

[41] Developments in the postal sector have been swift and the activities of universal service providers and express mail operators tend to converge.

[42] By means of the amendment of Directive 97/67 implemented by Directive 2008/6, the EU legislature intended, in accordance with recitals 13 and 16 of the latter directive, to complete the process of liberalisation of the postal services market and to confirm the final date for the accomplishment of the internal market for postal services by removing not only the remaining obstacles to full market opening for certain universal service providers, but also all other obstacles to the provision of postal services. See, to that effect, judgment of 27 March 2019, *Pawlak* (C-545/17, EU:C:2019:260, paragraph 31).

confirmed that that method of calculation is non-discriminatory, objective and transparent in connection with similar charges imposed on operators to finance NRAs in other economic sectors. [43]

2. Principle of proportionality

72. According to the Court, in order to assess the proportionality of national legislation, such as the Italian legislation transposing Directive 97/67 as regards qualifying certificates for the provision of postal services, 'it is for the referring court to determine, when carrying out an overall assessment of all the relevant facts and legal issues, whether that legislation is appropriate for the purpose of ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them'. [44]

73. As regards whether that legislation is appropriate 'for the purpose of attaining the objective pursued, … national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner'. [45]

74. The objective of the Italian postal model (private financing) is to cover the operational costs of its NRA, in the manner outlined above. The obligation for all operators in the sector to pay the charges is an appropriate way of ensuring, in principle, [46] the performance of the NRA's specific tasks.

75. It should be recalled that, according to the documents before the Court, the charge imposed by Italian law is no higher than the charges imposed by other Member States on private operators to finance their NRAs in the postal sector.

76. The matter at issue is whether the obligation for all postal operators to contribute on the basis of their earnings, without distinguishing between universal service operators and express mail operators, goes beyond what is necessary to ensure that the NRA has appropriate funding.

77. In my view, the system in dispute does not infringe the principle of proportionality since the NRA's actions are aimed at ensuring the liberalisation of the postal sector as a whole and are directed at all postal operators.

78. The following two arguments strengthen my conviction.

– First, while it is true that the activities of providers of the universal postal service are subject to more extensive regulation, it is also true that the liberalisation of the postal sector has favoured express mail providers to a greater extent.

[43] Judgment of 21 July 2011, *Telefónica de España* (C-284/10, EU:C:2011:513), paragraphs 31 and 32: 'As regards whether Member States are entitled to determine, as does the legislation at issue in the main proceedings, the amount of that fee on the basis of the gross operating income of the chargeable persons, it must be considered, firstly, … whether it is an objective, transparent and non-discriminatory criterion. Secondly, that criterion for determining the amount is not, as observed by the Commission at the hearing, unconnected with the costs incurred by the competent national authority. … In those circumstances, Directive 97/13 does not preclude Member States from determining the amount of a fee under Article 6 of that directive on the basis of the gross operating income of the chargeable persons'.

[44] Judgment of 31 May 2018, *Confetra and Others* (C-259/16 and C-260/16, EU:C:2018:370, paragraph 49).

[45] Judgment of 31 May 2018, *Confetra and Others* (C-259/16 and C-260/16, EU:C:2018:370, paragraph 50).

[46] Subject to the qualifications set out in points 60 to 62 of this Opinion.

– Second, as the Court has pointed out in relation to the financing of NRAs in the electronic communications sector, there need not be an exact correlation between the amount of the charge imposed on an operator and the costs actually incurred by the NRA relating to that operator.[47] That reasoning can easily be applied to Directive 97/67.

V. Conclusion

79. In the light of the foregoing, I propose that the Court of Justice give the following reply to the Consiglio di Stato (Council of State, Italy):

The fourth indent of the second subparagraph of Article 9(2) read in conjunction with Article 22 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, 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,

must be interpreted as meaning that:

– the concept of operational costs of national regulatory authorities in the postal sector which can be financed by postal service providers encompasses both costs incurred in respect of regulatory activities concerning postal services falling inside and outside the scope of the universal service, and cross-sector costs arising from the administrative and policymaking structures of those authorities;

– national legislation which makes it possible to impose an obligation on postal service providers to contribute to the financing of the national regulatory authority's operational costs, to the exclusion of any form of public funding, is compatible with EU law provided that the Member State takes the necessary measures to ensure the independence of that authority and the availability of resources for the performance of its tasks; and

– a system for financing the national regulatory authority of a Member State which imposes charges on postal operators, set at 0.x% of their earnings, without taking account of the intensity of the regulatory and supervisory tasks carried out in relation to the different types of postal services, and without distinguishing, for that purpose, between universal postal service providers and express mail operators, is also compatible with EU law, in particular with the principles of proportionality and non-discrimination.

[47] Judgment of 21 July 2011, *Telefónica de España* (C-284/10, EU:C:2011:513, paragraph 28): 'Directive 97/13 cannot be interpreted to the effect that there must be an exact correlation between the amount of the fee imposed on a chargeable operator and the costs actually incurred by the competent national authority and relating to that operator for a specific period, given that no provision of Directive 97/13 requires such a correlation'. The same is true of Directive 97/67.