

JUDGMENT OF THE COURT (Second Chamber)

11 February 2015 (*)

(Reference for a preliminary ruling — Postal services — Directive 97/67/EC — Article 12 — Universal service provider — Quantity discounts — Application to intermediaries who consolidate postal items — Requirement of non-discrimination)

In Case C-340/13,

REQUEST for a preliminary ruling under Article 267 TFEU, from the cour d'appel de Bruxelles (Belgium), made by decision of 12 June 2013, received at the Court on 21 June 2013, in the proceedings

bpost SA

v

Institut belge des services postaux et des télécommunications (IBPT),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 11 June 2014,

after considering the observations submitted on behalf of:

- bpost SA, by H. Gilliams, J. Bocken and T. Baumé, avocats,
- the Belgian Government, by M. Jacobs, acting as Agent, and by S. Depré and P. Vernet, avocats,
- the French Government, by D. Colas and F. Gloaguen, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,
- the Swedish Government, by E. Karlsson and A. Falk, acting as Agents,
- the European Commission, by H. Tserepa-Lacombe and F.W. Bulst, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (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’).

2 The request has been made in proceedings between bpost SA (‘bpost’), a universal postal service provider in Belgium, and Institut belge des services postaux et des télécommunications (‘IBPT’; the national regulatory authority for postal services in Belgium), concerning a decision of IBPT to impose a fine on bpost owing to its breach of the principle of non-discrimination in the implementation of the contractual tariffs for 2010.

Legal context

EU law

3 By its successive amendments by Directives 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 202 L 176, p. 21) and 2008/6, Directive 97/67 continues the process of gradual liberalisation of the postal services market begun in 1998.

4 Recital 8 in the preamble to Directive 97/67 reads as follows:

‘Whereas measures seeking to ensure the gradual and controlled liberalisation of the market and to secure a proper balance in the application thereof are necessary in order to guarantee, throughout the Community, and subject to the obligations and rights of the universal service providers, the free provision of services in the postal sector itself.’

5 Article 2 of that directive provides:

‘For the purpose of this Directive:

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

...

(16) sender: a natural or legal person responsible for originating postal items;

...’

6 Article 12 of the directive is worded as follows:

‘Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

– prices shall be affordable and must be such that all users, independent of geographical location, and, in the light of specific national conditions, have access to the services provided. Member States may maintain or introduce the provision of a free postal service for the use of blind and partially-sighted persons,

– prices shall be cost-oriented and give incentives for an efficient universal service provision. Whenever necessary for reasons relating to the public interest, Member States may decide that a uniform tariff shall be applied, throughout their national territory and/or cross-border, to services provided at single piece tariff and to other postal items,

– the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude individual agreements on prices with customers,

– tariffs must be transparent and non-discriminatory,

– whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.’

7 Pursuant to Article 2 of Directive 2008/6, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than 31 December 2010.

Belgian law

8 Article 12 of Directive 97/67, as amended by Directive 2002/39, was transposed into Belgian law by Article 144b of the Law of 21 March 1991 on the reform of certain public commercial undertakings (*Moniteur belge* of 27 March 1991, p. 6155), as amended by the Royal Decree of 7 October 2002 (*Moniteur belge* of 25 October 2002, p. 49053), and by the Law of 13 December 2010 (*Moniteur belge* of 31 December 2010, p. 83267).

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

9 In Belgium, bpost is the historical postal service provider, in essence in charge of the clearance, sorting, transport and distribution of postal items to the addressees.

10 Not only does bpost offer postal distribution services to the general public, but also to two particular categories of clients, namely bulk mailers (‘senders’) and consolidators.

11 Senders are end consumers of postal distribution services. They define the message which is to be sent and originate the requests for mailings. The consolidators supply senders with routing services upstream from the postal distribution service. Those services can include the preparation of mail before handing it on to bpost (sorting, printing, placing in envelopes, labelling, addressing and stamping) and the delivery of the mailings (collection from the senders, sorting and packaging of the mailings in mailbags, transport and delivery to sites designated by the postal operator).

12 Different types of tariffs are applied by bpost, including contractual tariffs which are special tariffs compared to the standard tariff paid by the general public. Those special tariffs result from an agreement between bpost and the clients concerned, which can provide for rebates granted to certain clients which generate a certain turnover for the operator. The most usual contractual rebates are the quantity discounts, granted according to the volume of mailings generated during a reference period, and the operational discounts, which seek to reward certain routing operations and reflect the costs avoided by bpost.

13 The IBPT is the national regulatory authority for the postal services sector under Directive 97/67.

14 For 2010, bpost informed IBPT of a change to its rebates system for the contractual tariffs concerning the service of distribution of addressed advertising mailings and administrative mailings. Those mailings represented approximately 20% of bpost’s turnover in the postal sector.

15 That new rebates system included a quantity discount calculated on the basis of the volume of mailings supplied, which was granted to both senders and consolidators. Nevertheless, the rebate granted to the consolidators was not calculated on the basis of the total volume of mailings coming from all senders to which they provided their services either, but on the basis of the volume of mailings generated individually by each of their clients (‘the quantity discount per sender’).

16 As well as the quantity discount per sender, the new system also included an operational rebate, called the 'Indirect Channel Rebate'. That rebate reflects the costs avoided by bpost by the fact of the consolidators taking over certain operations of the postal distribution service.

17 By decision of 20 July 2011, IBPT held that bpost had, in particular, infringed the requirement of non-discrimination as regards the quantity discounts from the contractual tariffs for 2010.

18 In that decision, IBPT complained that bpost had denied the highest reductions on the quantities of mail supplied to the consolidators, despite the fact that they gave volumes of consolidated mail comparable to the volumes supplied by the largest senders. In consequence, that system discriminated against the consolidators.

19 On 23 September 2011, bpost applied to the Cour d'appel de Bruxelles (Court of Appeal, Brussels) for annulment of IBPT's decision.

20 It is apparent from the order for reference that the parties to the main proceedings disagree on the scope of the fifth indent of Article 12 of Directive 97/67 and on the interpretation which the Court has made of that provision in the judgment in *Deutsche Post and Others* (C-287/06 to C-292/06, EU:C:2008:141).

21 While accepting that the scope of the fifth indent of Article 12 of Directive 97/67 does not appear to have changed since its amendment by Directive 2008/6, that court is nevertheless unsure as regards whether that provision concerns the operational discounts and the quantity discounts without distinction or whether, on the contrary, its scope excludes the quantity discounts.

22 In those circumstances, the Cour d'appel de Bruxelles decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the fifth indent of Article 12 of [the Postal Services Directive] to be interpreted as imposing an obligation of non-discrimination, particularly in relations between the [USP] and consolidators, with regard to operational discounts granted by that provider, the pure quantity discounts remaining subject to the application of the fourth indent of Article 12 [of that directive]?

2. If the reply to the first question is in the affirmative, is the [system of] pure quantity discount[s] [applied by bpost in 2010] consistent with the obligation of non-discrimination set out in the fourth indent of Article 12 [of the directive] where the differentiation in price which it creates is based on an objective factor having regard to the relevant geographical and services market and it does not create an effect of exclusion or of inducing loyalty?

3. If the reply to the first question is in the negative, does the quantity discount granted to the consolidator breach the principle of non-discrimination under the fifth indent of Article 12 [of that directive] where its level does not equal the discount granted to a sender who posts an equivalent number of items, but equals all the discounts granted to all the senders on the basis of the number of items of each sender which this consolidator has consolidated?'

Consideration of the questions referred

23 As a preliminary point, it must be borne in mind that the dispute in the main proceedings concerns an action for annulment brought by bpost against the decision of the IBPT imposing a fine on bpost for infringement of the principle of non-discrimination because of the application of the quantity discount per sender.

24 As regards whether that discount falls within the scope of the fourth indent of Article 12 of

Directive 97/67 or rather that of the fifth indent thereof is not critical in the light of the review of the lawfulness of the decision which the referring court is called upon to make.

25 It is apparent from Article 12 of Directive 97/67 that the tariffs for each of the services forming part of the universal service must comply in particular with the principle of non-discrimination as regards both the ‘tariffs’ (fourth indent) and the ‘special tariffs’ (fifth indent).

26 It follows therefrom that the assessment of the allegedly discriminatory nature of the quantity discounts applied by bpost in 2010 is not affected by the fact that those discounts fall under the fourth indent rather than the fifth indent of Article 12 of Directive 97/67, or vice versa.

27 In the context of that assessment, it is necessary only to ascertain whether the practice in question follows the established case-law of the Court, pursuant to which the principle of equal treatment, which is one of the fundamental principles of EU law, requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (judgments in *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7, and *Almer Beheer and Daedalus Holding*, C-441/12, EU:C:2014:2226, paragraph 47).

28 In those circumstances, the questions referred, taken as a whole, must be understood as asking whether, in essence, the principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67 must be interpreted as precluding a system of quantity discounts per sender, such as that at issue in the main proceedings.

29 In that regard, it is appropriate to note that quantity discounts are tariff reductions, the rate of which changes according to the volume of mailings generated during a reference period.

30 According to bpost, the quantity discount per sender was introduced in its contractual tariffs for 2010 with a view to putting an end to the practice of a limited number of consolidators which merely gathered the mailings of a number of senders in order to benefit from the quantity discounts without carrying out any operation on them.

31 As has been stated in paragraph 18 of this judgment, it is apparent from the decision of the IBPT of 20 July 2011 that that authority considered that the quantity discount per sender discriminated between, on the one hand, large senders which can obtain greater reductions on the volumes of mail handed on to bpost and, on the other, the consolidators which hand on comparable volumes of mail to it but after grouping that mail from different undertakings or administrations.

32 It is not in dispute that, in so far as the quantity discounts are calculated on the basis of the turnover generated individually by each sender, a sender which hands on a large volume of mailings to bpost benefits from a rebate higher than that obtained by a consolidator which hands on an equivalent volume of mailings resulting from the grouping of mail from a number of senders.

33 Although it is true that such a finding permits the conclusion that the quantity discount per sender gives rise to a difference in treatment between the senders and the consolidators, the fact remains that, in accordance with the case-law of the Court cited in paragraph 27 of this judgment, that difference in treatment will constitute discrimination prohibited under Article 12 of Directive 97/67 only if, firstly, the senders and the consolidators are in comparable situations on the postal distribution market and, secondly, there is no objective justification for that difference in treatment.

34 In order to ascertain the basis on which the comparison of the respective situations of the senders and consolidators must be made, it is appropriate to take account of the fact that the system introduced by bpost for 2010 included both quantity discounts and operational discounts.

35 With a view to finding any discrimination to the detriment of the consolidators in the context of the grant of the quantity discount per sender, the comparison must be limited to the situation of the senders to that of the consolidators when the latter merely group mail from a number of senders and invoice them for the postal distribution service provided by bpost, thus disregarding the routing services which enables them to benefit from the operational discounts.

36 In their observations, bpost and the French Government note that the objective of the quality discounts is to stimulate demand in the area of postal services, which are currently faced with a growing choice of competing methods of sending, particularly that of electronic mail.

37 In that regard, it must be noted that the senders are the only ones in a position to increase such a demand since they are responsible for originating postal items, as stated in the definition of the concept of 'sender' in Article 2, point 16, of Directive numerals 97/67.

38 However, when the consolidators hand on to bpost the mail which they have already collected from different senders, that does not have the effect of increasing the overall volume of mail in bpost's favour. It follows therefrom that, except to the limited extent that those consolidators are themselves senders, their activity does not, of itself, contribute to the increase in the volume of mailings handed on to bpost.

39 In addition, the application of the system of quantity discounts which was in force before 2010, under which the rebate granted to a consolidator was calculated on the basis of the total volume of mail from all the senders to which it provided its services, is likely to compromise the objective of increasing the demand for postal services.

40 As the Advocate General noted in points 69 and 72 of her Opinion, a sender which does not send enough mail to qualify for a quantity discount will not receive any discount regardless of whether that sender decides itself to deliver its mail to the bpost or to entrust a consolidator with that task. However, under the system of quantity discounts applicable before 2010, the same sender could receive such a discount indirectly, for the same volume of mail, if it decided to use the services of a consolidator, given that its volume of mail would then be consolidated with that of other senders using the services of the same consolidator.

41 In the latter situation, the sender in question received an indirect rebate without having increased its volume of mailings, which was not likely to encourage it to generate more mail in the future. Such a situation, which clearly runs counter to bpost's objective in introducing a system of quantity discounts, could lead that operator to restrict or even withdraw that system in order to safeguard its financial stability. That decision would not, in turn, fail to have a negative impact on the demand for postal services in general and, accordingly, on bpost's financial stability.

42 Indeed, in the judgment in *Deutsche Post and Others* (EU:C:2008:141, paragraph 44), the Court has held that Article 12 of Directive 97/67 precludes refusal to apply to consolidators of postal items from various senders the special tariffs which the national universal postal service provider grants to the senders themselves.

43 In the context of the reasoning underlying that decision, the Court dismissed in particular the argument of Deutsche Post AG and the German Government that permitting consolidators to benefit from certain discounts would threaten the financial stability of Deutsche Post AG (judgment in *Deutsche Post and Others*, EU:C:2008:141, paragraph 36).

44 Contrary to the submissions of the Belgian, Italian and Swedish Governments and the European Commission, that case-law is none the less not applicable to the main proceedings.

45 The case which gave rise to the judgment in *Deutsche Post and Others* (EU:C:2008:141) did not

involve quantity discounts, but operational discounts. In that regard, the Court considered, in paragraph 37 of that judgment, that, in so far as the special tariffs, which take account of the avoided costs, as compared to the standard service, can therefore be set in such a way that they do not differ from the normal tariffs except due to the fact that the costs actually avoided are deducted from the latter tariffs, with the result that the grant of special tariffs does not affect the financial stability of Deutsche Post AG, as the universal postal service provider.

46 The Court concluded therefrom that, if it were to turn out that the grant to the intermediaries of the discounts currently agreed only for the business customers of Deutsche Post AG meant that those discounts were excessive compared with the avoided costs, it would be open to the company to reduce those discounts to the extent necessary for all recipients (judgment in *Deutsche Post and Others*, EU:C:2008:141, paragraph 38).

47 Thus, although the bulk mailers and consolidators could be in comparable situations as regards operational discounts, as follows from the judgment in *Deutsche Post and Others* (EU:C:2008:141), that is not necessarily the case as regards quantity discounts, such as those at issue in the main proceedings. The quantity discounts per sender are such as to encourage the senders to hand on more mail to bpost, enabling it thereby to make economies of scale. However, the activity carried out by the consolidators does not contribute, of itself, as has been noted in paragraph 38 of this judgment, to an increase in the mail handed on to bpost and, accordingly, to bpost achieving those savings.

48 It follows from all the foregoing considerations that bulk mailers and consolidators are not in comparable situations as regards the objective pursued by the system of quantity discounts per sender, which is to stimulate demand in the area of postal services, since only bulk mailers are in a position to be encouraged, by the effect of that system, to increase the volume of their mail handed on to bpost and, accordingly, the turnover of that operator. Consequently, the different treatment as between those two categories of clients which follows from the application of the system of quantity discounts per sender does not constitute discrimination prohibited under Article 12 of Directive 97/67.

49 Accordingly, the answer to the question referred is that the principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67 must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings.

Costs

50 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:

The principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings.

[Signatures]

* Language of the case: French.