Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 23 April 2020[1]

Case C-521/18

Pegaso Srl Servizi Fiduciari,
Sistemi di Sicurezza Srl,
YW
v
Poste Tutela SpA,
joined parties:
Poste Italiane SpA,
Services Group

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy))

(Reference for a preliminary ruling — Public procurement — Directive 2014/25/EU — Postal services — Activities relating to postal services — Caretaking, reception and access control services — Withdrawal of the contract notice in the course of the proceedings — Interest to act of the applicants despite that withdrawal — Outstanding decision on costs)

I. Introduction

1. A contract notice was issued in 2017 by Poste Tutela SpA ('Poste Tutela'), back then a wholly owned subsidiary of Poste Italiane SpA ('Poste Italiane'). That contract notice aimed at establishing framework agreements for caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group.

2. Pegaso Srl Servizi Fiduciari, Sistemi di Sicurezza Srl and YW sought the annulment of that contract notice before the referring court. Within the framework of that procedure, the referring court wishes to know whether the activities covered by that contract notice fall within the scope of application of Directive 2014/25/EU[2] ('the Utilities Directive') or of Directive 2014/24/EU[3] ('the Public Sector Directive').

3. However, after the order for reference, the contested contract notice was withdrawn. That fact opens up the preliminary issue of whether this Court remains validly seised of the case. In particular, does the fact that the referring court still has to make a pronouncement on costs suffice to establish that an answer should be given to the questions posed by the request for a preliminary ruling?

1 Original language: English.

2 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

II. Legal framework

A. EU law

1. The Public Sector Directive

4. Recital 10 of the Public Sector Directive states that:

'The notion of "contracting authorities" and in particular that of "bodies governed by public law" have been examined repeatedly in the case-law of the Court of Justice of the European Union. … [I]t should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for "the most part" means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.'

5. According to Article 1(1) of the Public Sector Directive:

'This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.'

6. Pursuant to Article 2(1) of that directive:

'(1) "contracting authorities" means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

…

(4) "bodies governed by public law" means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

…'

7. Pursuant to Article 7 of the Public Sector Directive:

'This Directive shall not apply to public contracts and design contests which, under Directive 2014/25/EU, are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities …'

2. The Utilities Directive

8. Recital 16 of the Utilities Directive reads as follows:

'… contracts might be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended can be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the procurement documents. …'

9. Recital 19 reads as follows:

'To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 TFEU, that the rules governing the system of property ownership in Member States are not prejudiced.'

10. Article 1(1) of the Utilities Directive provides that:

'This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.'

11. Article 4(1) defines 'contracting entities' as 'entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14;

(b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

12. Under Article 4(2) of the Utilities Directive:

'"Public undertaking" means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:

(a) hold the majority of the undertaking's subscribed capital;

(b) control the majority of the votes attaching to shares issued by the undertaking,

(c) can appoint more than half of the undertaking's administrative, management or supervisory body.'

13. By virtue of Article 5(4):

'In the case of contracts which have as their subject-matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting entities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in Article 25, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

…'

14. Article 13(1) of the Utilities Directive provides that:

'This Directive shall apply to activities relating to the provision of:

(a) postal services;

(b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 of this Article and provided that the conditions set out in Article 34(1) are not satisfied in respect of the services falling within point (b) of paragraph 2 of this Article.'

15. Article 13(2) defines, under (b), 'postal services' as 'services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC'. Under (c), 'other services than postal services' are defined as mail service management services (services both preceding and subsequent to despatch, including mailroom management services) and certain services concerning postal items, such as direct mail bearing no address.

16. By virtue of Article 19(1) of the Utilities Directive:

'This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 …'

III. Facts, procedure and questions referred

17. Poste Italiane is a stock company. The order for reference indicates that 29.26% of its share capital is held by the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy), 35% by Cassa Depositi e Prestiti and the remainder by private investors. Poste Italiane holds the concession for the universal postal service. It also operates in the financial, insurance and mobile phone sectors.

18. At the time of the issuance of the contested contract notice, Poste Tutela was a wholly owned subsidiary of Poste Italiane. It merged with Poste Italiane with effect as from 1 March 2018.

19. In July 2017, Poste Tutela issued a contract notice for establishing framework agreements in connection with caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group, for a period of 24 months (with a further 12 months, in the event of contract renewal), for a total estimated amount of EUR 25 253 242.

20. That contract notice specified the Utilities Directive as its legal basis. It was published in Gazzetta Ufficiale della Repubblica Italiana (Official Journal of the Italian Republic; 'GURI')[4] and in the *Official Journal of the European Union*.[5]

21. On 28 September 2017, Pegaso Srl Servizi Fiduciari, Sistemi di Sicurezza Srl and YW ('the applicants') challenged the contract notice in question before the referring court. They alleged a number of infringements of the Italian Public Procurement Code.

22. On 20 October 2017, the referring court decided to suspend the procurement procedure in question by way of an interim order on the grounds that the applicants' allegations were prima facie founded.

23. Poste Tutela and Poste Italiane ('the defendants') raised a preliminary objection concerning the jurisdiction of the referring court. They argued that administrative courts do not have jurisdiction in cases where procurement procedures are launched by a public undertaking for the provision of services unconnected to those included in special sectors, such as the postal sector.

24. The referring court considers that that issue of jurisdiction requires it to determine whether Poste Tutela (and now Poste Italiane) was obliged to launch a procurement procedure to decide on the award of the services at issue. According to the referring court, Poste Tutela/Poste Italiane meet the conditions to be characterised as a 'body governed by public law' within the meaning of Directive 2014/23/EU[6] ('the Concessions Directive'), the Public Sector Directive and the Utilities Directive.

25. It is under those circumstances that the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) stayed the proceedings and referred the following questions for a preliminary ruling:

'(1) Should the company Poste Italiane SpA, on the basis of characteristics set out above, be classified as a "body governed by public law" within the meaning of Article 3(1)(d) of Legislative Decree No 50 of 2016 and of the relevant EU directives (2014/23/EU, 2014/24/EU and 2014/25/EU)?

(2) Should that classification be extended to include the wholly owned subsidiary company Poste Tutela SpA — whose merger with Poste Italiane SpA is already under way — bearing in mind what is stated in recital 46 of Directive 2014/23/EU concerning controlled legal persons? (See, also, in this respect, judgment of the Court of Justice of the European Union (Fourth Chamber) of 5 October 2017, Case [C-567/15]: competitive tendering requirement for companies controlled by public authorities; judgment No 6211 of the Consiglio di Stato [(Council of State, Italy)], Chamber VI, of 24 November 2011.)

(3) Are those companies, as contracting entities, required to conduct competitive tendering procedures only when awarding contracts in connection with activities carried out in the special sectors, pursuant to Directive 2014/25/EU — such contracting entities having to be deemed bodies governed by public law under the rules laid down in Part II of the Public Procurement

4 N° 87 del 31 luglio 2017, 5ª Serie Speciale — Contratti Pubblici (No 87 of 31 July 2017, 5th Special Series — Public Contracts).

5 OJ S 144 of 29 July 2017 (contract notice No 297868).

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

Code — whilst, on the other hand, having unfettered freedom and being subject only to private-sector rules for contracts not connected to such sectors, bearing in mind the principles set out in recital 21 and Article 16 of Directive 2014/23/EU?

(4) On the other hand, with regard to contracts considered not to be directly connected with the specific activities covered by the special sectors, are those companies, where they satisfy the requirements for being classified as bodies governed by public law, subject to the general Directive 2014/24/EU (and therefore to the rules governing competitive tendering procedures), even when performing primarily entrepreneurial activities under competitive market conditions, having developed from when they were originally established?

(5) In any event, in the case of offices in which activities connected to the universal service and activities unrelated to it are both performed, may the concept of functionality, in connection with a service which is specifically in the public interest, be said to be inapplicable as regards contracts relating to ordinary and extraordinary maintenance, cleaning, furnishing, caretaking and storage services for such offices?

(6) Finally, were the arguments of Poste Italiane SpA to be endorsed, should the fact that a decision to organise a competitive tendering procedure has been taken without there being any obligation to conduct such a procedure — which is not subject to all the guarantees of transparency and equal treatment, as governed by the Public Procurement Code — and the fact that the decision is duly published without any further notice in that regard in the [GURI] and the *Official Journal of the European Union*, be regarded as incompatible with the established principle that the legitimate expectations of tenderers must be protected?'

26. On 11 October 2018, Poste Italiane informed both the referring court and the Court, by way of letter, that it had withdrawn the challenged contract notice. Poste Italiane expressly asked the referring court to declare the applicants' action therefore inadmissible. On 20 October 2018, the referring court rejected that request.

27. On 16 October 2018, after the Court was informed by the defendants that the contract notice had been annulled, the Court asked the referring court whether it wanted to withdraw its reference for a preliminary ruling. On 26 October 2018, the referring court expressed its wish to maintain its reference for a preliminary ruling.

28. On 9 January 2019, in reply to the Court's request to substantiate the grounds for which the referring court considers that the dispute at issue is still pending before it, the Court received an additional clarification from the referring court. The latter stated why, in its view, the dispute was still pending before it and why therefore the questions posed should be answered by the Court.

29. On 3 April 2019, the referring court further informed the Court that an application was introduced seeking the annulment of another contract notice launched by Poste Italiane concerning the same services. According to the referring court, that contract notice is identical to the one at issue at the present case. The referring court has suspended this new case until the Court makes a decision in the present case.

30. Written observations have been submitted by Pegaso Srl Servizi Fiduciari and Sistemi di Sicurezza Srl, Poste Italiane, the Italian Government and the European Commission. All of them participated at the hearing held on 22 January 2020.

IV. Assessment

31. This Opinion is structured as follows. I will first explain why, in view of the developments taking place after the introduction of the present request for a preliminary ruling, there is no need to answer the referring court's questions (A). Should the Court not share my position, I will briefly sketch out how the key questions should be answered on the merits. I will suggest that activities such as the ones at issue in the main proceedings (caretaking, reception and access control services of the premises of Poste Italiane) are subject to EU public procurement rules, namely those laid down in the Utilities Directive regarding the special sectors (B).

A. Existence of a pending dispute in the main proceedings?

32. According to established case-law, questions regarding the interpretation of EU law are referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine. Such questions enjoy a presumption of relevance. [7]

33. However, it is also established case-law that it is clear from both the wording and the scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is *actually pending* before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling. Therefore, the Court may verify of its own motion that the dispute in the main proceedings is continuing. [8] If the object of the dispute has disappeared while the proceedings before the Court are still pending, thereby making the questions posed hypothetical or unrelated to an actual dispute, the Court is to decide that there is no need to give a ruling on the request for a preliminary ruling. [9]

34. In the present case, there is controversy as to whether there is still a pending dispute before the national court. The disagreement is twofold: first, has the contested contract notice been withdrawn by Poste Italiane? Second, despite the withdrawal, would there be any other ground on which the applicants would still have an interest to act before the referring court?

1. The withdrawal of the contract notice

35. In reply to the question posed by the Court as to whether there is still a dispute pending before it, the referring court noted that Poste Italiane has published a notice to that effect in the GURI and shorter notices in daily newspapers. In the notice in the GURI, it was stated that Poste Italiane decided to 'annul/revoke' the contract notice in view of the complex restructuring of Poste Italiane following the merger between the latter and Poste Tutela. However, the referring court goes on to note that in the other, shorter notices published in the daily newspapers, Poste Italiane only declared that the procurement procedure had been interrupted. The referring court continues to wonder whether, in so doing, Poste Italiane aimed at rectifying the infringements alleged by the applicants or to proceed differently (through a direct award) in order to satisfy the needs that were the object of the contract notice.

7 See, for example, judgments of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C-426/16, EU:C:2018:335, paragraph 31); of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 27); and of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraph 35).

8 See, for example, judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24); of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 46); and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

9 See, for example, orders of 10 January 2019, *Mahmood and Others* (C-169/18, EU:C:2019:5); of 2 May 2019, *Faggiano* (C-524/16, not published, EU:C:2019:399); and of 1 October 2019, *YX (Forwarding of a judgment to the Member State of nationality of the sentenced person)* (C-495/18, EU:C:2019:808).

36. Poste Italiane and the Italian Government claim that the contract notice has been formally withdrawn. In particular, Poste Italiane argues that the annulment was duly published in all the required fora (the GURI, two national and two local newspapers and the Official Journal). Following the annulment, a new procurement procedure was launched in order to fulfil more efficiently the new needs of Poste Italiane after the restructuring of the group, in particular the rescaling of the needs in matters of safety and monitoring.

37. The applicants are not contesting the fact that the contract notice has been withdrawn. They nevertheless maintain that the request for a preliminary ruling remains admissible, but for different reasons, discussed in the next section. [10]

38. I must admit to being somewhat puzzled at this stage. With the exception of the referring court, everybody else appears to agree that the contract notice in question was withdrawn. The referring court itself confirms that in the full notice published in GURI, the term used was to 'annul/revoke'. The referring court also notes that in the other, shorter versions of the notice published in daily press, it was stated that the procedure 'has been interrupted', but that was the consequence of the interim order issued by the referring court already on 20 October 2017. [11]

39. On the basis of all the facts presented before this Court, it indeed seems that the contract notice has been withdrawn. The referring court appears to have reserved its decision on whether or not the withdrawal has taken place. In its reply to this Court, it stressed that, irrespective of that question, there is still the issue of competence: whether administrative courts have jurisdiction in relation to such contract notices.

40. I am well aware of the standard division of tasks within the preliminary rulings procedure. Indeed, it remains solely for the referring court to ascertain whether the contract notice at issue was withdrawn, both on the facts as well as to their evaluation under national law. The launching of a new procurement procedure by the same tenderer may be a further hint of such a withdrawal.

41. However, this case pushes that traditional division of tasks to its limits. Despite the great degree of deference that this Court normally shows towards its reference partners under Article 267 TFEU, it is ultimately the responsibility of this Court to assess whether or not it remains validly seised. [12]

42. On all the available documentation, the contract notice was withdrawn. In fact, a new contract notice for the same services has been issued. The referring court nonetheless still harbours doubts as to whether the contract notice was 'formally' withdrawn.

43. Although I have difficulty understanding that statement, I would have less difficulty in understanding that a referring court would still wish to receive an answer in a case in which it would be suggested that a certain respondent keeps withdrawing contract notices as a matter of strategy. I could imagine a situation in which an entity, which does not desire certain matters to be authoritatively settled by a court, would keep withdrawing contract notices if challenged, thus systematically seeking to deprive national courts of their jurisdiction.

10 Below, in point 49.

11 As stated above in point 22.

12 Above, point 33 and the case-law cited therein.

44. That would certainly be a different matter. In such a case, even already at the stage of the assessment of admissibility of a request for a preliminary ruling,[13] greater flexibility could perhaps be shown with regard to the notion of what is a pending dispute. After all, prohibition of abuse is a transversal principle of EU law.[14]

45. However, none of the parties, and nor the referring court, have suggested that Poste Italiane repetitively withdrew contract notices, with the intention to avoid judicial review or with the aim of deterring certain candidates from participating in the procurement procedure.[15] In fact, it is rather to the contrary: Poste Italiane offered a plausible explanation as to why the original contract notice was withdrawn, and appears to have acted consistently with that explanation.[16]

46. In those circumstances, it indeed appears that the dispute in the main proceedings has lost its object.

2. The applicants' ongoing interest to act at the national level

47. In the alternative, the referring court, the applicants, as well as, partially, the European Commission, appear to consider that that interest still exists, independently from the withdrawal of the contract notice.

48. The referring court is of the view that it cannot be presumed that the applicants had no longer an interest to act against the contract notice, even if the latter was withdrawn. The Court must therefore address its reference for a preliminary ruling, especially in view of the principle of effective judicial review.

49. The applicants claim that, despite the withdrawal, Italian law still requires the competent court to rule on the lawfulness of the contested acts for the purposes of awarding damages and deciding who shall bear the costs. In particular, under Italian law, an action for damages may be filed within 120 days after the annulment judgment has become final. To rule on that action, it must first be established whether the referring court has jurisdiction. That issue requires one to determine whether Poste Italiane is subject to public procurement rules.

50. According to the European Commission, should it be assumed that the contract notice was formally withdrawn, that latter fact is by no means a decisive element. The referring court's Question 6 requires an answer inasmuch as that question concerns the consequences attached to a possible violation of legitimate expectations, thus a matter that is independent from the keeping into force of the contested contract notice. In addition, determining whether the contested contract notice concerns a tender falling within the scope of the Utilities Directive is decisive in order to establish what is the competent court before which the applicants could ask for damages.

51. By contrast, according to Poste Italiane and the Italian Government, the applicants no longer have any interest to act. While Poste Italiane considers that a judgment of the referring court would have no favourable effects vis-à-vis the applicants, the Italian Government submits that the applicants have not launched an action for damages. Therefore, the prospect of such an action is merely hypothetical.

13 See, for a later stage, the second sentence of Article 100(1) of the Rules of Procedure of the Court.

14 See, by analogy, on the prohibition of abusive practices in VAT law, judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881). However, the principle of the prohibition of abuse is certainly not limited to just VAT: see my Opinion in *Cussens and Others* (C-251/16, EU:C:2017:648, points 23 to 30). See, also, judgment of 26 February 2019, *N Luxembourg I and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 to 102).

15 It is to be noted that, in another case pending before the Court (C-419/19, Irideos, OJ 2019 C 328, p. 5) which raises very similar questions as the present case, the contract notice in issue has not been withdrawn by Poste Italiane.

16 Above, points 35 and 36.

52. Thus, in spite of the contract notice being withdrawn, it has been suggested that (a) the applicants might introduce an action for damages in relation to the contested contract notice and (b) the issue of costs must still be determined by the referring court.

(a) The prospect of a future action for damages

53. It is settled case-law that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute.[17] In circumstances similar to the ones in the main proceedings, the Court has already held that the intention of bringing an action for damages, the latter being merely possible and hypothetical, could not justify maintaining a request for a preliminary ruling where the main proceedings no longer have a purpose.[18]

54. The applicants confirmed at the hearing that an action for damages *has not been filed* yet before the referring court, or any other national court for that matter. It is certainly true that if an action for damages were eventually filed, then the issue of whether the contract notice was mandatory and, accordingly, which national court would be competent to adjudicate on the matter, would be of importance. However, it would be precisely of importance for that later potential action that is not currently pending. Thus, within the framework of the present proceedings before the referring court, the issues relating to potential future action for damages are entirely hypothetical.

55. The fact, underlined by the European Commission, that the applicants may have entertained legitimate expectations with regard to the continuance of the procurement procedure, and that there would in any case be the need to answer Question 6, does not alter the previous conclusion.

56. First, prima facie, I personally would be rather surprised to learn that the EU principle of legitimate expectation effectively prevents a contracting authority from ever withdrawing a contract notice. Would that then mean that, once published, a public contract must be run to an end, whatever the (changed) circumstances?

57. Second, if that is not the case, then Question 6 also effectively becomes an issue that would be assessed in a potential successive claim for damages, as the infringement of any other rights of candidates to a tendering procedure.[19] However, once more, those issues are not the object of the proceedings currently pending before the referring court.

(b) The decision on costs

58. Finally, there is the issue of costs of national proceedings. Even if the contract notice were withdrawn, the referring court would still need to decide on the costs of the proceedings. Thus, it could be suggested that there is still a dispute pending before the national court relating to, at least, the matter of costs.

59. I do not think that that logic can be embraced.

17 See, for example, judgments of 10 November 2016, *Private Equity Insurance Group* (C-156/15, EU:C:2016:851, paragraph 56), and of 26 October 2017, *Balgarska energiyna borsa* (C-347/16, EU:C:2017:816, paragraph 31).

18 Order of 10 June 2011, *Mohammad Imran* (C-155/11 PPU, EU:C:2011:387, paragraphs 18 to 22).

19 See, to that effect, judgment of 26 July 2017, *Persidera* (C-112/16, EU:C:2017:597, paragraph 25).

60. First, my understanding of the general statements of what is a *dispute pending*[20] has always been one which considers that what is required is a reasonable correlation (albeit, indeed, perhaps not a perfect match) between *the scope of the questions* posed by the referring court and the legal dispute before it. Thus, the subject matter of the questions posed must have some bearing on the resolution of the dispute pending before the national judge. Outside that scope (and thus hypothetical) are questions that, in whatever way the Court provides the answer to them, would have no impact on the resolution of the dispute before the referring court.

61. In this light, I fail to see how the settling of the six rather detailed questions, which were all posed in view of the review of an ongoing tendering procedure and its contract notice, would have any bearing whatsoever on the settling of the issue of costs before the national court after that notice has been withdrawn. That is simply a matter for national law, with the answers solicited from this Court having no bearing on the outstanding issue of costs.

62. Second, in general, unless costs in a given case are in a specific way tied to an issue of interpretation of EU law, which then should be properly explained in the order for reference, the fact that, following the object of a dispute falling away, there is still a need to decide on costs, is not enough to maintain the jurisdiction of the Court.[21]

63. In principle, the Court's jurisdiction disappears when there is no longer any dispute pending before the referring court, for instance because the applicant obtained what he or she wanted in the course of the proceedings, or because the author of the contested measure withdrew it, or because the applicable national provisions have changed.[22] In those circumstances, the dispute is considered to have been settled. The fact that the national court is still to decide on costs is immaterial.[23] If it is not for the Court to settle the dispute by applying EU law provisions to the facts at issue, it is a fortiori even less so for the Court to decide on the costs of a dispute that no longer exists. Thus, decisions on costs are a matter for the sole referring court to make, on the basis of national law.[24]

64. Of course, there is the caveat: *unless* the issue of costs before the national court is itself tied to the interpretation of EU law solicited before this Court. This will notably be the case in two instances.

65. First, the Court certainly has jurisdiction when the subject matter of the dispute in the main proceedings is precisely the costs. In such a factual context, it is within the mission of the Court under Article 267 TFEU to interpret any EU law provision that specifically deals with the costs of judicial proceedings or, more generally, the right to an effective access to justice.[25] However, in those cases, what the Court is called to interpret are concrete, harmonised provisions of EU law that provide for costs allocation or their capping in certain matters. A notable example in the latter category is a provision stating that costs in environmental matters are 'not prohibitively expensive'.[26]

20 Above, point 33 and the case-law cited therein.

21 The contrary suggestion would lead to rather absurd consequences: since a national court has always to decide on outstanding costs, even if the object of the dispute before it fell away for whatever reason, would it then mean that a case before this Court can never be withdrawn, because there will always remain the issue of costs before the national court? Thus, irrespective of the fate of a case at the national level, would the Court remain validly seised forever?

22 See, for example, order of 14 October 2010, *Reinke* (C-336/08, not published, EU:C:2010:604, paragraph 14), and judgment of 27 June 2013, *Di Donna* (C-492/11, EU:C:2013:428, paragraph 27).

23 See, for example, order of 14 October 2010, *Reinke* (C-336/08, not published, EU:C:2010:604, paragraphs 15 and 16).

24 Judgment of 6 December 2001, *Clean Car Autoservice* (C-472/99, EU:C:2001:663, paragraph 27).

25 See, also, Opinion of Advocate General Campos Sánchez-Bordona in *Amt Azienda Trasporti e Mobilità and Others* (C-328/17, EU:C:2018:542, points 40 to 49).

26 See, for recent examples, judgment of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833), or judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185).

66. Second, there are also borderline cases, in which there are no EU harmonised rules on costs, but the question of interpretation or validity posed to this Court has a clear impact on the decision on costs. It is in this way that I would interpret why the Court decided to provide an answer on merits in *Amt and Others*.[27]

67. *Amt and Others* concerned the decision of a contracting authority to launch a tender procedure for the award of public transport services in a region of Italy. The national legislation did not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate. The referring court essentially sought to know whether such economic operators had standing under EU law.

68. In the course of the proceedings, the contracting authority decided not to pursue the call for tenders after the adoption of a new law. Thus, the object of the dispute had formally disappeared. Nevertheless, the Court considered that the request for a preliminary ruling remained admissible and it answered the question on the merits. That was understandable given the structure of that case and the only question asked by the referring court: does EU law preclude national law that does not allow non-participants in the tendering procedure to challenge the documents relating to the tendering procedure?

69. The positive (or negative) answer to that question was decisive for settling the matter of whether or not the applicants in the main proceedings, who challenged the tendering documentation even though it did not participate in the tendering procedure, would pay the costs of the proceedings.

70. One may only contrast that scenario, in which one single targeted question by the referring court is conclusive for the issue of costs still outstanding, with the present case. The six rather detailed questions posed by the referring court concern the applicability of a number of public procurement rules to caretaking, reception and access control services for the premises of Poste Italiane. They do not raise any issues of interpretation of EU rules governing costs or, more generally, the overall cost of the review procedure that was launched by the applicants. Likewise, none of the referring court's questions raise any issues that could have a direct impact on the decision on costs. In particular, the applicants' standing against the contract notice at issue is not contested. I therefore fail to see how, *whatever answer* were to be provided by this Court in response to the six detailed questions posed, it could have any bearing on the issue of costs in the present proceedings, within the parameters of the two scenarios outlined above.

71. As a consequence, in the circumstances of the present case, since the object of the dispute (the contract notice) has disappeared and because no action for damages is currently pending, the outstanding decision on costs cannot be the only reason to justify the maintaining of the preliminary reference.

72. On a closing note, I readily acknowledge that the issue of the relevance of the answer to be given by the Court for the settlement of a real dispute pending before the national court is hardly a two-sided, clear-cut divide. There are admittedly also cases in which the Court has shown greater lenience (or rather greater imagination) as to how exactly the answer given by it would be relevant for the specific dispute pending before the national court.[28]

27 Judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others* (C-328/17, EU:C:2018:958; '*Amt and Others*').

28 See, for a recent example, judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 26 to 29 and 31 to 39).

73. Be that as it may, and even acknowledging that it is indeed rather a continuum of relevance than a two-sided clarity, the six questions posed in the present request for a preliminary ruling are at the outer end of that continuum. Again, the only issue which remains is how those questions are relevant for *the scope of the dispute currently pending* before the national court. The uneasy answer is that they are not.

74. It follows that there is no need to answer any of the questions posed by the referring court.

B. Consideration of the questions referred

75. In view of the mission of Advocates General to (fully) assist the Court (Article 252 TFEU), I will briefly address the merits of the referring court's questions, should the Court not share my view on the (absence of the) need to adjudicate in the circumstances of the present case. However, I shall only do so briefly and to the extent that it would have been necessary had the object of the dispute not fallen away. Even if the Court were to adjudicate on the merits of the case, it would not have been necessary to address all the questions posed by the referring court.

76. The referring court has asked six questions. Through all those questions, the referring court seeks, in essence, to know whether the services at issue, that were tendered by Poste Tutela before its merger with Poste Italiane, fall within the scope of EU public procurement rules, in particular the Utilities Directive and the Public Sector Directive.[29]

77. Questions 1, 2 and 4 (and, partly, Question 3) concern the legal characterisation of Poste Italiane (and Poste Tutela) as bodies governed by public law within the meaning of the Public Sector Directive and the Utilities Directive. Questions 3 and 5 concern the applicability of the Utilities Directive to activities such as those in the main proceedings. As to Question 6, its scope is somewhat unclear. It could be understood as a generic question as to what legitimate expectations are created for the tenderers by the launching of a procurement procedure and whether those expectations prevent the withdrawal of an already published notice.[30] It could also be understood as enquiring whether any legitimate expectations are created for the tenderers in a case in which a body, which would normally not be obliged to organise a tendering procedure, does so of its own accord.

78. For the purposes of the present case, whereby the referring court seeks to know whether the activities in question are governed by EU public procurement rules and, if so, by which one, it is entirely sufficient to answer Questions 3 and 5, in relation to the applicability of the Utilities Directive. In my view, in the context of the contract notice that was the subject matter of the case before the referring court, it was the Utilities Directive that would have been applicable to the activities at issue.

1. The respective scopes of application of the Public Sector Directive and the Utilities Directive

79. The respective scopes of application of the Public Sector Directive and of the Utilities Directive are defined differently. As far as their applicability in the individual case is concerned, both instruments are supposed to be mutually exclusive.[31]

29 The referring court also mentions Directive 2014/23 on the award of concession contracts. However, I do not see how the latter is of any relevance for the present case. In the somewhat unlikely scenario in which the activities in issue happened to be provided through a concession, the last subparagraph of Article 5(4) of the Utilities Directive provides that, in principle, 'in the case of mixed contracts containing elements of supply, works and service contracts *and of concessions*, the mixed contract shall be awarded in accordance with this Directive' (my emphasis).

30 Which would appear to be the understanding of the European Commission in relation to the issue of what questions of the referring court would remain relevant in spite of the contract notice being withdrawn (above, point 50).

31 Article 7 of the Public Sector Directive. See, also, Articles 5(4) and 6(3) of the Utilities Directive.

80. The scope of application of the Public Sector Directive is primarily defined *ratione personae*. It generally applies to contracting authorities, thus, in particular the State, regional or local authorities and bodies governed by public law,[32] because of their formal status and their quality as certain types of legal persons.

81. By contrast, the scope of application of the Utilities Directive is primarily defined *materially*, by reference to *the nature of the activities*.[33] Those activities are referred to in Articles 8 to 14 of that directive. They notably cover heat, electricity, water, transport services, ports and airports and postal services.

82. At the same time, the Utilities Directive is less strict as to the quality of the persons it covers. It applies to a wide range of 'contracting entities'. The latter category includes contracting authorities, public undertakings, and undertakings enjoying exclusive or special rights.[34] That broad personal scope of application is the logical consequence of the material scope of the directive. The latter indeed aims at regulating the water, energy, transport and postal services sectors. Yet, in those sectors where there used to be State monopolies, entities that currently operate therein take various legal forms so that 'it is necessary for the entities covered to be identified on a basis other than their legal status'.[35]

83. It follows from those provisions that the material scope of the Utilities Directive is defined rather strictly. One of the more important consequences of that conceptual difference is that, for that reason, in the context of Utilities Directive, there is no room for application of the approach known as the 'contagion theory'.

84. That approach was originally set out by the Court in 1998 in its judgment in *Mannesmann Anlagenbau Austria and Others*.[36] That case concerned the legal characterisation of the Austrian State printing office (Österreichische Staatsdruckerei; 'ÖS'). Under Austrian law, ÖS used to be a State undertaking, which later became a trader for the purposes of the Commercial Code. ÖS was primarily entrusted with the production of official administrative documents requiring secrecy or security measures. However, it also pursued other activities, such as the publication of books or newspapers. The Court held that ÖS was a body governed by public law within the meaning of the then applicable Public Sector Directive. As a consequence, *all* its activities fell within the scope of that directive. Even its commercial activities were thus considered subject to the Public Sector Directive *because of* its legal status as a body governed by public law.

85. In a metaphorical nutshell, therefore, much like King Midas, the public law body's touch 'taints' all its activities and makes them all fall under the Public Sector Directive (albeit perhaps not necessarily turning them into gold).

86. By contrast, the Court refused to extend that logic to the Utilities Directive in *Ing. Aigner*.[37] That case regarded an undertaking, Fernwärme Wien, that was established for the purpose of supplying heating in the City of Vienna. At the same time, that undertaking was engaged in the general planning of refrigeration plants for large real estate projects. In carrying out that activity, it competed with other undertakings. In its judgment, the Court reinstated that all contracts entered into by a

32 See Articles 1(2) and 2(1) of the Public Sector Directive.

33 See Articles 1(2) and 4(1) of the Utilities Directive.

34 See Article 4(1) of the Utilities Directive.

35 Recital 19 of the Utilities Directive.

36 Judgment of 15 January 1998 (C-44/96, EU:C:1998:4).

37 Judgment of 10 April 2008 (C-393/06, EU:C:2008:213, paragraphs 28 to 30).

contracting authority were subject to EU public procurement rules, since Fernawärme Wien happened to also be a 'body governed by public law'. However, the Court distinguished between the activities at issue: while the contracts related to activities enumerated in the Utilities Directive were subject to the rules laid down therein, the other contracts were covered by the Public Sector Directive.

87. It follows that the legal status as a body governed by public law has the effect of extending the application of EU public procurement rules to all its activities under the Public Sector Directive. However, it does not stretch the potential applicability of the Public Sector Directive to activities expressly covered by the Utilities Directive. The material scope of the latter therefore remains intact irrespective of the legal status of the undertaking at issue. Equally, the contagion theory does not apply within and across the activities under the Utilities Directive.

88. Thus, the Utilities Directive is *lex specialis*, while the Public Sector Directive is *lex generalis*. As a *lex specialis*, the Utilities Directive is to be applied in a stricter manner.

2. 'Postal Services' under the Utilities Directive

89. What is then the scope of the notion of postal services under the Utilities Directive? According to Article 13(1), that directive applies to activities relating to the provision of postal services and of other services than postal services, notably on condition that such services are provided by an entity which also provides postal services.

90. Transcribed, this provision appears to set out two categories: (i) the postal services (in the narrow sense); (ii) the other services enumerated in Article 13(2)(c) of the Utilities Directive, provided that the conditions laid down in Article 13(1)(b) are met. However, the introduction of Article 13(1) of the Utilities Directive also clearly says that it is not just those services in the narrow sense, but (iii) the *activities relating to* the provision of postal services or the other services enumerated in Article 13(2)(c).

91. First, what exactly are *postal services* is legislatively defined in Article 13(2)(b) as services consisting of the clearance, sorting, routing and delivery of postal items, with a successive definition of 'postal item' in Article 13(2)(a). The definition includes both services falling within, as well as services falling outside, the scope of the universal service.

92. Second, Article 13(2)(c) defines those 'other services' than postal services as 'mail service management services (services both preceding and subsequent to despatch, including mailroom management services)' and 'services concerning postal items not included in [Article 13(2)(a)], such as direct mail bearing no address'.

93. Third, what about the residual or additional category of 'activities relating to the provision' of postal services and other than postal services?

94. According to Poste Italiane and the Italian Government, since no 'contagion theory' is applicable in the context of the Utilities Directive, the scope of Article 13 of the Utilities Directive is to be interpreted narrowly. Only those two types of activities explicitly listed in Article 13(1) of the Utilities Directive are covered.

95. I agree with the first proposition. I disagree with the second one.

96. Indeed, the statement made by the Court in this regard in *Ing. Aigner* is good law. However, the correct interpretation of Article 13 of the Utilities Directive is that its scope is not as narrow as Poste Italiane and the Italian Government suggest.

97. In my view, there is clearly a third category inscribed in Article 13(1) of the Utilities Directive: *activities relating to* the provision of postal services.

98. First, there is the wording not only of Article 13(1), but also of Article 1(2) of the Utilities Directive: 'procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services *are intended for the pursuit of one of the activities* referred to in Articles 8 to 14'.[38] Both of these turns of phrases indicate that what is supposed to be covered are not just those postal services in the narrow sense, but also other necessary supplies or services that make that main service happen.

99. Second, the same is also confirmed by the logic of the sector. It is fair to assume that the provision of postal services in the narrow sense (clearing, sorting, routing, and the delivery of postal items) would normally be done by the contracting entities themselves. It would be rather surprising to find out that a post, in particular the provider of the universal postal service, would in fact not be delivering any postal items itself. However, if it were to be then said, as Poste Italiane is essentially suggesting, that the obligation to resort to public procurement procedures relates only to postal services in the narrow sense, then Article 13(1)(a), as well as 13(1)(b) for that matter, would be in practice vacated of any content. What would those provisions then be applicable to?

100. Thus, it is rather clear to me that what Article 13 of the Utilities Directive aims at are, in particular, works, supplies or services that are intended to *enable* the provision of postal services. As stated by the Court, 'where a contracting entity exercising one of the activities mentioned in [the Utilities Directive] contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive'.[39]

101. Thus, in general, the Utilities Directive applies not only to contracts awarded in the sphere of one of the activities expressly listed therein, but also to contracts which are entered into in the exercise of activities defined in the Utilities Directive. Consequently, where a contract awarded by a contracting entity is connected with an activity which that entity carries out in the sectors listed in the Utilities Directive, that contract is subject to the procedures laid down in that directive.[40]

102. However, the crucial question then becomes how far does that logic of 'in relation to' or 'in order to enable' reach. On the one hand, it is certainly not as narrow as suggested by Poste Italiane. On the other hand, it is not as broad as to amount to a de facto application of the contagion theory also within the Utilities Directive.

103. In my view, 'activities relating to the provisions of' under Article 13(1) of the Utilities Directive should best be understood as including all those activities that are *necessary for* or *usually connected with* the exercise of postal services. Necessary in the sense that without them, postal services could not be properly provided. However, 'relating to' in this sense would also include activities which are not, strictly speaking, necessary, but which are normally and usually connected with the provision of such types of services.

38 My emphasis.

39 Judgment of 16 June 2005, *Strabag and Kostmann* (C-462/03 and C-463/03, EU:C:2005:389, paragraph 39).

40 See judgments of 16 June 2005, *Strabag and Kostmann* (C-462/03 and C-463/03, EU:C:2005:389, paragraphs 41 and 42); of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213, paragraphs 56 to 59); and of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi* (C-152/17, EU:C:2018:264, paragraph 26).

104. I would suggest including both categories, because the borderline between the two may be sometimes rather blurred. Of course, nowadays, electricity to run postal offices, cars or scooters to deliver the mail, or specific outfits making postal agents identifiable for the public, may all be classed as examples of the necessary supplies. However, already the last example might be challenged: is a special uniform for postal agents really necessary for effective delivery of postal items? It could indeed be suggested that a fancy uniform is not strictly speaking necessary for the effective delivery of postal items. A postal agent in jeans and a T-shirt can certainly do the job as well.

105. That is why 'relating to' should not only cover strictly *technically necessary*, but also *usually connected with*. Thus, activities not usually connected with the provision of postal services, such as contracting car insurance, selling newspapers or journals, or the opening of a massage corner in the lobby of a post office for that matter, are unlikely to be qualified as activities relating to the normal provision of postal services. [41]

106. Beyond that, it will certainly be a matter for the national courts to decide whether, on the facts of the particular case, the concrete supply or activity in question is usually relating to the provision of postal services or other services than postal services. The logic is to capture the package that nowadays is normally understood as constituting the proper provision of postal services.

3. Application to the present case

107. The present case concerns caretaking, reception and access control services on the premises of Poste Italiane and of other companies in that group. Do such activities fall within the scope of the Utilities Directive?

108. According to the applicants, even if they themselves are not directly postal services, the services at issue are necessary and/or connected to the exercise of the activities mentioned in Article 13 of the Utilities Directive, in so far as they enable the exercise of the activities pertaining to the universal service. The efficient operation of the premises where the universal service is provided is also ensured by the concierge and the wardens.

109. According to Poste Italiane, the activities at issue do not fall within the activities enumerated in the Utilities Directive. The activities at issue do not pertain to those services that justify the application of public law rules because they do not consist in a service including mail collection and delivery. The activities at issue are not ancillary to postal services since they are not necessary for the exercise of those services. Caretaking, reception and access control services are complementary and transversal activities with regard to all types of services provided by Poste Italiane. The premises concerned by the activities at issue are simultaneously used as administrative offices and head office for the financial services. By the same token, the services at issue are provided to companies of the whole group, thereby including those that do not provide postal services (for instance, PostePay SpA, which is specialised in payment services, digital services and mobile phones; or Poste Vita, which provides insurance services).

110. According to the European Commission, the Utilities Directive is applicable to services that are functionally linked to the services expressly covered therein. In the present case, the premises that constitute the bedrock of the services at issue are the same as those where the postal services are provided. Not only is it immaterial that those premises are also used for financial operations, but it is not necessary to establish the degree of intensity of the functional link existing between the services at issue and postal services for the purposes of deciding whether the Utilities Directive is applicable.

41 Although no doubt that, certainly with regard to the latter activity, it would be nice.

111. I essentially agree with the applicants and the European Commission. There is no doubt that the activities at issue fall within the scope of the Utilities Directive in so far as they are necessary for the proper exercise of postal services, and thus relating to the provision of postal services pursuant to Article 13 of the Utilities Directive.

112. First, Poste Italiane (and Poste Tutela at the time of the issuance of the contract notice) falls within the *personal* scope of the Utilities Directive. Although there has been an extensive discussion in the written and oral observations submitted by the parties regarding the legal nature of Poste Italiane, it is not necessary, for the purposes of the applicability of the Utilities Directive, to establish whether Poste Italiane is a 'body governed by public law'.

113. It is sufficient to note that Poste Italiane fulfils the criteria of Article 4(2) of the Utilities Directive to be characterised as a 'public undertaking'. Since the majority of the shares of Poste Italiane are owned by the State or State-related bodies,[42] a dominant influence of the State over Poste Italiane is to be presumed. It follows that Poste Italiane is a public undertaking within the meaning of Article 4(2) of the Utilities Directive.

114. Second, the services at issue are within the *material* scope of the Utilities Directive. In my view, caretaking, reception and access control on the premises of Poste Italiane would be necessary for an adequate completion of postal services. Certainly, in a similar vein to the general points above,[43] there could be a discussion on whether those specific services are, strictly speaking, necessary for the provision of postal services.[44] However, they are certainly *usually connected with* the provision of such services and in this sense indeed *relating to* them.

115. In that respect, the fact that the services at issue are not provided for only postal offices, but also for administrative offices that do not receive the public and in premises where financial or insurance services are provided, is of no relevance.

116. First, even if administrative offices do not normally receive the public — the users of postal services — the fact that policies regarding postal services are decided and implemented in those offices means that they are simply part of postal services. In a way, this is the continuation of the argument of Poste Italiane suggesting that postal services are effectively only the physical handling of postal items. Nevertheless, by necessity, postal services must also include the management and planning of those services: postal services do not happen spontaneously.

117. Second, as regards the other types of services performed by Poste Italiane, they are for their part likely to be provided on the same premises as postal services. In order to establish the absence of a functional link between the activities at issue and postal services, it should in any event be proven that those activities have been contracted out *exclusively* for premises that do not directly or indirectly touch upon postal services.

118. Third, Article 5(4) of the Utilities Directive does in fact foresee that there might be some overreach in cases where contracting entities choose to award a single contract (covering postal and non-postal services). However, even in such cases, that directive applies to the ensuing *mixed single contract*.

42 Above, point 17 of this Opinion.

43 Above, points 101 to 103 of this Opinion.

44 But such an objection could then in fact be made with regard to any activities that would, on a reasonable construction, be normally seen as a necessary part of postal services. Certainly, postal services could be perhaps delivered without electricity (postal offices being lit by candles), without cars (postal agents can walk), or without cleaning services (piles of rubbish may not physically prevent customers from accessing a counter at a post office).

119. However, such an overreach is not inevitable. It is the consequence of the choice of the contracting entity to proceed in this way and to have all those services bundled into one contract. Article 6(1) indeed allows contracting entities to award separate contracts in order to avoid an undifferentiated application of the Utilities Directive to all— admittedly diverse — activities of Poste Italiane, no matter how diverse.

120. In sum, the logic of the operation of the Utilities Directive is in a way contrary to what Poste Italiane seems to be suggesting. It is indeed possible to escape the applicability of the Utilities Directive if, instead of bidding for one mixed contract applicable transversally to all the activities, including postal ones, the contracting entity chooses to award separate contracts for the purposes of each separate activity. It is nonetheless not possible to escape the applicability of the Utilities Directive by bidding for a mixed contract and then claiming that, since the directive would not apply to some parts of the contract if they were to stand alone, it does not apply to the entire contract.

V. Conclusion

121. I propose that there is no need to answer the questions referred by the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy).