

OPINION OF ADVOCATE GENERAL

BOT

delivered on 20 September 2007<sup>1</sup>

1. May a limited liability company whose capital is wholly state-owned be directly entrusted with the provision of reserved and non-reserved postal services without infringing Community rules governing the award of public service contracts and Article 86(1) EC, read in conjunction with Articles 43 and 49 EC? This, in substance, is the question which the Audiencia Nacional (National High Court, Spain) has referred to the Court of Justice.

2. In this opinion, I will propose to the Court of Justice that it be declared that the rules governing the award of public service contracts, and Article 86(1) EC read in conjunction with Articles 43 and 49 EC, preclude national legislation that directly entrusts a universal service provider with the provision of reserved and non-reserved postal services.

<sup>1</sup> — Original language: French.

**I — Legal framework**

*A — Community law*

1. Primary law

3. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 49 EC prohibits restrictions on freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

4. Article 86(1) EC stipulates that '[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure

contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89’.

5. Article 86(2) EC provides for a derogation from the prohibition to enact or maintain in force special or exclusive rights for certain undertakings in cases where the application of the rules of the Treaty obstruct the performance, in law or in fact, of the particular tasks assigned to a public undertaking entrusted with a task of general interest.

## 2. Directive 97/67/EC

6. For the purpose of the completion of the internal market within which, in particular, the free movement of services must be ensured, and taking account of the need to guarantee the economic and social cohesion of the Community,<sup>2</sup> the Community — by adopting Directive 97/67 — has established a framework for the operation of a minimum general postal service.

2 — See first and second recital 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 (O) 1998 L 15, p. 14).

7. Directive 97/67 guarantees the existence of a minimum universal postal service and lays down its extent, by giving Member States the opportunity to reserve the provision of some services to a single provider; therefore, those services can be provided under a monopoly.

8. Thus, Directive 97/67 aims to open up the postal sector to competition — gradually and in a controlled manner.<sup>3</sup>

9. According to Article 2(1) of Directive 97/67, postal services are services involving the clearance, sorting, transport and delivery of postal items.

10. Pursuant to Article 3(1) of Directive 97/67, ‘universal service’ means the right to ‘the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users’.

3 — On 11 July 2007, the Members of the European Parliament at first reading adopted a report which supports the European Commission’s proposal relating to the Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services [COM(2006) 594 final] (see report of the European Parliament A6-0246/2007). However, a compromise must be found concerning the date on which the market for postal services is to be fully liberalised. The European Parliament proposes that the sector be fully liberalised from 31 December 2010, while the Commission proposes to keep the date of 31 December 2008.

11. Article 3(4) of Directive 97/67 stipulates that:

correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within the weight and price restrictions laid down in that Directive.<sup>4</sup>

‘Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,
  
- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,
  
- services for registered items and insured items’.

13. The derogation from the liberalisation of postal services only applies to mail items weighing less than 350 grams, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category.<sup>5</sup>

14. Pursuant to Article 7(2) of Directive 97/67, to the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve incoming cross-border mail and direct mail,<sup>6</sup> within the same price and weight limits as those set out for services that may be reserved.

15. Directive 97/67 has since been amended by Directive 2002/39/EC.<sup>7</sup>

12. Directive 97/67 provides a list of services which may be reserved for the universal service provider(s) of each Member State. These include the clearance, sorting, transport and delivery of items of domestic

4 — Article 7(1).

5 — *Idem*.

6 — For the definition of direct mail, see Article 2(8) of Directive 97/67.

7 — Directive of the European Parliament and the Council of 10 June 2002 (OJ L 176, p. 21).

16. However, Directive 2002/39 entered into force on the day of its publication in the *Official Journal of the European Communities*, that is to say on 5 July 2002. In the case at issue in the main proceedings, the relevant facts predate that date. Therefore, Directive 2002/39 does not apply in the present case.

### 3. Directive 92/50/EEC

17. As failure to open up public procurement to competition represents an obstacle to the completion of the internal market and imposes restrictions on the development of competitive European undertakings on world markets, the Community decided to make public service contracts subject to the rules on competition.

18. Article 1(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts<sup>8</sup> defines public service contracts as contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

<sup>8</sup> — OJ L 209, p. 1. Directive as amended by Directive 97/52/EEC of the European Parliament and the Council, of 13 October 1997 (OJ L 328, p. 1, 'Directive 92/50').

19. According to Article 6 of Directive 92/50, the Directive shall not apply 'to public service contracts awarded to an entity which is itself a contracting authority ... on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty'.

20. Pursuant to subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, the Directive applies to public service contracts covering, in particular, transport of mail by land and by air which are awarded by the contracting authorities and where the estimated value net of value-added tax is not less than 200 000 special drawing rights ('SDRs').<sup>9</sup>

## B — National legislation

### 1. Postal services

21. Directive 97/67 was transposed into the Spanish legal system by Law 24/1998 on the

<sup>9</sup> — According to the definition provided by the International Monetary Fund ('IMF'), the SDR is an international reserve asset, created to supplement the existing official reserves of member countries. Its value, expressed in US Dollars, is determined by the IMF each day on the basis of a basket of currencies including the euro, the US dollar, the Japanese yen and UK sterling.

universal postal service and the liberalisation of postal services (Ley 24/1998 del Servicio Postal Universal y de Liberalización de los Servicios Postales) of 13 July 1998.<sup>10</sup>

22. Pursuant to Article 1 and 2 of that Law, postal services are considered to be services of general interest and the universal postal service is subject to public-service obligations.

23. Article 18 of that Law reserves some services to the universal postal service provider. The reserved services include:

- the money orders service;
  
  
  
  
  
  
  
  
  
  
- the clearance, acceptance, sorting, delivery, handling, routing, transport and distribution of inter city items, whether registered or not, of letters and postcards, provided that they weigh 100 grams or less. From 1 January 2006, the weight limit will be 50 grams.

If any other operators are to carry out this kind of activity, in respect of inter city items they must charge users at least three times the amount of the corresponding tariff for an item of correspondence in the first weight step of the fastest standard category, fixed by the universal postal service operator. From 1 January 2006, the price will be at least two and a half times as much.

Domestic or cross border items of direct mail, books, catalogues and periodicals shall not form part of the reserved services.

Document exchange may not be reserved;

- the incoming and outgoing cross border postal service for letters and postcards, with the price and weight conditions established in the second indent; and
  
  
  
  
  
  
  
  
  
  
- the receipt, as a postal service, of applications, letters and communications which citizens may address to Public Authorities.

10 — BOE No 167, of 14 July 1998, p. 23473, 'the Postal Law'.

2. Public procurement

24. According to Article 11 of the Law on public procurement (Ley de Contratos de las Administraciones Públicas), the consolidated text of which was approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000) of 16 June 2000,<sup>11</sup> contracts awarded by public authorities shall comply with the principles of advertising and competition, subject to the exceptions provided for by that Law, and shall always observe the principles of equal treatment and non-discrimination.

25. Pursuant to Article 206(4) of the Law on public procurement, transport of mail by land and air is considered to be the subject-matter of a public contract within the meaning of Article 11 of the Law, and is therefore subject to competition rules.

26. Article 3(1)(d) of the Law on public procurement excludes from its scope of application cooperation agreements concluded by the administration with natural or legal persons governed by private law, in so far as the subject-matter of such agreements does not concern public procurement governed by the said Law or by administrative rules.

3. Law 14/2000

27. Article 58 of Law 14/2000 concerning tax, administrative and public order measures (Ley 14/2000 de Medidas Fiscales, Administrativas y del Orden Social) of 29 December 2000<sup>12</sup> created the 'Sociedad Estatal Correos y Telégrafos, S.A.' ('Correos'). That provision makes it clear that the capital of Correos is held by the State administration. In addition, pursuant to the same provision, any disposal of the share capital or any acquisition, either direct or indirect, of shareholdings in that company by persons or entities unconnected with the State administration requires authorisation by legislative decree.

28. Further, according to Article 58, public authorities may conclude cooperation agreements — as referred to in Article 3 of Royal Legislative Decree 2/2000 — with Correos, in order to carry on activity connected with its company objects, that is, in particular, postal services.

<sup>11</sup> — BOE No 148, of 21 June 2000, p. 21775.

<sup>12</sup> — BOE No 313, of 30 December 2000, p. 46631, 'Law 14/2000'.

## II — Facts and main proceedings

29. By a cooperation agreement concluded between the Spanish Ministry of Education, Culture and Sport ('the Ministry') and Correos, signed on 6 June 2002 (the 'Cooperation Agreement') Correos was entrusted with the provision of postal and telegraphical services.

30. Pursuant to Article 1 of the Cooperation Agreement, Correos undertakes to provide the following postal services:

- letters (ordinary, registered and express), local, inter-city and international, with no weight or size limit;
- packages (postal, blue and international) with no weight or size limit;
- national express mail and international express mail service ('Express Mail Service' (EMS)), with no weight or size limit; and

- delivery of books, library material, magazines and the Ministry's Official Gazette nationally (local and inter-city) and internationally (by land and air), with no weight or size limit.

31. The Cooperation Agreement specifies that the financial value of the services provided depends on turnover achieved. In any event, the Audiencia Nacional calculates that the value is a sum of more than EUR 12 020.42 per annum.

32. The Cooperation Agreement was awarded without a public call for tenders.

33. For that reason, the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Trade Association of Mail Delivery and Handling Companies, 'Asociación Profesional') challenged the administrative decision entrusting the contract to Correos before the Technical General Secretary of the Ministry.

34. By decision of 20 March 2003, the Technical General Secretary of the Ministry

dismissed the challenge. Asociación Profesional appealed against that decision to the Audiencia Nacional.

#### **IV — Assessment**

##### *A — Admissibility*

#### **III — Question referred for a preliminary ruling**

35. The Audiencia Nacional decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Articles 43 and 49 of the EC Treaty in conjunction with Article 86 thereof, as applied within the framework of the liberalisation of the postal services established by Directives 97/67 and 2002/39 and within the framework of the rules governing public procurement introduced by the ad hoc Directives, to be interpreted as precluding an agreement whose subject-matter includes the provision of postal services, both reserved and non-reserved and, therefore, liberalised, concluded between a department of the State administration and a State company whose capital is wholly state-owned and which is furthermore, the universal postal service provider?’

36. The Spanish Government challenges the admissibility of the question. It contends that, in actual fact, the question seeks an interpretation of the legality of an agreement, which has to be addressed under national law.

37. In its submission, the Spanish Government contends that the question actually put to the Court is apparent from the order for reference. As a matter of fact, the Audiencia Nacional has not asked the Court to interpret Directives 97/67 and 92/50, but rather to state whether the Cooperation Agreement is in conformity with that Community legislation.

38. According to settled case-law, even though it is not for the Court to rule on the compatibility of national rules with the provisions of Community law in proceedings brought under Article 234 EC, since the interpretation of such rules is a matter for



the national courts, the Court does have jurisdiction to supply the national courts with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law.<sup>13</sup>

39. With regard to the main proceedings, the Court may not rule on the compatibility of Law 14/2000 with Community law, but it can provide all the guidance as to the interpretation of Community law necessary to enable the Audiencia Nacional to rule on that compatibility.

40. Therefore, I take the view that the question is admissible.

*B — Question referred for a preliminary ruling*

41. By its question, the national court is essentially asking whether Directives 97/67 and 92/50, and Article 86 EC, read in conjunction with Articles 43 and 49 EC, have to be interpreted as precluding national

legislation that allows public authorities to entrust the provision of reserved and non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the rules governing the award of public service contracts.

42. Effectively, the question here is to establish whether Community law has to be interpreted as precluding a law that prevents would-be service providers from submitting a tender for a contract for reserved and non-reserved postal services and, by the same token, deprives them of the opportunity to be entrusted with that contract.

43. For the purposes of my assessment, I will begin by examining whether Article 7 of Directive 97/67 must be interpreted as meaning that the services provided by Correos are reserved services.

44. Further, on the assumption that the services at issue in the main proceedings are non-reserved services, and therefore subject to the competition rules, I will establish whether Directive 92/50 applies to the public service contract entrusted to

<sup>13</sup> — Case C-295/05 *Asociación Nacional de Empresas Forestales* [2007] ECR I-2999, paragraph 29, and the case-law cited there).

Correos. The Court has ruled that the provisions of the EC Treaty relating to freedom of movement are intended to apply to public contracts which are outside the scope of Directive 92/50.<sup>14</sup> Therefore, I must first determine whether that Directive is applicable to the situation at issue in the main proceedings. If that is not the case, the situation must be considered in the light of primary law.

45. Finally, if Directive 92/50 does not apply, I will consider the situation at issue in the main proceedings in the light of primary law, and more specifically the fundamental principles of the Treaty.

#### 1. Interpretation of Article 7 of Directive 97/67

46. The Court has previously been called upon to rule on the interpretation of Article 7 of Directive 97/67. In its judgment in *Asempre and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería*<sup>15</sup> the Court already adopted a strict interpretation of that provision. The Court held that, in the light of the

purpose of Directive 97/67, namely the liberalisation of postal services, Member States are not free to impose additional conditions on the provision of postal services by extending the range of services reserved for the universal service provider.<sup>16</sup>

47. Therefore, the list of reserved services must be regarded as exhaustive. The following can thus be considered to be reserved services: the clearance, sorting, transport and distribution of items of domestic correspondence, as well as direct mail and outgoing cross-border correspondence, to the extent necessary to ensure the maintenance of universal service for the latter.

48. However, as stated, the reserved services only affect items of correspondence weighing less than 350 grams, the price of which is less than five times the public tariff.

49. In the present case, according to the Audiencia Nacional, the Cooperation Agreement encompasses the provision of postal services that go beyond the services regarded as reserved.

<sup>14</sup> — Judgment in Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16, and Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32, and the case-law cited there.

<sup>15</sup> — Case C-240/02 *Asempre and Others* [2004] ECR I-2461.

<sup>16</sup> — Paragraphs 21 to 26.

50. The documents before the Court show that, pursuant to Article 58(2) of Law 14/2000, the company objects of Correos cover the management and operation of any postal service. Thus, no distinction is made between reserved and non-reserved services. Moreover, on the basis of that law, pursuant to Article 1 of the Cooperation Agreement, the provision of postal services reserved for Correos concerns all letters, and all packages and parcels, without any restrictions on weight or volume.

51. As previously stated, according to Article 7 of Directive 97/67, only the clearance, sorting, transport and distribution of items of domestic correspondence, within the price and weight conditions defined by the Directive, can be reserved for a single provider. Only the provision of those services can be directly entrusted to a single provider without a call for tenders. Other postal services, within the meaning of Article 2 of Directive 97/67, must be made subject to competition rules.

52. Therefore, Article 7(1) of Directive 97/67 must be interpreted as precluding national legislation which reserves the provision of postal services to a single provider without making a distinction between reserved and non-reserved services.

53. The question that arises at this point is whether entrusting the provision of non-reserved postal services, which Article 58 of Law 14/2000 aims to do, without a prior call for tenders and a call for competition infringes Directive 92/50.

## 2. Applicability of Directive 92/50

54. As regards Directive 92/50, it is common ground that it applies to public service contracts whose value, net of value added tax, is not less than 200 000 SDRs.<sup>17</sup>

55. According to the Audiencia Nacional, the value of the Cooperation Agreement exceeds EUR 12 020.42. During the oral hearing, neither party was in a position to specify the exact value of the contract. It will be a matter for the national court to establish that value in order to determine whether Directive 92/50 applies in the situation at issue in the main proceedings.

<sup>17</sup> — See second indent of subparagraph (ii) of Article 7(1)(a) of Directive 92/50. In a communication dated 30 August 2000 concerning the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2000) 275 final/2, p. 14), the Commission stated that the value of 200 000 DTS amounted to EUR 214 326.

56. Suppose, first of all, that the value of the Cooperation Agreement is not less than 200 000 SDRs.

57. In that situation, it will be seen that Directive 92/50 has to be interpreted as precluding national legislation that allows Public Authorities to entrust the provision of non-reserved postal services to a company whose capital is wholly state-owned, for the following reasons.

58. Pursuant to Article 1(a) of Directive 92/50, public service contracts shall mean ‘contracts for pecuniary interest concluded in writing between a service provider and a contracting authority’.

59. According to the case-law, the categorisation of a contract is not to be sought in the law of the Member States.<sup>18</sup> Therefore, the notion of public contracts has to be regarded as a Community concept. In order to determine whether one is dealing with a public contract, it has to be examined whether the criteria set out in Article 1(a) of Directive 92/50 are fulfilled.

60. For Directive 92/50 to apply, two conditions must be fulfilled. The contract must be for pecuniary interest and must have been concluded between two distinct entities, namely a contracting authority and a service provider.

61. As regards the first condition, it seems to me to be fulfilled, since, in the present case, Law 14/2000 provides that public authorities may conclude cooperation agreements with Correos for the provision of postal services. In addition, on the basis of that law, the Cooperation Agreement was concluded between the Ministry and Correos in return for a financial value whose amount depends on turnover. The contract in issue is thus clearly a contract for pecuniary interest.

62. As regards the second condition, namely the existence of a contracting authority and a service provider, Directive 92/50 provides a definition for both. Article 1(b) of Directive 92/50 states that contracting authorities shall mean ‘the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law’. Article 1(c) of Directive 92/50 defines the service provider as ‘any natural or legal person, including a public body, which offers services’.

18 — *Commission v France* (cited above, paragraph 36).

63. It would appear in the present case that the Ministry is indeed a contracting authority and Correos a service provider.

authority, and the conditions set out in Article 1 of Directive 92/50 would not be fulfilled. Therefore the Community rules on public contracts would not apply.

64. However, given that Correos' capital is wholly state-owned, the question arises here whether the derogation provided for under Article 6 of Directive 92/50 falls to be applied. Pursuant to that provision, Directive 92/50 shall not be applicable to public service contracts entrusted to an entity which is itself a contracting authority within the meaning of Article 1(b) of the Directive, on the basis of an exclusive right which it enjoys pursuant to a law, regulation or administrative provision.

67. It would seem to me that the answer may be found in the Court's case-law.

65. In the present case, it is common ground that Correos enjoys exclusive rights conferred on it by Law 14/2000.

68. In its judgment in *Stadt Halle and RPL Lochau*,<sup>19</sup> the Court — within the context of Directive 92/50 — applied conditions formulated in its judgment in *Teckal*<sup>20</sup> in relation to Council Directive 93/36/EEC.<sup>21</sup> Given that Directive 93/36 does not contain any exception comparable to that provided for under Article 6 of Directive 92/50, the Court held that — as regards whether there is a contract — the national court must determine whether there has been an agreement between two separate persons.

66. Therefore, in my view, it must be examined whether the two entities concerned — namely the contracting authority and the service provider — actually form one single entity. If the answer is in the affirmative, there cannot be a contract for pecuniary interest concluded with an entity that is legally distinct from the contracting

69. According to the Court, this is not the case when the contracting authority exercises over the service provider a 'control which is similar to that which it exercises over its own departments' and that '[service provider] carries out the essential part of its activities [with the controlling contracting authority or authorities]'.<sup>22</sup>

19 — Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 49 to 52.

20 — Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 49 to 51.

21 — Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, p. 1).

22 — Judgment in *Teckal*, cited above (paragraph 50).

70. Those two conditions, which are found in a relationship referred to as ‘in house’, constitute cumulative conditions which, if fulfilled, mean that public authorities may award a public contract to a single provider without making the contract subject to competition rules. None the less, given that those conditions constitute derogations from the general rules of Community law, they must be interpreted strictly.<sup>23</sup>

71. As regards the condition relating to control which is similar to that which the contracting authority exercises over its own departments, the Court explained its meaning in its judgment in *Parking Brixen*.<sup>24</sup> In order to determine whether the contracting authority exercises such control over the service provider, it is necessary to establish whether it can be inferred from an examination of the legislative provisions and the relevant circumstances that the service provider in question is subject to control which allows the contracting authority to influence the service provider’s decisions. The Court adds that it must be a case of a power of decisive influence over both strategic objectives and significant decisions.<sup>25</sup>

72. Moreover, according to the Court, the fact that the capital of the company providing the services is wholly owned by the contracting authority is not decisive.<sup>26</sup>

73. By contrast, the Court considers that the fact that a particular undertaking changes its status to a limited liability company tends to show that that company has become market-oriented, which renders the public authority’s control tenuous.<sup>27</sup>

74. In addition, the Court also took into consideration the fact that the administrative board of the company providing the services had considerable powers, with the public authority exercising no control, and that the objects of the company could be broadened.<sup>28</sup> These two elements militate in the direction that the contracting authority does not exercise ‘similar control’ over the company providing the services.

75. Given that the condition of ‘similar control’ must be interpreted strictly, I consider that that condition implies that the company providing the services has no discretion whatsoever and that, in the end, the public authority is the only one to take decisions concerning that company. Moreover, use of the expression ‘in house’ indeed reveals the intention to make a distinction between activities which the authority carries out directly — by means of internal structures ‘belonging to the house’ — and those that it will entrust to a third-party operator.

23 — See judgment in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 26.

24 — Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

25 — Paragraph 65.

26 — See judgments in *Teckal* and *Parking Brixen*, cited above.

27 — Judgment in *Parking Brixen*, cited above (paragraph 67).

28 — *Idem*.

76. In the present case, several elements combine to show that Correos, the capital of which is indeed state-owned, retains some discretion as regards decisions it has to take.

77. Whilst it is true that pursuant to Article 58(2)(g) of Law 14/2000, Correos, the universal service provider, is under an obligation to accept the Cooperation Agreement, it is apparent from the documents before the Court that Correos can put an end to the contract with the contracting authority, by giving one month's written notice.

78. In addition, pursuant to Law 14/2000, Correos, which used to be a public undertaking, changed its status to a limited liability company which offers services in exchange for remuneration. It is also common ground that Correos can be asked to carry out any other activities or services in addition to the above or necessary to the achievement of the objects of the company.<sup>29</sup> This also seems to be apparent from its 2005 annual report, which mentions that growing competition in that sector has made it inevitable to broaden the services on offer and to enter other markets.<sup>30</sup>

79. By changing its status to a limited liability company, and by having the possibility to broaden its company objects and to terminate the contract which binds it to the State administration, I consider that Correos became market-oriented, which renders the State administration's control tenuous.

80. In light of those elements, I consider that the contracting public authority does not exercise 'similar control' over Correos, within the meaning of the case-law mentioned above. However, it is for the national court to examine whether that condition is indeed fulfilled in the present case.

81. As far as the second condition is concerned, namely that the service provider must carry out the essential part of its activities with the controlling contracting authority or authorities, the Court had the opportunity to clarify its meaning in its judgment in *Carbotermo and Consorzio Alisei*,<sup>31</sup> concerning the interpretation of Directive 93/36.

82. According to the Court, that second condition will only be fulfilled if the activities carried out by the company providing the services are devoted principally to the controlling contracting authority and any

29 — See order for reference (p. 11).

30 — Report available on the Internet site [www.correos.es](http://www.correos.es).

31 — Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137.

other activities are only of marginal significance.<sup>32</sup> In other words, Correos' activities must be almost exclusively devoted to the controlling State administration.

83. In order to determine if that is so, the national court must take into account all the facts of the case, both qualitative and quantitative.

84. In the present case, pursuant to Law 14/2000, Correos can conclude cooperation agreements with any public authority. The Audiencia Nacional even states in its order for reference that Correos has in fact concluded several cooperation agreements with various public bodies.

85. Moreover, in its submissions to the Court, the Spanish Government acknowledges that Correos operates the universal postal service, whose main recipients are third parties, across the whole of Spain.

86. Therefore, public authorities are neither the main nor the only recipients of the services provided by Correos.

87. Therefore, subject to review by the national court, it appears that the second condition is not fulfilled either.

88. Consequently, on the assumption that the value of the contract at issue in the main proceedings is not less than 200 000 SDRs, I am of the opinion that Directive 92/50 applies in this case.

89. Accordingly, I consider that, under Article 8 of Directive 92/50, the public contract for postal services entrusted to Correos should have been awarded in accordance with the provisions of Titles III to VI of the Directive, and in particular the provisions of Article 11(1) of the Directive. Consequently, I consider that the contract should have been awarded by a call for tenders and made the subject of appropriate publicity.

90. In its submissions, the Spanish Government takes the view that making non-reserved services subject to competition rules would cause financial imbalance, with the result that Correos would no longer be able to ensure the provision of the minimum universal service with which it has been entrusted.

91. As a matter of fact, by arguing in that way, the Spanish Government invokes the derogation in Article 86(2) EC.

<sup>32</sup> — *Ibidem* (paragraphs 61 to 63).



92. However, that argument cannot be upheld in the present case, for the following reasons.

93. According to Article 86(2) EC, undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to those relating to competition, in so far as the application of such rules does not obstruct the performance of the particular tasks entrusted to them.

94. In the present case, Correos' company objects consist of the provision of postal services that are not restricted to the universal service, but cover the management and operation of any postal service.

95. I consider that the Community legislature's intention to liberalise the postal sector by making a distinction between reserved and non-reserved services shows that the performance of the particular tasks entrusted to providers like Correos is not defeated by putting non-reserved services up for competition.

96. Directive 97/67 has established a regulatory framework for the postal sector. In

particular, the Directive makes provisions for securing a universal service in this sector by giving Member States the opportunity to reserve certain postal services. The provision of all other services which cannot be reserved must be open to competition.

97. If Member States were able to grant a public contract for non-reserved postal services to a single provider without a prior call for tenders, this would actually go against the purpose of Directive 97/67, which is to liberalise the postal sector.

98. Moreover, I should add that the Commission has made it clear that reserved services enjoy a presumption that they are justified by reason of Article 86(2) EC.<sup>33</sup>

99. It would seem to me that, by distinguishing between reserved and non-reserved services and by making it possible for Member States to entrust reserved services to a single universal service provider, Directive 97/67 applies Article 86(2) EC.

<sup>33</sup> — Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2).

100. In light of all of these considerations, I am of the opinion that, in a situation in which the value of the public service contract is not less than the threshold of 200 000 SDRs, Directive 92/50 has to be interpreted as precluding national legislation that reserves the provision of non-reserved postal services to a limited liability company which is wholly state-owned, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the controlling authority or authorities.

101. However, on the assumption that the threshold of 200 000 SDRs is not reached, the allocation of public contracts not falling within the scope of Community directives remains none the less subject to the fundamental principles of the Treaty. Therefore, the situation at issue in the main proceedings must also be considered in the light of those principles.

### 3. Interpretation of Articles 43 EC, 49 EC et 86 EC

102. As stated in paragraph 44 of this opinion, the Court has held that when the value of a public service contract does not reach the threshold set by Directive 92/50,

the contracting authorities are nevertheless bound to comply with the fundamental principles of the Treaty.

103. Therefore, the Audiencia Nacional asks whether Article 86(1) EC, read in conjunction with Articles 43 and 49 EC, precludes national legislation that permits the provision of non-reserved postal services to be entrusted directly to a limited liability company whose capital is state-owned.

104. Pursuant to Article 86(1) EC, the Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty in the case of public undertakings to which they grant special or exclusive rights.

105. In the present case, Article 86(1) EC indeed applies to the situation at issue in the main proceedings, seeing that Correos — whose capital is state-owned — is a public undertaking within the meaning of that provision. Moreover, it is apparent from the documents before the Court that Correos has been allocated the exclusive right to

ensure the provision of postal services that, as stated, go beyond the services regarded as reserved.

respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

106. Since Article 86(1) EC has no independent effect and must be read in conjunction with the relevant rules of the Treaty,<sup>34</sup> I consider that in the present case, the relevant rules are Articles 43 and 49 EC.

109. Article 43 and 49 EC are specific expressions of the principle of equal treatment, which in itself implies the principle of non-discrimination on grounds of nationality, as set out in Article 12 EC.<sup>35</sup>

107. To the extent that the public contract for postal services at issue could be of interest to undertakings established in another Member State, its direct allocation, without a call for tenders, deprives those undertakings of any possibility to tender. Further, undertakings offering services similar to those offered by Correos are discouraged from establishing themselves in the Member State concerned, since they will not be given the opportunity to tender.

110. In its case-law relating to public contracts, the Court has already held that the principle of equal treatment of tenderers is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality.<sup>36</sup>

108. The first paragraph of Article 43 EC states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. The first paragraph of Article 49 EC prohibits restrictions on freedom to provide services within the Community in

111. Consequently, the Court has held that respect for the principles of equal treatment and non-discrimination require, with respect to public contracts, that the contracting authority observes the principle of transparency by making the public contract subject to some degree of advertising. In that way, all potential bidders can acquire knowledge of the existence of such a contract and can thus respond to the call for tenders.<sup>37</sup>

<sup>34</sup> — Judgment in *Asociación Nacional de Empresas Forestales*, cited above (paragraph 40).

<sup>35</sup> — See judgment in Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16, and Case C-3/88 *Commission v Italie* [1989] ECR 4035, paragraph 8.

<sup>36</sup> — Judgment in *Parking Brixen*, cited above (paragraph 48).

<sup>37</sup> — *Ibidem* (paragraph 49).

112. In other words, with respect to public contracts, the discrimination consists in not making the contract subject to the rules on advertising and therefore depriving undertakings established in another Member State of the possibility to tender.

113. As stated, the public contract entrusted to Correos concerns, on the one hand, the provision of reserved services, which can thus be directly entrusted to a single provider, and, on the other hand, the provision of non-reserved services, which have to be made subject to the competition rules.

114. The Audiencia Nacional has admitted that the public contract for postal services was neither covered by publicity nor by a call inviting other providers active on the national market or on foreign markets to participate, but was directly entrusted to Correos.

115. By acting in that manner, the contracting authority not only deprived undertakings established in another Member State of the right to tender and to offer their services in the Member State concerned, but also discouraged other undertakings with the same company objects as Correos from establishing themselves in that Member State, which constitutes an obstacle to the freedom of establishment and the freedom to provide services, contrary to Articles 43 and 49 EC.

116. None the less, two objections may be raised.

117. In the first place, while it is true that under Article 86(1) EC, public undertakings cannot receive more favourable treatment than private undertakings, the situation is different if the contracting authority entrusts the public service contract to an undertaking which it controls.<sup>38</sup>

118. However, in the present case, as stated in paragraphs 69 to 88 of this opinion, the relationship between the contracting authority and Correos cannot be described as 'in house'. Therefore, this objection has to be rejected.

119. In the second place, pursuant to Article 86(2) EC, there is a derogation from the prohibition in paragraph (1) of that Article.

120. However, as stated above, the Spanish Government cannot invoke Article 86(2) within the context of Directive 97/67.

<sup>38</sup> — See judgment in *Stadt Halle and RPL Lochau*, cited above (paragraph 48).

121. Therefore, that second objection must also be rejected. Articles 43 and 49 EC, has to be interpreted as precluding national legislation that allows public authorities to allocate the provision of non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the fundamental principles governing the award of public service contracts.
122. Consequently, I am of the opinion that Article 86(1) EC, read in conjunction with

## V — Conclusion

123. In view of the foregoing, I propose that the Court answer the question referred to it for a preliminary ruling by the Audiencia Nacional as follows:

In so far as the value of the public service contract is not less than 200 000 SDRs, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, must be interpreted as precluding national legislation that allows public authorities to allocate the provision of non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the rules governing the award of

public service contracts, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the contracting authority or authorities.

In a situation in which the value of the service contract is less than 200 000 SDRs, Article 86(1) EC, read in conjunction with Articles 43 and 49 EC, must be interpreted as precluding national legislation that allows public authorities to allocate the provision of non-reserved postal services to a company whose capital is wholly state-owned, without making that allocation subject to the fundamental principles governing the award of public service contracts, to the extent that the contracting authority does not exercise over the service provider a control which is similar to that which it exercises over its own departments and the service provider does not carry out the essential part of its activities with the contracting authority or authorities.