

JUDGMENT OF THE COURT (First Chamber)

15 November 2007^{*}

In Case C-162/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 7 March 2006, received at the Court on 27 March 2006, in the proceedings

International Mail Spain SL, formerly TNT Express Worldwide Spain SL,

v

Administración del Estado,

Correos,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, R. Schintgen, A. Borg Barthet and M. Ilešič, Judges,

^{*} Language of the case: Spanish.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 March 2007,

after considering the observations submitted on behalf of:

- International Mail Spain SL, by R. Ballesteros Pomar, abogada,
- the Spanish Government, by F. Díez Moreno, acting as Agent,
- the Belgian Government, by A. Hubert, acting as Agent,
- the Commission of the European Communities, by R. Vidal Puig and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 7(2) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14).
- ² The reference has been made in proceedings between International Mail Spain SL ('International Mail'), formerly TNT Express Worldwide Spain SL, and the Administración del Estado and the Correos concerning the decision of 16 June 1999 by the Secretaría General de Comunicaciones (Ministerio de Fomento) (Secretariat-General of Communications, Ministry of Development) ('Secretariat-General of Communications') penalising International Mail for providing postal services reserved to the universal postal service provider, without the latter's authorisation.

Legal context

Community legislation

- ³ Article 1 of Directive 97/67 establishes common rules concerning, inter alia, the provision of a universal postal service within the European Community and the criteria defining the services which may be reserved for universal service providers.

4 Pursuant to Article 3(1) of that directive, Member States are to ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users. According to Article 3(7), that universal service covers both national and cross-border services.

5 Chapter 3 of Directive 97/67, entitled 'Harmonisation of the services which may be reserved', includes Article 7, which provides:

'1. To the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, 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 where such category exists, provided that they weigh less than 350 grams ...

2. To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.

3. As a further step towards the completion of the internal market of postal services, the European Parliament and the Council shall decide not later than 1 January 2000 and without prejudice to the competence of the Commission, on the further gradual and controlled liberalisation of the postal market, in particular with a view to the liberalisation of cross-border and direct mail, as well as on a further review of the price and weight limits, with effect from 1 January 2003, taking into account the

developments, in particular economic, social and technological developments, that have occurred by that date, and also taking into account the financial equilibrium of the universal service provider(s), with a view to further pursuing the goals of this Directive.

...'

6 Recitals (16) and (19) in the preamble to Directive 97/67 state:

'(16) ... the maintenance of a range of those services that may be reserved, in compliance with the rules of the [EC] Treaty and without prejudice to the application of the rules on competition, appears justified on the grounds of ensuring the operation of the universal service under financially balanced conditions; ...

...

(19) ... it is reasonable to allow, on an interim basis, for direct mail and cross-border mail to continue to be capable of reservation within the price and weight limits provided; ...'.

7 Directive 97/67 came into force on 10 February 1998, and the period granted to Member States to transpose it into national law expired on 10 February 1999, in accordance with the first paragraph of Article 24.

- 8 Article 1(1) of Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67 with regard to the further opening to competition of Community postal services (OJ 2002 L 176, p. 21) replaced Article 7 of Directive 97/67 with the following:

‘1. To the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s). Those services shall be limited to the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within both of the following weight and price limits. The weight limit shall be 100 grams from 1 January 2003 and 50 grams from 1 January 2006. These weight limits shall not apply as from 1 January 2003 if the price is equal to, or more than, three times the public tariff for an item of correspondence in the first weight step of the fastest category, and, as from 1 January 2006, if the price is equal to, or more than, two and a half times this tariff.

...

To the extent necessary to ensure the provision of universal service, direct mail may continue to be reserved within the same weight and price limits.

To the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits.

...

3. The Commission shall finalise a prospective study which will assess, for each Member State, the impact on universal service of the full accomplishment of the postal internal market in 2009. Based on the study's conclusions, the Commission shall submit by 31 December 2006 a report to the European Parliament and the Council accompanied by a proposal confirming, if appropriate, the date of 2009 for the full accomplishment of the postal internal market or determining any other step in the light of the study's conclusions.'

- 9 Recitals (15) to (17), (20), (22) and (23) in the preamble to Directive 2002/39 state as follows:

'(15) It is appropriate to ensure that the next phases of market-opening are both substantial in nature and achievable in practice for the Member States whilst also ensuring the continuing of universal service.

(16) General reductions to 100 grams in 2003 and 50 grams in 2006 in the weight limit of the services which may be reserved to the universal service providers, combined with opening outgoing cross-border mail fully to competition with possible exceptions to the extent necessary to ensure the provision of universal service, represent relatively simple and controlled further phases which are nevertheless significant.

- (17) ... items of outward cross-border correspondence below the 50-gram weight limit represent a further 3% or so, on average, of the total postal revenues of the universal service providers.

...

- (20) Outgoing cross-border mail represents on average 3% of total postal revenues. Opening this part of the market in all Member States, with exceptions that would be necessary to ensure the provision of universal service, would allow different postal operators to collect, sort and transport all outgoing cross-border mail.

...

- (22) Setting a timetable now, aimed at further steps towards the full accomplishment of the internal market for postal services, is important for both the long-term viability of the universal service and the continued development of modern and efficient posts.

- (23) It is appropriate to continue to provide for the possibility for Member States to reserve certain postal services to their universal service provider(s). These arrangements will enable the universal service providers to complete the process of adapting their operations and human resources to conditions of greater competition without upsetting their financial equilibrium and thus without jeopardising the safeguarding of universal service.'

- 10 Directive 2002/39 came into force on 5 July 2002 and the period granted for Member States to transpose the directive expired on 31 December 2002.

National legislation

- 11 Directive 97/67 was transposed into the Spanish legal system by the Law on the 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 ('Law 24/1998'). Article 18(1)(C) of the version of that law in force at the time of the facts in the main proceedings provided as follows:

'Under Article 128(2) of the Constitution and under the conditions laid down in the next chapter, the following services, which are included in the universal postal service, are reserved exclusively to the universal postal service provider:

...

- (C) the incoming and outgoing cross-border postal service for letters and postcards, within the weight and price limits established in paragraph (B). For the purposes of this Law, cross-border postal service means the service beginning or ending in other States.'

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

- ¹² International Mail provided outgoing cross-border postal services for postcards in the main Spanish tourist locations. For that purpose it had placed letterboxes in hotels, camp sites, apartment blocks, supermarkets, and so forth, in which users could place their postcards being sent abroad after having them stamped with adhesive labels which could be purchased at the same points of sale as the postcards.
- ¹³ The Secretariat-General of Communications took the view that this service constituted a serious administrative breach pursuant to the combined provisions of Article 41(3)(a) and (2)(b) of Law 24/1998, consisting in ‘supplying postal services reserved to the universal postal service provider without its authorisation, undermining the latter’s supply of the service’.
- ¹⁴ By decision of 16 June 1999 the Secretariat-General of Communications imposed a fine on International Mail in the amount of ESP 10 million and ordered it to cease offering and supplying postal services identical to those reserved to the operator authorised to ensure the provision of a universal postal service and to remove all letterboxes and information relating to that service.
- ¹⁵ As the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid) dismissed the action brought by International Mail against that decision, holding, *inter alia*, that Law 24/1998 complies with Directive 97/67, the company lodged an appeal on a point of law before the Tribunal Supremo (Supreme Court).

- 16 According to the Tribunal Supremo, the resolution of the dispute in the main proceedings depends largely upon the interpretation to be given to Article 7(2) of Directive 97/67. If Article 18(1)(C) of Law 24/1998 does not comply with the conditions set down in the aforementioned Community provision, the infringement of such a national rule by private operators could not justify an administrative penalty such as that imposed on International Mail. The doubts which the Tribunal Supremo has regarding the correct interpretation of Article 7 of Directive 97/67 arise, in part, from the new wording given to that article by Directive 2002/39.
- 17 In those circumstances the Tribunal Supremo decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 7(2) of Directive 97/67 ..., which authorises Member States to include cross-border mail in the reserved postal services, allow them to establish that reservation only in so far as they are able to prove that, without it, the economic equilibrium of the universal service provider is at risk, or, instead, does it also allow them to retain it for other reasons, among them reasons of expediency, relating to the overall situation in the postal sector, including the degree of liberalisation in that sector at the time the reservation is decided?’

The question referred for a preliminary ruling

Admissibility

- 18 The Spanish Government considers that the request for a preliminary ruling is inadmissible in that, in reality, it concerns the validity of a national rule and not the

interpretation of provisions of Community law. By submitting that question to the Court, the Tribunal Supremo is in reality asking it to assess whether Article 18(1)(C) of Law 24/1998 complies with Directive 97/67 or whether that national provision goes beyond the limits set down by that directive.

- 19 In that regard, it should be noted that, in proceedings brought under Article 234 EC, it is not for the Court to rule on the compatibility of national rules with provisions of Community law (see, *inter alia*, Case C-130/93 *Lamairé* [1994] ECR I-3215, paragraph 10, and Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 34). Furthermore, under the system of judicial cooperation established by that article, the interpretation of national rules is a matter for the courts of the Member States and not for the Court of Justice (see, *inter alia*, Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 7, and *Wilson*, paragraph 34).
- 20 By contrast, the Court does have jurisdiction to supply the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of the national rules with the provisions of Community law (see, *inter alia*, *Lamairé*, paragraph 10, and *Wilson*, paragraph 35).
- 21 Consequently, the Spanish Government's line of argument must be rejected, all the more so because the question referred by the national court expressly relates to the interpretation of a provision of Community law.
- 22 The Spanish Government also submits that the request for a preliminary ruling is inadmissible in that it serves no purpose and is hypothetically constructed. The

Court, it argues, can take a view only in abstract and general terms on the lawfulness of reserving cross-border mail to the operator required to offer the universal postal service, but it cannot assess whether such a reservation, provided for in Article 18(1)(C) of Law 24/1998, is lawful, or whether, by contrast, it goes beyond the limits set down in Article 7(2) of Directive 97/67, as such an assessment does not come within its jurisdiction.

23 In that regard, it must be recalled that, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43 and the case-law cited).

24 In addition, the mere fact that the Court is called upon to give a decision in abstract and general terms cannot have the effect of rendering a reference for a preliminary ruling inadmissible. It is one of the essential characteristics of the system of judicial cooperation established under Article 234 EC that the Court replies in rather abstract and general terms to a question on the interpretation of Community law referred to it, while it is for the referring court to give a ruling in the dispute before it, taking into account the Court's reply.

25 The request for a preliminary ruling must accordingly be held to be admissible.

Substance

- 26 The question referred by the national court asks, in essence, whether Article 7(2) of Directive 97/67 must be interpreted as allowing Member States to reserve cross-border mail to the universal postal service provider only in so far as they establish that, in the absence of such a reservation, the financial equilibrium of that provider would be in danger, or whether other considerations relating to the general situation of the postal sector, including mere expediency, are sufficient to justify that reservation.
- 27 Article 7(2) of Directive 97/67 allows Member States to continue to reserve cross-border mail to the universal service provider, within certain price and weight limits, '[t]o the extent necessary to ensure the maintenance of universal service'. The same condition applies, in addition, under paragraphs 1 and 2 of that article, to the option of reserving to the universal postal service provider, within certain limits of price and weight, the clearance, sorting, transport and delivery of items of domestic correspondence and direct mail.
- 28 It must be stated at the outset that the use of the word 'necessary' means that the reservation cannot be justified on the ground of mere expediency.
- 29 The grounds which led the Community legislature to provide for the possibility of such a reservation are explained in recital (16) in the preamble to Directive 97/67, which states that 'the maintenance of a range of those services that may be reserved, in compliance with the rules of the Treaty and without prejudice to the application of the rules on competition, appears justified on the grounds of ensuring the operation of the universal service under financially balanced conditions'.

- 30 As regards, in that context, direct mail and cross-border mail particularly, in recital (19) in the preamble to Directive 97/67 the Community legislature specified that it is 'reasonable to allow, on an interim basis, for direct mail and cross-border mail to continue to be capable of reservation ...'.
- 31 The objective of Article 7(2) of Directive 97/67 is therefore to guarantee maintenance of the universal postal service, in particular by providing the necessary resources to enable it to operate under financially balanced conditions.
- 32 That interpretation is, moreover, supported by the fact that the financial balance of the universal postal service provider is one of the essential criteria which, under Article 7(3) of that directive, must be taken into account by the Parliament and the Council in their subsequent decision relating to the further gradual and controlled liberalisation of the postal services market, particularly in view of the liberalisation of cross-border mail.
- 33 The criterion of financial balance has already been taken into account in the Court's case-law in relation to postal services prior to the entry into force of Directive 97/67 and relating, in particular, to Article 90 of the EC Treaty (now Article 86 EC).
- 34 According to that case-law, the Member States may confer on the universal postal service provider, as an undertaking entrusted to operate services of general economic interest, exclusive rights likely to restrict competition or even exclude all competition when that is necessary in order to allow it to perform its task of general interest and in particular to have the benefit of economically acceptable conditions (Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16).

- 35 In that regard, it is clear from the same case-law that it is not necessary that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 54).
- 36 In that context, the Court has specified that the obligation on the part of the undertaking entrusted with that task to perform its services under conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned (*Corbeau*, paragraph 17).
- 37 That case-law concerning primary law is equally relevant in the context of the dispute in the main proceedings, all the more so since Directive 97/67 specifically states, on several occasions, that the rules of the Treaty must be respected when an exclusive right is granted.
- 38 Thus, Article 4 of Directive 97/67 provides that '[e]ach Member State shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them'. Recital (16) in the preamble to that directive provides likewise, as does recital (41), which states that the directive 'does not affect the application of the rules of the Treaty, and in particular its rules on competition and the freedom to provide services', emphasising that such rules, in particular those relating to competition, must be complied with.

39 It is clear from the case-law relating to primary law mentioned at paragraphs 33 to 36 of the present judgment that the criterion of the financial balance of the universal postal service can validly be taken into account by a Member State when it decides to reserve cross-border mail and that that criterion must in principle, as the Advocate General states at points 26 to 31 of his Opinion, be applied, taking into account only services which constitute the universal postal service and not other activities which the universal service provider, where appropriate, may provide. It may be that the latter also carries out other economic activities which must be excluded from the benefit of cross-subsidies from the reserved sectors.

40 However, it is also clear from that case-law that the condition laid down in Article 7(2) of Directive 97/67 cannot be reduced to a single financial issue, inasmuch as it cannot be ruled out that there may be other reasons for which, in accordance with Article 86(2) EC, the Member States can decide to reserve cross-border mail in order to ensure that the universal postal service provider is not prevented from achieving its specific objective.

41 Considerations, such as expediency, relating to the overall situation in the postal sector, including that linked to the degree of liberalisation of the market at the time when a decision is taken as regards cross-border mail, are not enough to justify the reservation of cross-border mail, unless, in the absence of such a reservation, the achievement of a universal postal service would be prevented, or the reservation is necessary to ensure that the universal service can be provided under acceptable economic conditions.

42 Therefore, it must be held that both the wording of Article 7(2) of Directive 97/67 and the objective of that provision preclude a decision to reserve cross-border mail to the universal postal service provider being justified on the ground of mere expediency.

- 43 The amendment of Article 7 of Directive 97/67 by Directive 2002/39 ('Directive 97/67, as amended'), to which the referring court specifically made reference to justify its decision to make a reference to the Court for a preliminary ruling, does not invalidate that interpretation.
- 44 It is important to bear in mind that the fourth subparagraph of Article 7(1) of Directive 97/67, as amended, provides that '[t]o the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits'.
- 45 As the Commission of the European Communities points out in its written observations, it is clear particularly from recitals (22) and (23) in the preamble to Directive 2002/39 that the fourth subparagraph of Article 7(1) of Directive 97/67, as amended, like Article 7(2) of Directive 97/67, has the objective of not upsetting the financial balance of the universal postal service and therefore not jeopardising the safeguarding of that universal service.
- 46 In addition, as the Commission also points out, it would be contrary to the objective of Directive 2002/39, which is to pursue the gradual and controlled opening of postal services to competition, to interpret the fourth subparagraph of Article 7(1) of Directive 97/67, as amended, as meaning that it increases the scope of discretion afforded to Member States.

47 In reality, as the Advocate General stated in point 36 of his Opinion, recital (16) in the preamble to Directive 2002/39, in the words of which ‘opening outgoing cross-border mail fully to competition with possible exceptions to the extent necessary to ensure the provision of universal service, [represents] relatively simple and controlled further phases which are nevertheless significant’, read in conjunction with recitals (15), (17) and (20) in the preamble to that directive, make clear the exceptional nature of the possibility of reserving outgoing cross-border mail, such as provided for in the fourth subparagraph of Article 7(1) of Directive 97/67, as amended.

48 Therefore, the examples given in the fourth subparagraph of Article 7(1) of Directive 97/67, as amended, as the Advocate General stated at point 33 of his Opinion, are only useful indicators to guide the assessment relating to the allocation of special rights to the universal postal service provider, such as reserving the provision of cross-border mail, without being such as to affect the interpretation required of Article 7(2) of Directive 97/67.

49 As regards the burden of proof with regard to the need to reserve cross-border mail to the provider of the universal postal service, in order to maintain that service, it is clear from the wording of Article 7(2) of Directive 97/67 that this rests with the Member State which makes use of the option to reserve or, where appropriate, the service provider. That interpretation is supported by the fact that, in the context of Article 86(2) EC, it is incumbent on the Member State or the undertaking which seeks to rely on that provision to show that the conditions for application of that provision are fulfilled (*TNT Traco*, paragraph 59).

50 Having regard to all of the foregoing, the answer to the question referred must be that Article 7(2) of Directive 97/67 is to be interpreted as allowing Member States to reserve cross-border mail to the universal postal service provider only in so far as they establish

- that, in the absence of such a reservation, achievement of that universal service would be precluded, or
- that that reservation is necessary to enable that service to be carried out under economically acceptable conditions.

Costs

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

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

Article 7(2) 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 must be interpreted as allowing Member States to reserve cross-border mail to the universal postal service provider only in so far as they establish

- **that, in the absence of such a reservation, achievement of that universal service would be precluded, or**

- **that that reservation is necessary to enable that service to be carried out under economically acceptable conditions.**

[Signatures]