



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 28 November 2017¹

Joined Cases C-259/16 and C-260/16

**Confederazione Generale Italiana dei Trasporti e della Logistica (Confetra),
Associazione Nazionale Imprese Trasporti Automobilistici,
Società Fercam SpA,
Associazione non Riconosciuta Alsea,
Associazione Fedit,
Società Carioni Spedizioni Internazionali Srl,
Federazione Nazionale delle Imprese di Spedizioni Internazionali — Fedespedi,
Società Tnt Global Express SpA (C-259/16),
Associazione Italiana dei Corrieri Aerei Internazionali (AICAI),
DHL Express (Italy) Srl,
Federal Express Europe Inc.,
United Parcel Service Italia Ups Srl (C-260/16)**
v
**Autorità per le Garanzie nelle Comunicazioni,
Ministero dello Sviluppo Economico,
intervener:
Poste Italiane SpA**

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

(Reference for a preliminary ruling — Freedom to provide services — Postal services in the European Union — Companies operating in the goods delivery, road haulage and express parcel delivery sector — Authorisations for the provision of public postal services — Contribution to the cost of the universal service)

1. The gradual liberalisation of the internal market in postal services, which are essential for economic and social cohesion, has enabled different types of undertaking to supply those services in addition to the historical operators to which the services were traditionally entrusted. This new situation requires a determination, inter alia, of when transport and express mail undertakings actually provide postal services.
2. Liberalisation has been offset by the requirement that Member States must ensure that users enjoy the right to be offered those services (in particular, some services categorised as essential) at a certain level of quality, on a permanent basis throughout the territory and at affordable prices. That is the definition of *universal service*. The consensus regarding its central features breaks down, however, when it comes to deciding by whom and how it should be financed.

¹ Original language: Spanish.

3. The Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) asks, in short: (a) whether Directive 97/67/EC² applies to the activities of hauliers and express couriers; (b) whether, if that is the case, undertakings which carry out those activities need an authorisation to operate; and (c) whether those undertakings have to contribute to the financing of the universal service in Italy.

4. The dispute has arisen as a result of proceedings brought by a number of transport and express mail undertakings and related associations, seeking the annulment of a resolution and a regulation adopted by the *Autorità per le garanzie nelle Comunicazioni*,³ and of a decree of the *Ministro dello Sviluppo Economico*,⁴ on the rules for the issue of qualifying certificates for the provision of postal services to the public.⁵

I. Legislative framework

A. EU law

*Directive 97/67*⁶

5. Recitals 22 and 23 read as follows:

‘(22) Whereas Member States should be able to regulate, by appropriate authorisation procedures, on their territory, the provision of postal services which are not reserved to the universal service providers; whereas those procedures must be transparent, non-discriminatory, proportionate and based on objective criteria;

(23) Whereas the Member States should have the option of making the grant of licences subject to universal service obligations or contributions to a compensation fund intended to compensate the universal service provider for the provision of services representing an unfair financial burden; ...’

6. Article 2 provides:

‘For the purposes of this Directive, the following definitions shall apply:

1. postal services: services involving the clearance, sorting, transport and delivery of postal items;

1a. postal service provider: undertaking that provides one or more postal services.’

7. Article 2(6) refers to postal items in the following terms:

‘Postal item: an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value.’

² Directive of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (‘Directive 97/67’) (OJ 1998 L 15, p. 14).

³ Communications Regulatory Authority, Italy; ‘AGCom’.

⁴ Minister for Economic Development, Italy.

⁵ See the details of those provisions in points 14 to 19.

⁶ As amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3; ‘Directive 2008/6’).

8. Under Article 2(19), ‘essential requirements’ are:

‘General non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners, in accordance with Community and national law and, where justified, data protection, environmental protection and regional planning. ...’

9. Article 7 states:

‘1. ... Member States may finance the provision of universal services in accordance with one or more of the means provided for in paragraphs 2, 3 and 4, or in accordance with any other means compatible with the Treaty.

...

3. Where a Member State determines that the universal service obligations, as provided for in this Directive, entail a net cost, calculated taking into account Annex I, and represent an unfair financial burden on the universal service provider(s), it may introduce:

- (a) a mechanism to compensate the undertaking(s) concerned from public funds; or
- (b) a mechanism for the sharing of the net cost of the universal service obligations between providers of services and/or users.

4. Where the net cost is shared in accordance with paragraph 3(b), Member States may establish a compensation fund which may be funded by service providers and/or users’ fees ... Member States may make the granting of authorisations to service providers under Article 9(2) subject to an obligation to make a financial contribution to that fund or to comply with universal service obligations. ...’

10. According to Article 9:

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

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

The granting of authorisations may:

...

- where appropriate, be subject to an obligation to make a financial contribution to the sharing mechanisms referred to in Article 7, if the provision of the universal service entails a net cost and represents an unfair burden on the universal service provider(s), designated in accordance with Article 4,

...

— where appropriate, be made subject to or impose an obligation to respect working conditions laid down by national legislation.

...

Except in the case of undertakings that have been designated as universal service providers in accordance with Article 4, authorisations may not:

- be limited in number,
- for the same elements of the universal service or parts of the national territory, impose universal service obligations and, at the same time, financial contributions to a sharing mechanism,
- duplicate conditions which are applicable to undertakings by virtue of other, non-sector-specific national legislation,

...’

Directive 2008/6

11. According to recital 17:

‘Transport alone should not be considered as a postal service. ...’

12. Recital 27 states:

‘Postal service providers may be required to contribute to the financing of the universal service in cases where provision is made for a compensation fund. In order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user’s perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.’

B. The Italian legislation

13. Directive 97/67 was transposed into Italian law by Legislative Decree No 261 of 22 July 1999.⁷ The amendments inserted into that directive by Directive 2008/6⁸ were transposed into national law by Legislative Decree No 58 of 31 March 2011.⁹

14. Article 6(1) and (*1bis*) of Legislative Decree No 261, as amended by Legislative Decree No 58, provides:

‘1 The supply to the public of services which are not part of the universal service, including the provision of private postboxes for the distribution of correspondence, shall be subject to ... general authorisation ...’

⁷ GURI No 182 of 5 August 1999.

⁸ The referring court states that Article 2(a) and (f) of Legislative Decree No 261 repeats the definitions laid down in Article 2(1), (1a) and (6) of Directive 97/67 (last paragraph of point 2.5.1 of the order for reference).

⁹ GURI No 98 of 24 April 2011. ‘Legislative Decree No 261/1999.’

1bis The issue of general authorisations, including for the universal service providers, having regard to the market situation and the organisation of postal services, may be made subject to the fulfilment of specific universal-service obligations relating inter alia to ... obligations to make financial contributions to the cost-sharing mechanism referred to in Article 10 of the present decree. ...'

15. In accordance with Article 10(2) of Legislative Decree No 261/1999:

'2. Holders of individual licences and general authorisations relating to services substitutable for those falling within the scope of the universal service shall be required to contribute to the fund referred to in paragraph (1) in an amount which may not exceed 10% of gross income deriving from the authorised activity.'

16. The Regulation governing qualifying certificates for the provision of postal services to the public, adopted by the AGCom¹⁰ ('Regulation on qualifying certificates'), provides as follows in Article 1(1)(g), (i) and (r):

'1. For the purposes of the present Regulation, the following meanings shall apply:

...

(g) "postal services": the services which include clearance, sorting, transport and distribution of postal items, including those coming within the scope of the universal postal service;

...

(i) "added value postal services": services associated with the universal postal service characterised by additional services even if they relate to individual phases of the postal service (for example, the handing of items to the addressee, guarantee of delivery at a particular time, collection from a home address, confirmation of due delivery, possibility of change of address, electronic tracing);

...

(r) "transport-only activity": the performance of activities relating to the carriage phase which do not include the performance of other activities classifiable as forming part of the various phases of the sequence of postal services as defined in subparagraph (g).'

17. According to Article 8(4) of the regulation, 'general authorisation shall not be required for transport-only activity'.

18. Pursuant to Article 11(1)(f) and Article 15(2) of the Regulation on qualifying certificates, the holder of a general authorisation has an obligation to contribute to the universal-service charges compensation fund where the conditions provided for in recital 27 of Directive 2008/6 and Article 10(2) of Legislative Decree No 261/1999 are met.

19. Article 9 of the Decree of the Minister for Economic Development¹¹ provides that holders of individual and general licences must comply with the obligations in Article 11 of the regulation.

¹⁰ Annex A to Resolution No 129/15/CONS ('Resolution No 129/15').

¹¹ Disciplinary procedure for the issuance of qualification certificates for the provision of postal services to the public (Decree adopting the rules applicable to procedures for the issue of qualifying certificates for the provision of postal services to the public), of 29 July 2015 (GURI No 189 of 17 August 2015; 'the Decree').

II. Facts of the dispute and questions referred for a preliminary ruling

20. The applicants are undertakings and associations of undertakings which carry on the activities of hauliers, freight forwarders and express couriers.¹² Although they assert that they do not provide postal services, they hold the general authorisation referred to in Article 6 of Legislative Decree No 261/1999, which they applied for on a precautionary basis owing to the alleged uncertainty of the Italian legislation on the scope of those services.

21. In 2015, the applicants brought an action before the referring court, seeking the annulment of Resolution No 129/15 and the Regulation on qualifying certificates. They argued that their activities as hauliers, forwarding agents, freight forwarders and express couriers cannot be classified as postal services within the meaning of Article 2 of Directive 97/67 and Article 1 of Legislative Decree No 261/1999. They further object to the contested legislation on the grounds that it is punitive, contrary to EU law and not proportionate to the interests it is intended to protect or their own activities. In particular, they object to the requirement to obtain an authorisation for services which should be exempt and they take issue with the obligation to contribute to the universal-service compensation fund.

22. After setting out its view (which is generally favourable to the applicants' position) in the order for reference, the referring court decided to stay the proceedings and refer the following questions for a preliminary ruling:

- (1) Does EU law, in particular Article [2](1), 2(1a) and 2(6) [¹³] of Directive 97/67, as supplemented and amended by Directive 2008/6/EC, preclude the application of national provisions, in particular Article 2(a) and (f) of Legislative Decree No [261]/1999, and Article 1(1)(g) and (r), in conjunction with each other and subparagraph (i), of the Regulation governing qualifying certificates for the provision of postal services to the public set out in Annex A to Resolution AGCom 129/15/CONS of 23 March 2015 and the related Rules governing the procedure for the issue of qualifying certificates for the provision of postal services to the public, referred to in the Decree of the Ministry of Economic Development of 29 July 2015, in so far as they are intended to bring the services of road hauliers, freight-forwarders and express couriers also within the scope of postal services?
- (2) Does EU law, in particular Article 9(1) and Article [2](19) of Directive 97/67 ... and the principles of proportionality and reasonableness, preclude the application of national provisions, in particular Article 6(1) of Legislative Decree No [261]/1999 and Article 8 of the Regulation governing qualifying certificates for the provision of postal services to the public set out in Annex A to Resolution AGCom 129/15/CONS of 23 March 2015 and the related Rules governing the procedure for the issue of qualifying certificates for the provision of postal services to the public, referred to in the Decree of the Ministry of Economic Development of 29 July 2015, in so far as they impose on the suppliers of the services of road hauliers, freight-forwarders and express couriers the requirement to obtain a general authorisation in addition to the authorisation required to guarantee compliance with the essential requirements regarding the supply of postal services?
- (3) Does EU law, in particular Article 7(4) and Article 9(2) of Directive 97/67 ... preclude the application of national provisions, in particular Article 6(1*bis*) and Article 10(2) of Legislative Decree No 261/1999, and Article 11(1)(f) and Article 15(2) of the Regulation governing qualifying certificates for the provision of postal services to the public, set out in Annex A to Resolution AGCom 129/15/CONS of 23 March 2015, and Article 9 of the related Rules governing the

¹² In Case C-260/16, the applicants operate only in the express deliveries sector.

¹³ The orders for reference refer to Articles 1 and 6 but must mean Article 2(1), (1a) and (6).

procedure for the issue of qualifying certificates for the provision of postal services to the public referred to in the Decree of the Ministry of Economic Development of 29 July 2015, in so far as they impose on the suppliers of services of road hauliers, freight-forwarders and express couriers the burden of contributing to the compensation fund for the universal service?

- (4) Does EU law, in particular Article 9(2) of Directive 97/67 ... preclude the application of national provisions, in particular Articles 6 and 10 of Legislative Decree No 261/1999, and Article 11(1)(f) and Article 15(2) of the Regulation governing qualifying certificates for the provision of postal services to the public, referred to in Annex A to Resolution AGCom 129/15/CONS of 23 March 2015, and Article 9 of the related Rules governing the procedure for the issue of qualifying certificates for the provision of postal services to the public, referred to in the Decree of the Ministry of Economic Development of 29 July 2015, in so far as they do not contain any assessment as to those cases in which the contribution to the compensation fund in respect of universal service costs can be described as appropriate, and do not lay down conditions for application which differ according both to the subjective circumstances of the contributors and to the markets?’

III. Proceedings before the Court of Justice

23. The order for reference in Case C-259/16 was received at the Court Registry on 10 May 2016 and the order for reference in Case C-260/16 was received the following day, on 11 May. It was decided to join the two cases in view of the connection between them.

24. Written observations were lodged by Confetra and others,¹⁴ AICAI and others,¹⁵ UPS Italia, Poste Italiane SpA, the Italian Government and the Commission. All those parties and the French Government took part in the hearing, which was held on 20 September 2017.

IV. Legal analysis

A. *Introductory remarks*

25. The four questions refer to the Decree with a view to determining whether it is compatible with Directive 96/67. However, the Decree governs the procedural, rather than substantive, aspects of the granting of licences and authorisations in the Italian postal sector. In fact, the other two provisions (Legislative Decree No 261/1999 and the Regulation on qualifying certificates) govern the substantive aspects.

26. In any event, since Questions 1 and 2 do not mention a specific article of the Decree, that analysis is virtually impossible. Questions 3 and 4 refer to Article 9 of the Decree but I do not believe that it is essential to examine that article for it simply refers to the obligations of holders of general authorisations, which are laid down in Article 11 of the Regulation on qualifying certificates. Therefore, I shall focus on the rest of the national provisions with which the reference for a preliminary ruling is concerned.

¹⁴ Observations were lodged jointly by Confetra and the following undertakings and associations: Fedespedi, Associazione Fedit, Associazione non Riconosciuta Alsea, Società Tnt Global Express SpA, Associazione Nazionale Imprese Trasporti Automobilistici, Società Fercam SpA and Società Carioni Spedizioni Internazionali Srl; to simplify matters, I shall refer to them all as ‘Confetra’ from now on.

¹⁵ The observations are also signed by the representatives of DHL Express (Italy) Srl, Federal Express Europe Inc. and United Parcel Service Italia Ups Srl.

27. While the written procedure was underway in the present two preliminary-ruling proceedings, the Court gave judgment in *DHL Express (Austria)*,¹⁶ in which it ruled on the obligation of an express courier and postal undertaking to contribute to the financing of the national regulatory authority responsible for the sector, in the light of Article 9(2) of Directive 97/67. The effects of that judgment and the judgment of 15 June 2017, *Ilves Jakelu*,¹⁷ on the present references for a preliminary ruling was debated at the hearing.

B. Question 1

1. Summary of the parties' positions

28. Confetra submits that Directive 97/67 precludes national legislation which brings the services of hauliers, freight forwarders and express couriers within the scope of postal services. Neither the legal definition nor the nature of any of those services bears any relation to postal services. In particular, hauliers dealing with the collection or distribution of postal items, which tend to be tasks ancillary to their main activity (transport), are not included in the scope of that directive.

29. Supported by AICAI and others and by UPS, Confetra draws attention to the characteristic features of express mail services, such as flexible handling of packages, individual pricing, post-shipment payment, 'door-to-door' service and other similar factors, which distinguish those services from the universal postal service even though they constitute a segment of that service.

30. ACAI and others submit that the first question was answered in the *Corbeau* judgment,¹⁸ and that it may be inferred from recital 18 of Directive 97/67 that express mail services do not form part of the universal service. They further submit that the definition in Article 2(1)(1) of that directive is similar to that of traditional postal services, in other words, standard services targeted at general customers. However, recital 18 incorrectly limits the characteristic features of express mail simply to an added value postal service.

31. UPS observes that postal services of general economic interest are expressly excluded from the scope of Directive 2006/123/EC on services in the internal market,¹⁹ based on a combined reading of Article 1 and Article 17(1)(a) thereof. Accordingly, by contrary inference, those postal services are covered by Directive 97/67, whereas the others, including express mail services, are governed by Directive 2006/123. UPS states that the Commission's decision-making practice in relation to the control of mergers confirms the differences between the standard and express parcel delivery markets.²⁰ Indeed, the Commission drew attention to the limited presence in the express mail market of traditional operators providing standard postal services.²¹

32. Poste Italiane, the Italian Government and the Commission all contend that it is apparent from a reading of Article 2(1) and (1a) of Directive 97/67 in conjunction with recital 17 of Directive 2008/6 that the definition of postal services encompasses all transport undertakings which also carry out any of the typical operations of the postal service, such as the clearance, sorting or distribution of postal

¹⁶ Judgment of 16 November 2016 (C-2/15, EU:C:2016:880).

¹⁷ Case C-368/15, EU:C:2017:462.

¹⁸ Judgment of 19 May 1993 (C-320/91, EU:C:1993:198).

¹⁹ Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) ('Directive 2006/123').

²⁰ UPS refers to the Commission decisions of 26 August 1998, *Deutsche Post v DHL*, IV/M 1168, paragraph 17; of 23 February 1999, *Deutsche Post v Securicor*, VI/M11347; and of 30 January 2013, *UPS v TNT*, M6570.

²¹ UPS refers to the judgment of 23 April 2009, *TNT Post UK* (C-357/07, EU:C:2009:248, paragraph 46).

items. Transport-only activities alone are not caught by that definition.²² Therefore, undertakings providing express mail services should not be excluded because they also carry out one or more of the distinctive operations of postal services.²³ The added value activities which typify express mail services in no way alter the fact that these come within the scope of postal services.

33. The Italian Government also draws attention to the likely development of secondary legislation which supports that interpretation. In that connection, the proposal for Regulation 2016/149²⁴ does not differentiate between ‘simple’ packages and ‘postal’ packages, contrary to what the referring court suggests.

2. Legal analysis

34. According to Article 1, first indent, of Directive 97/67, the directive establishes common rules concerning the conditions governing the provision of ‘postal services’, which, in line with the exhaustive²⁵ definition in Article 2(1) of that directive, include ‘the clearance, sorting, *transport* and distribution of postal items’. I shall emphasise *transport* in italics from now on because of its importance in answering the question.

35. The definition of ‘postal item’ is governed by Article 2(6) of Directive 97/67. It consists of an item addressed in the final form in which it is to be *carried* by a postal service provider. Postal items may of course be correspondence,²⁶ but they may also be books, catalogues, newspapers, periodicals and ‘postal parcels containing merchandise with or without commercial value’.

36. Since any undertaking which provides *one or more* of the services listed in Article 2(1) of Directive 97/67 is considered to be a postal service provider, an initial combined reading of the above provisions suggests that the transport of postal items falls within the scope of postal services. Therefore, it will suffice if an undertaking deals with the transport of postal items for it to be covered by Directive 97/67, without it also being necessary for that undertaking to carry out one of the other activities referred to in Article 2(1).

37. However, as regards the amendment of Directive 97/67, the first sentence of recital 17 of Directive 2008/6 states that *transport alone* should not be considered as a postal service. Although that statement was not included in the enacting terms,²⁷ it may be presumed to reflect the original aim of the legislature, to the effect that transport *unconnected* with other postal activities did not fall within the scope of Directive 97/67 at the outset.

²² They submit that that position is borne out by the judgments of 17 May 2001, *TNT Traco* (C-340/99, EU:C:2001:281), and of 13 October 2011, *DHL International* (C-148/10, EU:C:2011:654), and by the Opinion of Advocate General Mengozzi in *DHL Express (Austria)*, C-2/15, EU:C:2016:168.

²³ The Italian Government and the Commission refer to the 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).

²⁴ Proposal for a Regulation of the European Parliament and of the Council of 25 May 2016 on cross-border parcel delivery services (COM(2016) 285 final).

²⁵ Judgment of 22 October 2015, *Easy Pay and Finance Engineering* (C-185/14, EU:C:2015:716, paragraph 29).

²⁶ According to Article 2(7), correspondence is defined as ‘a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence’.

²⁷ Unlike the proposal for a regulation on cross-border parcel delivery services, to which I referred in footnote 24.

38. In the main proceedings, the classification of postal service providers concerns two categories of undertaking: those carrying out transport and freight-forwarding activities, on the one hand, and those carrying out express mail activities, on the other. The postal service regulatory bodies or agencies have drawn attention to the difficulty in delimiting the scope of transversal rules (like those governing transport) vis-à-vis rules specifically relating to postal services, when both apply to those two types of undertaking.²⁸ I shall refer to each one separately.

a) Transport undertakings

39. In recent years, the evolution of the postal services market has shown a clear tendency towards diversification, motivated primarily by the increase in e-commerce. Traditional postal-sector undertakings compete with logistics and transport undertakings, and even operators providing the industrial transport of goods have become parcel-delivery undertakings. Their customers no longer simply demand traditional carriage-of-goods services (from factories to shopping centres) but also the distribution of individual parcels. New types of undertaking have thus emerged which do not completely satisfy the definition of postal operators but offer similar services which may be substitutes.²⁹

40. The transport and freight-forwarding undertakings rely on an interpretation of Directive 97/67 which removes them from the scope of that directive. They assert that, since they provide services transporting postal items, the performance of any other services (such as the collection and distribution of those items) is only ancillary to the main service. Therefore, they should not be treated in the same way as postal service providers.³⁰

41. I do not share that view, for a number of reasons.

42. First, in the absence of any other indication in the preparatory documents for Directive 2008/6,³¹ the most logical interpretation of the first sentence of recital 17 of that directive³² is that it is a clarification of Article 2(1) and (6), a provision which ‘illuminates but does not amend’,³³ in the sense that the provision of a service confined to the transport *alone* of postal items, without performance of any of the other defining activities of postal services (clearance, sorting and distribution), is not subject to the legislation governing the postal sector.³⁴

28 European Regulators Group for Postal Services (ERGP), Medium Term Strategy (2017-2019) — Discussion paper for Public Consultation (ERGP (16) 16), p. 7: ‘NRAs are currently tasked with overseeing “postal services” provided by “postal services providers”, which generally covers some but not always all parcel delivery operators and the scope of which varies across Member States. The courier, parcel and express (CEP) services are not only covered by the European regulation (and specifically by the postal directive) applying to the postal sector, but also by other transversal legislation, for instance transport law. The boundaries as regards applicable law for these services may not always be clear.’

29 See the Commission Staff Working Document, (SWD(2015) 207 final of 17 November 2015) — accompanying the document — Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive (Directive 97/67/CE as amended by Directive 2002/39/EC and Directive 2008/6/EC), COM(2015) 568 final, p. 66 (‘SWD(2015) 207 final’).

30 The situation may arise where freight-forwarding undertakings do not perform postal services, based on their specific activities. The question of whether or not such undertakings fall within the scope of Directive 97/67 does not depend on how those undertakings are defined in the civil or company law of the Member States but rather on whether they provide any of the postal services referred to in that directive.

31 Unless I am mistaken, the sentence appeared for the first time during the legislative procedure, in the Council Common Position of 8 November 2007 (Council Document No 13593/6/07 REV 6), and was not accompanied by any explanation. The Commission confirmed that impression at the hearing.

32 A systematic interpretation of that sentence does not provide any useful information because it appears at the beginning of a paragraph relating to the treatment of direct mail as an item of correspondence in certain circumstances.

33 That graphic expression was used by Confetra’s representative at the hearing.

34 The legislative technique (a sentence hidden in a recital) is not the best and perhaps there would have been more clarity if the criterion had been included in the enacting terms of Directive 97/67. However, this formal element does not undermine the logical interpretation of the substance.

43. Secondly, acceptance that the ancillary nature of the activities of clearance and distribution of postal items excludes the transport undertakings from the scope of Directive 97/67 would increase the difficulties of interpretation. Instead of the objective — and easily verifiable — criterion of whether there has been clearance, sorting or distribution of postal items, it will be necessary to assess on a case-by-case basis the greater or lesser proportion of ‘ancillary’ services in relation to the main (transport) services provided by those undertakings in order to determine the applicable legal rules.

44. To my mind, what matters with regard to Directive 97/67 is not the proportion of ‘ancillary’ services in relation to transport services but the fact that an operator provides the former in addition to the latter in the context of the definition of the postal services.³⁵ Aside from the legal uncertainty which the interpretation proposed by Confetra would create, it is not possible to identify any element in Directive 97/67 which supports it.

45. Lastly, the interpretation I propose is borne out by the proposal for a regulation on cross-border parcel delivery services,³⁶ recital 8 of which states that, ‘*in line with current practice and Directive [97/67], [37]* each step in the postal chain, i.e. clearance, sorting and delivery should be considered parcel delivery services’ and that ‘transport alone that is not undertaken in conjunction with one of those steps should fall outside the scope of parcel delivery services as it can in this case be assumed that this activity is part of the transport sector’.³⁸

b) Express mail undertakings

46. As regards providers of express mail services, the Court has treated these as postal service operators on at least four occasions: (i) classifying those services as ‘specific’ services in the judgment in *Corbeau*;³⁹ (ii) holding that the requirement for an external procedure for dealing with complaints, of the kind provided for in Article 19 of Directive 97/67, was applicable to such providers in the judgment in *DHL International*;⁴⁰ (iii) interpreting Article 9(2) of that directive as meaning that a national law may impose on such providers the obligation to finance the regulatory authority responsible for the postal sector in the same way as other postal operators, in the judgment in *DHL Express (Austria)*;⁴¹ and (iv) declaring that the provision of such services may be made subject to the issuing of a general authorisation, in the judgment in *Ilves Jakelu*.⁴² Those judgments would make no sense if the Court had not accepted the premiss that express mail falls within the scope of postal services.

35 The Italian regulator formed a similar view, as is clear from the ERGP 2015 report to the European Commission on Legal regimes applicable to European domestic or cross-border e-commerce parcel delivery (ERGP PL (15) 28), p. 12.

36 Proposal of the European Parliament and of the Council of 25 May 2016 (COM(2016) 285 final).

37 Italics added.

38 Its legislative reflection is found in Article 2(2)(a), which provides that ‘transport alone shall not be considered a parcel delivery service’.

39 Judgment of 19 May 1993 (C-320/91, EU:C:1993:198, paragraph 19); to the effect that they are ‘dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services ... such as collection from the senders’ address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit ...’

40 Judgment of 13 October 2011 (C-148/10, EU:C:2011:654, paragraphs 30 and 52). According to paragraph 20, it was the applicant undertaking’s contention in those proceedings that its express delivery services could not be classified as postal services.

41 Judgment of 16 November 2016 (C-2/15, EU:C:2016:880, paragraph 31).

42 Judgment of 15 June 2017 (C-368/15, EU:C:2017:462, paragraph 29).

47. Although express mail differs — in some instances, significantly — from the postal service covering items of correspondence, the core of its activity remains one of the instruments for communication and information exchange which characterise postal services.⁴³ It is a genuine segment of the postal market, characterised by its premium services which are paid for accordingly by customers. Moreover, the definitions laid down in Directive 97/67, such as the definitions of ‘postal service’ or ‘postal item’,⁴⁴ are broad enough to encompass those specific, high value added services.⁴⁵

48. Based on those premisses, although it is ultimately for the national court to assess the compatibility of its national legislation with Directive 97/67 in the light of the judgment to be given by the Court of Justice, I believe that the provisions cited in Question 1 of the order for reference are compatible with that directive. First, the national court has confirmed that Article 2(1), (1a) and (6) of Directive 97/67 was transposed verbatim in Article 2(a) and (f) of Legislative Decree No 261/1999. Secondly, Article 1(1)(g), (i) and (r) and Article 8(4) of the Regulation on qualifying certificates are compatible with the interpretation of postal services and transport services which I propose.

49. That is due in particular to the fact that that regulation (Article 8(4)) does not require general authorisation for transport-*only* activities. Pursuant to Article 1(1)(r) of that regulation, that term is defined as ‘the performance of activities relating to the carriage phase which do not include the performance of other activities classifiable as forming part of the various phases of the sequence of postal services as defined in subparagraph (g).’ Subparagraph (g) contains the definition of ‘postal services’.

C. Question 2

1. Summary of the parties’ positions

50. Confetra submits that the imposition on undertakings which do not provide the universal service of the obligation to obtain a general authorisation is made subject, in Article 9(1) of Directive 97/67, to the need to ensure fulfilment of the essential requirements, as set out in Article 2(19). Confetra argues that the obligation to obtain an authorisation was imposed in Italy without the authorities having carried out any assessment of the need to adopt regulatory measures based on those requirements. Confetra further submits that the obligations imposed on it are disproportionate.

51. AICAI and others and UPS share those objections. They argue in addition that the postal market enjoys a high level of competition and shows no sign of any weakness which would call for reasons of general interest (essential requirements) to be invoked as justification for the imposition of conditions. The fact that Article 1 of Legislative Decree No 261/1999 categorises the activities of clearance, sorting, transport and distribution of postal items as being of overriding general interest does not justify a system of compulsory authorisation because that negates the effectiveness of Article 9(1) of Directive 97/67. Moreover, many of the obligations laid down in the Legislative Decree are already found in other sectoral provisions.

52. Poste Italiane contends that the broad discretion which Directive 97/67 grants Member States to adopt systems of general authorisation and to designate the non-universal postal services that are subject to authorisation makes the Italian rules compatible with EU law. Poste Italiane argues that the national legislature assessed the need for regulatory measures in the light of the essential requirements, pursuant to Article 6 of Legislative Decree No 261/1999 and the definition of ‘services of overriding general interest’ in Article 1. As regards proportionality, Poste Italiane draws attention to the

⁴³ See recital 5 of Directive 2008/6.

⁴⁴ It should be noted that such items include postal parcels containing merchandise with or without commercial value, a sector in which express mail undertakings predominantly operate.

⁴⁵ They are, therefore, not covered by Directive 2006/123 on services in the internal market, contrary to AICAI’s contention.

legitimate nature of the objective of respect for employment legislation, in accordance with Article 2(19) of Directive 97/67. Furthermore, the procedure for issuing authorisations places as few restrictions as possible on the fundamental freedoms, since a postal service provider may commence its activity 45 days after lodging the application.

53. The Italian Government concurs with Poste Italiane regarding the broad discretion of Member States, particularly in the light of the minimum harmonisation effected by Directive 97/67. That is why the regulatory power granted to Member States is not restricted to the universal service and instead the authorities have to uphold the general interest in the sector as a whole.⁴⁶

54. In the Commission's view, a system of the kind at issue in these proceedings should be accepted if it is justified by any of the essential requirements referred to in Article 2(19) of Directive 97/67, is proportionate and satisfies the conditions laid down in Article 9(3) of the directive.

2. *Legal analysis*

55. In principle, Member States may make the provision of postal services not falling within the scope of the universal service subject to general authorisation: Article 9(1) of Directive 97/67 is unambiguous in that regard.⁴⁷ As I observed above, to the extent that postal transport⁴⁸ and express mail undertakings provide those services, the system of general authorisation is applicable to them.

56. Like Poste Italiane and the Italian Government, I believe that Article 9(1) of Directive 97/67, read in conjunction with recital 22 of that directive, grants national authorities a certain margin of discretion: (a) to decide whether to establish a system of general authorisations, and (b) if they decide to do so, to lay down the conditions governing that system, within the parameters stipulated in the directive.

57. In accordance with that same provision, the issuing of authorisations will be acceptable only *to the extent necessary to guarantee compliance with the essential requirements*. Since the discretion of the Member States depends on the level of precision of the provisions of the directive which they must transpose into their national law,⁴⁹ that discretion is significantly restricted in this instance because the *essential requirements* are explicitly and exhaustively⁵⁰ formulated in Article 2(19) of Directive 97/67.

58. Accordingly, a Member State which decides to make access to the postal services market conditional on the obtaining of a general authorisation will have to justify this by reference to one or more of those *requirements* which, in reality, reflect a disparate range of *general non-economic reasons*.⁵¹ It will not be essential for the Member State to rely on each and every one of the *general non-economic reasons* included in the provision. It will suffice if it chooses to base the system of general authorisations on one or more of those reasons.

46 The Italian Government cites the Opinion of Advocate General Mengozzi in *DHL Express (Austria)* (C-2/15, EU:C:2016:168, point 44).

47 The provision of services which do not fall within the scope of the universal service may be subjected only to the issuing of a general authorisation. See judgment of 15 June 2017, *Ilves Jakelu* (C-368/15, EU:C:2017:462, paragraph 30).

48 I refer to the considerations above concerning transport-only activities, which are excluded from the scope of Directive 97/67 and the national postal legislation.

49 Judgment of 8 May 2008, *Danske Svineproducenter* (C-491/06, EU:C:2008:263, paragraph 31).

50 The wording of the provision leaves no room for uncertainty regarding the closed nature of the options valid as essential requirements.

51 Including such wide-ranging public interests as the confidentiality of correspondence, the secure transport of dangerous substances, data protection, environmental protection and regional planning.

59. Legislative Decree No 261/1999 defined the clearance, sorting, transport and distribution of postal items as ‘activities of overriding general interest’. Subsequently, Resolution No 129/15, the preamble to which includes a broad analysis justifying the Regulation on qualifying certificates,⁵² explains that a public consultation was held on, inter alia, the obligation of respect for the terms and conditions of employment.

60. The dispute turns on whether, in making the activities of providers of postal services which do not fall within the scope of the universal service subject to general authorisation, the Italian authorities properly exercised the margin of discretion conferred on them by Directive 97/67.

61. Directive 97/67 does not call for a detailed explanation concerning the *appropriateness* (depending on the assessment criteria of each Member State) of creating that system but rather requires that the system must satisfy the criteria referred to in Article 9(1), in conjunction with Article 2(19). In other words, if a Member State wishes to make the provision of the services in question subject to an authorisation system, it must establish a link between the creation of the authorisation system and one of the reasons of general interest stipulated in Directive 97/67.

62. According to the case file, in defining the ‘essential requirements’ which led the Italian legislature to make the activities of undertakings like the applicants subject to the general authorisation system, Article 1(2)(u) of Legislative Decree No 261/1999 lists a number of the requirements laid down in Directive 97/67 (such as, inter alia, ensuring the confidentiality of correspondence and the protection of personal data).

63. That list also includes the aim of protecting the social security obligations in relation to employees of postal operators and the national employment legislation and collective agreements in the sector. There are traces of that specific aim in legislative provisions enacted after the Legislative Decree, which enables Poste Italiane⁵³ to note that the Italian legislation satisfies one of the reasons of general interest (‘respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement’) referred to in Article 2(19) of Directive 97/67.⁵⁴

64. With the very existence of the system of general authorisation for the postal services at issue having been justified in that way, the referring court asks whether the Italian authorities have made such authorisation conditional on compliance with disproportionate obligations. However, the orders for reference do not state precisely⁵⁵ which specific obligations (with the exception of the obligation relating to the financing of the universal service,⁵⁶ to which I shall refer below) may be regarded as excessive.

52 See recitals 65 and 66 to Resolution No 129/15. In my view, that resolution complies with the obligation for every public authority to explain its acts, which, in that case, was preceded by a consultation of interested parties regarding the provisions of the postal legislation on qualifying certificates.

53 At point 55 of its observations, referring to Article 10(4)(c) and Article 11(1)(b) and (c) of the regulation.

54 That reason was introduced by the Common Position of the European Parliament and the Council on the amendment of Directive 97/67 by Directive 2008/6, in view of ‘the political importance that social considerations maintain within the FMO [Full Market Opening] process’ (Common Position (EC) No 19/2007 of 8 November 2007 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Directive of the European Parliament and of the Council amending Directive 97/67 with regard to the full accomplishment of the internal market of Community postal services (OJ 2007 C 307 E, p. 22)).

55 Points 2.5.2.2, 2.5.2.3 and 2.5.2.4 of the orders for reference do not identify any specific obligation which could be described as ‘disproportionate, illogical and excessive’.

56 Point 2.5.2.5 et seq. of the orders for reference.

65. In my opinion, it is not possible to identify any lack of proportion in the obligations laid down in Article 11 of the Regulation on qualifying certificates. The obligations relating to users, as set out in Article 11(2) (having sight of the undertaking's trade marks, publication of the service charters and respect for the general provisions in that field) appear quite logical to me. The same applies to the 'reporting' obligations laid down in Article 11(3) (transmission to the AGCom or the competent ministry of details relating to the activity and complaints and the reporting of any changes occurring since the authorisation was first issued).

66. As regards Article 11(1) of the Regulation on qualifying certificates, most of the debate has focused on the obligation in point (f), with which I shall deal below. I do not believe that the rest of the obligations in that paragraph are disproportionate: some (points (a) and (b)) concern the hiring of and the rules applicable to staff, who must not have any relevant previous convictions, and compliance with national provisions and agreements relating to terms and conditions of employment; others (points (c), (d) and (e)) deal with relationships between operators and the administrative authorities, including settlement of the charges payable for the tasks of verification and monitoring entrusted to the administrative authorities, contribution to the costs of the AGCom, and the duty to notify operators of any amendments to the original requirements.

67. Although it is ultimately for the referring court to carry out that assessment, it is, I repeat, my view that the obligations referred to are appropriate (and not excessively onerous) for the purposes of the provision of postal services in a context where operators' freedom to conduct business is combined with the imposition of minimum rules of orderly functioning, under the supervision of the public authorities to which this is entrusted.

D. Questions 3 and 4

1. Summary of the parties' positions

68. Confetra⁵⁷ proposes a literal interpretation of Article 9(1) and (2) and Article 7(4) of Directive 97/67, from which it concludes that the obligation to contribute to the universal-service compensation fund should be imposed only on the operators providing that service (and not, therefore, on the applicants). EU law precludes national legislation which provides for an *automatic* obligation to contribute to that fund without making a distinction based on the situation of the contributors or that of the relevant markets.

69. AICAI and others and UPS share Confetra's view. They also argue that, from a literal, teleological, systematic and historical perspective, the reference to 'authorisations' in Article 9(2), second subparagraph, of Directive 97/67 does not encompass the authorisations referred to in Article 9(1), from which it follows that only universal service operators are required to contribute to the compensation fund. AICAI and others and UPS submit that recital 27 of Directive 2008/6 bears out that interpretation.

70. By contrast, Poste Italiane and the Italian Government submit that Article 3(12) of Legislative Decree No 261/1999, concerning contributions to the universal service compensation fund by providers of postal services which do not fall within the scope of the universal service, does not apply directly. In their submission, application of that provision is conditional on verification by the AGCom of the net cost and the unfairness of the financial burden on the provider of that service and on its method of financing. They argue that, in accordance with Article 11(1)(f) and Article 15(2) of the

⁵⁷ First, it submits that the two questions have been referred in the alternative, in the event that the other two are answered in the negative.

Regulation on qualifying certificates, the contribution to that fund is assessed on a case-by-case basis and depends on the interchangeability of the services provided with the services falling within the scope of the universal service, the features of which evolve as a result of economic, technological and social factors.

71. Poste Italiane and the Italian Government state that, despite its unfortunate wording, Article 9(2) of Directive 96/67 refers to authorisations in general terms and is not limited to the universal service authorisations referred to in the first subparagraph, even though the concatenation of the two subparagraphs may give that impression. The literal, systematic, logical and teleological interpretations of the provision confirm that view.

72. The French Government, which took part in the hearing only to reply to these two questions, argues that, owing to the specific features of express mail undertakings, the added value of their services, the use made of them by their customers and their pricing, they should not be required to contribute to the compensation fund.

73. The Commission questions the admissibility of the questions, arguing that they are hypothetical, since the AGCom has currently not adopted any resolution imposing on the undertakings concerned the obligation to contribute to the compensation fund. In addition, it shares the view of Poste Italiane and the Italian Government regarding the possibility of requiring a contribution to that fund from undertakings offering services which are interchangeable with those provided in the context of the universal service.

2. *Legal analysis*

a) Admissibility of the questions referred for a preliminary ruling

74. The Commission's plea concerning the hypothetical nature of the questions calls for an examination of the admissibility of this part of the reference for a preliminary ruling.

75. It was pointed out at the hearing that the AGCom has not yet decided to create the universal-service compensation fund and, therefore, has not required any undertakings to contribute to it.⁵⁸ If that is the case — which it is for the referring court to ascertain — Questions 3 and 4 of the reference for a preliminary ruling are based on an assumption about the future which is as yet uncertain and this makes the questions inadmissible.⁵⁹

76. At the very most, Question 3 could be ruled admissible if it is construed as an abstract expression of uncertainty surrounding the compatibility with Directive 97/67 of national provisions which, for the future, may permit — but not compel — a contribution to the compensation fund to be required from holders of a general authorisation.

77. At all events, in case the Court decides to reject the plea of inadmissibility, I shall set out my view on both questions, which may be answered together.

⁵⁸ AICAI's representative acknowledged at the hearing that the operators' concern related to the *risk* that such a fund might be established and that operators might be required to finance it in the future. After stating that Italian postal legislation was in a state of development, the representative agreed that, as the legislation stood, those operators were faced with a hypothetical, rather than an actual, obstacle.

⁵⁹ See, in that connection, judgment of 15 September 2011, *Unió de Pagesos de Catalunya* (C-197/10, EU:C:2011:590, paragraphs 17 and 18 and the case-law cited).

b) Substance

78. The judgment in *DHL Express (Austria)*⁶⁰ has already confirmed that Article 9(2) of Directive 97/67 is applicable to general authorisations. The Court stated, in particular, that it may be inferred from Article 9(2), second subparagraph, of Directive 97/67 that the term ‘authorisations’ applies both to the (individual) authorisations referred to in Article 9(2), first subparagraph, and to the (general) authorisations referred to in Article 9(1).

79. Although the reference for a preliminary ruling in that case concerned Article 9(2), second subparagraph, fourth indent, of that directive, the uncertainty focused on the meaning of the term ‘authorisations’, which the Court examined in relation to all the indents in that provision.

80. Accordingly, there is, in principle, nothing to prevent the Member States from making the grant of general authorisations conditional on the obligation to contribute to the compensation fund.

81. The establishment of a fund of that kind, in accordance with the conditions referred to in Article 7(4) of Directive 97/67, is one of the methods made available to the Member States for financing the universal service. As I observed above, the universal service is, in fact, a balancing mechanism in the process of liberalisation and opening-up to competition effected by Directive 2008/6. The contributions by postal service providers to the financing of the universal service is intended to establish some parity between them, by requiring new entrants who do not incur the same costs as operators entrusted with the universal service⁶¹ to pay into that fund and contribute to the financing of certain obligations based on the principle of solidarity.

82. Recital 27 of Directive 2008/6 makes it possible to request postal service providers to contribute to the financing of that fund. Naturally, that stipulation includes operators holding general authorisations. It suffices if the postal services they provide under those authorisations (which ‘do not ... have to cover all the features of the universal service’) may, from a user’s perspective, be regarded as displaying ‘inter-changeability to a sufficient degree’ with the universal service.

83. If users can receive the service from a postal undertaking as an alternative to that supplied by the universal service provider, it may be concluded that the two services are *substitutable*, which, I repeat, is sufficient for it to be acceptable to require the former to contribute to the compensation fund.⁶²

84. I believe that the Italian legislation cited by the referring court satisfies that model. First, Article 6(1*bis*) and Article 10(2) of Legislative Decree No 261/1999 provide for holders of general authorisations to contribute to the universal-service compensation fund where they supply services that are *substitutable* for those included within the scope of the universal service.

85. Second — and this is a key legislative detail — Article 11(1)(f) and Article 15(2) of the Regulation on qualifying certificates govern, in identical terms,⁶³ the obligation to contribute to that fund, referring to the conditions set out in recital 27 of Directive 2008/6. I do not see how a national provision which precisely because it refers to conditions laid down in Directive 2008/6 for the purpose of determining the scope of the obligation to finance the compensation fund could be regarded as contrary to the directive.

⁶⁰ Judgment of 16 November 2016 (C-2/15, EU:C:2016:880, paragraphs 22 to 28). See also point 28 et seq. of the Opinion of Advocate General Mengozzi in that case (EU:C:2016:168).

⁶¹ According to the Commission, in 2015, the universal service provider in all the Member States continued to be the historical public postal operator (SWD(2015) 207 final, p. 13).

⁶² Naturally, in that situation, it will be necessary to comply with the other stipulations of Directive 97/67 in that regard (including the stipulation that it is not lawful, for the same elements of the universal service or parts of the national territory, to impose universal service obligations and, at the same time, financial contributions to a sharing mechanism).

⁶³ It should be recalled that, according to those provisions, contributions to the financing of the cost of providing the universal service are conditional on satisfaction of the conditions referred in recital 27 of Directive 2008/6.

86. Accordingly, I can see no contradiction between those provisions of the Italian legislation and Directive 97/67. If, in the future, the AGCom decides to establish that mechanism and require certain undertakings to make a contribution, that — and not now — will be the time when it will be necessary to examine the extent to which the criteria derived from Directive 97/67 are satisfied.

V. Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy):

- (1) Article 2(1), (1a) and (6) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC, does not preclude national legislation on the postal sector which includes within its scope the services of hauliers, freight forwarders and express couriers where they carry out the activities of clearance, sorting, transport and distribution of postal items, and which excludes from its scope 'transport-only' services.
- (2) Article 9(1) and Article 2(19) of Directive 97/67 and the principle of proportionality do not preclude national legislation, like that applied in the main proceedings, which imposes on postal operators providing the services of hauliers, freight forwarders and express couriers the requirement to obtain a general authorisation.
- (3) Article 7(4) and Article 9(2) of Directive 97/67 do not preclude national legislation, like that applied in the main proceedings, which permits the imposition on holders of general authorisations of the obligation to contribute to the financing of the compensation fund in respect of universal service costs, where the conditions referred to in recital 27 of Directive 2008/6 are satisfied.