

JUDGMENT OF THE COURT (First Chamber)

18 December 2007^{*}

In Case C-220/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Audiencia Nacional (Spain), made by decision of 15 March 2006, received at the Court on 15 May 2006, in the proceedings

Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia

v

Administración General del Estado,

THE COURT (First Chamber),

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

^{*} Language of the case: Spanish.

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 June 2007,

after considering the observations submitted on behalf of:

- the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia, by J.M. Piqueras Ruíz, abogado,
- the Spanish Government, by F. Díez Moreno, acting as Agent,
- the Belgian Government, by A. Hubert, acting as Agent,
- the Austrian Government, by M. Fruhmann, acting as Agent,
- the Commission of the European Communities, by X. Lewis and K. Simonsson, acting as Agents, assisted by C. Fernández and I. Moreno-Tapia Rivas, abogadas,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2007,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC, read in conjunction with Article 86 EC, in the context of the liberalisation of postal services and in light of Community rules governing public service contracts.
- ² This reference has been made in the course of proceedings between the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Trade Association of Mail Delivery and Handling Companies, 'the Asociación Profesional') and the Administración General del Estado, Ministerio de Educación, Cultura y Deporte (State administration, Ministry of Education, Culture and Sport, 'the Ministerio'), concerning the latter's decision to award, without a public call for tenders, postal services to the Sociedad Estatal Correos y Telégrafos SA (Public corporation for postal and telegraphical services, 'Correos'), which is the provider of the universal postal service in Spain.

Legal context

Community legislation

Directive 97/67/EC

- 3 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) establishes, pursuant to its Article 1, common rules concerning, inter alia, the provision of a universal postal service within the Community and the criteria defining the services which may be reserved for universal service providers.
- 4 Pursuant to Article 3(1) of Directive 97/67, 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.
- 5 In accordance with Article 3(4) of Directive 97/67:

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

- the clearance, sorting, transport and distribution of postal items up to two kilograms,

- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,

- services for registered items and insured items.’

6 Article 7 of Directive 97/67, which falls under Chapter 3 of the Directive, entitled ‘Harmonisation of the services which may be reserved’, provides in paragraphs 1 and 2:

‘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.’

Directive 92/50/EEC

- 7 According to Article 1(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1, 'Directive 92/50'), 'public service contracts' means contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of contracts listed in subparagraphs (i) to (ix) of that provision.
- 8 In accordance with Article 1(b) of Directive 92/50, 'contracting authorities' means 'the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.' Subparagraph (c) of Article (1) defines 'service provider' as 'any natural or legal person, including a public body, which offers services'.
- 9 Article 3(2) of Directive 92/50 specifies that contracting authorities are to ensure that there is no discrimination between different service providers.
- 10 Article 6 of Directive 92/50 reads as follows:

'This Directive shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the [EC] Treaty.'

- 11 Subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, read in combination with category 4 in Annex I A to the same Directive, provides that it applies to public service contracts covering transport of mail by land and by air which are awarded by the contracting authorities listed in Article 1(b) of Directive 92/50, other than those referred to in Annex I to Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), and where the estimated value net of VAT is not less than the equivalent in euros of 200 000 SDR [special drawing rights].

- 12 Article 7(5) of Directive 92/50 provides:

‘In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

- in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;
- in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.’

- 13 In accordance with Article 8 of Directive 92/50, contracts which have as their object services listed in Annex I A to the Directive shall be awarded in accordance with the provisions of Titles III to VI of the Directive, which means, in particular, that they must be awarded by a call for tenders and made the subject of appropriate publicity.

National legislation

- ¹⁴ According to Law 24/1998 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, which transposes Directive 97/67 into Spanish national law, postal services are considered to be services of general interest provided under conditions of free competition. Only the universal postal service is considered to be a public service or is subject to public-service obligations. Article 18 of Law 24/1998 exclusively reserves some services to the provider of universal postal service.
- ¹⁵ The provider of that universal postal service in Spain, namely Correos, is a public limited company whose capital is wholly state-owned.
- ¹⁶ According to Article 11 of the Law on public procurement (Ley de Contratos de las Administraciones Públicas), the consolidated text of which was approved by Royal Legislative Decree 2/2000 (Real Decreto Legislativo 2/2000 por el que se aprueba el texto refundido de la Ley de Contratos de las Administraciones Públicas) of 16 June 2000 ('Law on public procurement'), contracts awarded by public authorities shall comply, subject to the exceptions provided for by that Law, with the principles of advertising and competition and, in any event, shall always observe the principles of equal treatment and non-discrimination.
- ¹⁷ It is apparent from Article 206(4) of the Law on public procurement that, as a rule, the award of contracts for the provision of postal services comes, from a contractual point of view, within the scope of public procurement governed by that Law.

- 18 However, Article 3(1)(d) of the Law on public procurement excludes from its scope of application cooperation agreements which, in accordance with the specific provisions governing them, are concluded by the administration with natural or legal persons governed by private law, in so far as the subject-matter of such agreements does not fall within the scope of public procurement governed by the said Law or by administrative rules.
- 19 According to the Audiencia Nacional's analysis of the legal context in which the case before it is to be placed, such a cooperation agreement is a legal transaction which is not subject to the statutory rules governing public procurement and, therefore, the principles of competitiveness, advertising and free competition which are a feature of the sphere of public procurement do not apply to such a transaction.
- 20 Article 58 of Law 14/2000 concerning Tax, Administrative and Public Order Measure (Ley 14/2000 de medidas Fiscales, Administrativas y de Orden Social) of 29 December 2000 ('Law 14/2000') provides that public authorities may conclude cooperation agreements with Correos such as those referred to in Article 3 of the Law on public procurement, in order to provide services connected with the objects of that company.
- 21 According to the findings of the Audiencia Nacional, having regard to the objects of Correos as defined in Article 58 of Law 14/2000, the possibility of concluding such cooperation agreements is not limited to non-liberalised or reserved postal services, but covers the management and operation of any postal service. Therefore, the possibility of concluding cooperation agreements is not restricted to the universal postal service and does not, within that universal postal service, distinguish services that are reserved from those that are not.

- 22 In addition, the Audiencia Nacional states that, in accordance with Article 58 of Law 14/2000, Correos is under an obligation to provide certain postal services. Among Correos' duties is that of providing any services connected with its company objects that may be entrusted to it by the public authorities. Therefore, one of the parties lacks the intention to conclude a contract.

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

- 23 At the end of a negotiated procedure without a public call for tenders, the Ministerio and Correos signed a cooperation agreement on 6 June 2002 for the provision of postal and telegraphical services (Convenio de colaboración para la prestación de servicios postales y telegráficos, 'the Cooperation Agreement').
- 24 In accordance with the Cooperation Agreement, Correos is to provide postal and telegraphical services for the Ministerio covering the following items:
- letters (ordinary, registered and express), local, inter-city and international, with no weight or size limit;
 - packages (postal, blue and international) with no weight or size limit;
 - the express national postal service and international EMS ('Express Mail Service'), with no weight or size limit, and

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

- 25 Since it depends on turnover, the financial value of the services provided is not specified. The estimate given before the Audiencia Nacional, which is not disputed, is that of a sum of more than EUR 12 020.42 per annum.
- 26 The Cooperation Agreement was concluded for an indefinite term and was still in force at the date of the order for reference.
- 27 The Asociación Profesional brought an appeal before the Ministerio in which it challenged the administrative decision awarding, by means of the Cooperation Agreement, liberalised postal services without a public call for tenders.
- 28 By decision of 20 March 2003, the Ministerio rejected that appeal on the grounds that the procedure it had adopted to award the postal services was based on the existence of a cooperation agreement, which fell outside the rules governing public procurement and was therefore not subject to the rules relating to advertising and free competition.
- 29 In this regard, the Ministerio took the view that it had not concluded a contract with Correos at all, but that the latter provided its services on the basis of a cooperation agreement concluded pursuant to Article 3(1)(d) of the Law on public procurement and Article 58(2)(5) of Law 14/2000.

30 It is the Ministerio's rejection decision of 20 March 2003 which is the subject of the Asociación Profesional's action before the Audiencia Nacional.

31 According to the Audiencia Nacional, the outcome of the case before it depends on the interpretation of Community law. The Court may hold that the use of cooperation agreements is incompatible with the rules on advertising and free competition that apply to the award of public contracts, by taking the view that such agreements can only be used in the sphere of postal services reserved by law to the universal service provider, or that they are incompatible with the abovementioned rules, also in that sphere. Should the Court find accordingly, it would have to be concluded that a cooperation agreement like that in issue in this case is contrary to law, and its content would be null and void, either in its entirety or only in so far as it extends beyond those postal services for which the Court considers it could lawfully be used.

32 In those circumstances, the Audiencia Nacional decided to stay proceedings and to refer to the Court the following question for a preliminary ruling:

'Are Articles 43 [EC] and 49 [...] EC, in conjunction with Article 86 thereof, as applied within the framework of the liberalisation of the postal services established by Directives 1997/67/EC and 2002/39/EC and within the framework of the rules governing public procurement introduced by the ad hoc directives, to be interpreted as precluding an agreement whose subject-matter includes the provision of postal services, both reserved and non-reserved and, therefore, liberalised, concluded between a department of the State Administration and a state company whose capital is wholly state-owned and which is furthermore, the universal postal service provider?'

On the question for a preliminary ruling

- 33 As a preliminary point, it must be held that, even though the Audiencia Nacional refers in its question to 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), that directive cannot be applied in the main proceedings. Pursuant to Article 2(1) of that directive, Member States were given until 31 December 2002 to transpose the directive into national law.

Admissibility

- 34 The Spanish Government considers that the question for a preliminary ruling is inadmissible in as far as, in actual fact, the Court is being asked whether the Cooperation Agreement complies with the directives on the award of public service contracts and the liberalisation of postal services, which is a question that falls under the jurisdiction of the national court.
- 35 It must be held at the outset that neither the wording of the question referred nor the necessary grounds supporting it, as set out in the order for reference, indicate that the Audiencia Nacional asks the Court to decide whether the Cooperation Agreement complies with Community law.
- 36 In addition, it must be observed that whilst the Court does not have jurisdiction under Article 234 EC to apply the rules of Community law to a particular case or to

judge the compatibility of provisions of national law with those rules, it may provide a national court with all the elements relating to the interpretation of Community law which may be useful to it in assessing the effects of the provisions of that law (see Case C-181/00 *Flightline* [2002] ECR I-6139, paragraph 20).

- 37 Therefore, the reference for a preliminary ruling must be considered to be admissible.

Substance

- 38 By its question, the Audiencia Nacional asks, essentially, whether Community law must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of both reserved and non-reserved postal services to a public limited company whose capital is wholly state-owned and which is, in that State, the provider of the universal postal service.

Reserved postal services within the meaning of Directive 97/67

- 39 As a preliminary point, it must be recalled that Article 7 of Directive 97/67 permits Member States to reserve some postal services for the provider(s) of the universal postal service to the extent necessary to ensure the maintenance of that service. Consequently, in so far as postal services are, in a manner consistent with that directive, reserved for a single universal service provider, such services are by necessity not subject to competition, given that no other economic operator is authorised to offer those services.

- 40 The fact remains that, as regards such reserved services, Community rules in the field of public procurement, which have as their principal objective the free movement of services and the opening-up to undistorted competition in all the Member States, cannot be applied (Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44, and Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 58).
- 41 Therefore, the answer to the question referred must be that Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with Directive 97/67, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.

Non-reserved postal services within the meaning of Directive 97/67

- 42 It is only in regard to postal services that are non-reserved within the meaning of Directive 97/67 that it must be examined whether, in concluding a cooperation agreement like the one in issue in the main proceedings, Community rules on public procurement must be observed.

— Directive 92/50

- 43 In the first place, it must be examined whether an agreement like the one in issue in the main proceedings came within the scope of the directive that is relevant to the public procurement of postal services in the period relevant to the case before the Audiencia Nacional, namely Directive 92/50.

- 44 Directive 92/50 requires that the award of the public service contracts to which it applies must comply with certain requirements concerning procedure and advertising.
- 45 According to the actual wording of Article 1(a) of Directive 92/50, a public service contract presupposes the existence of a contract for pecuniary interest concluded in writing between a service provider and a contracting authority within the meaning of Article 1(b).
- 46 As the Advocate General observed in point 63 of his Opinion, the Ministerio is indeed a contracting authority and Correos a service provider within the meaning of the provisions referred to in the preceding paragraph. In addition, it is not contested that the Cooperation Agreement was concluded in writing and for pecuniary interest.
- 47 However, given that the Audiencia Nacional only states that the value of the services provided under the said contract exceeds EUR 12 020.42 per annum, this raises the question whether that figure reaches the threshold of 200 000 SDR laid down in subparagraph (ii) of the second indent of Article 7(1)(a) of Directive 92/50, which, in the period relevant to the main proceedings, amounted to EUR 249 681.
- 48 It is for the Audiencia Nacional to determine whether, in the light of the national provisions that transpose the second indent of Article 7(5) of Directive 92/50, the threshold of EUR 249 681 is reached.
- 49 Assuming that that threshold is reached, this raises the question whether the Cooperation Agreement is in fact a contract within the meaning of Article 1(a) of Directive 92/50. The Spanish Government submits that the agreement is not

contractual but instrumental, given that Correos is unable to refuse to enter into such an agreement, but is under an obligation to accept.

- 50 In this respect, it must be noted that the definition of a public service contract is a matter of Community law, with the result that the classification of the Cooperation Agreement under Spanish law is irrelevant for the purposes of determining whether it falls within the scope of Directive 92/50 (see, to that effect, Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 36, and Case C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 30).
- 51 Admittedly, in paragraph 54 of its judgment in Case C-295/05 *Asemfo* [2007] ECR I-2999, the Court held that the requirement for the application of the directives governing the award of public service contracts relating to the existence of a contract was not met where the State company in issue in the case that gave rise to the judgment had no choice as to the acceptance of a demand made by the competent authorities in question or as to the tariff for its services, a matter which was for the referring court to establish.
- 52 However, that reasoning must be read in its specific context. It follows on from the finding that, under Spanish legislation, that State company is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned, the Court having already held, in a context different from that in the case that gave rise to the judgment in *Asemfo*, that being an instrument and technical service of the Spanish Administration, the company in issue is required to implement only work entrusted to it by the General Administration of that State, the Autonomous Communities or the public bodies subject to them (*Asemfo*, paragraphs 49 and 53).

53 Correos, as the provider of the universal postal service, carries out an entirely different task, which means in particular that its customers consist of any person wishing to use the universal postal service. The mere fact that that company has no choice as to the acceptance of a demand made by the Ministerio or as to the tariff for its services cannot automatically entail that no contract was concluded between the two entities.

54 In fact, such a situation is not necessarily different from that which arises where a private customer wishes to use services provided by Correos coming within the scope of the universal postal service, since it is in the very nature of the task of a provider of that service that, in such a situation, he is also required to provide the services requested and must do so, if necessary, for a fixed tariff or, in any event, for a price that is transparent and non-discriminatory. There is no question that such a relationship must be called contractual. It is only if the agreement between Correos and the Ministerio were in actual fact a unilateral administrative measure solely creating obligations for Correos — and as such a measure departing significantly from the normal conditions of a commercial offer made by that company, a matter which is for the Audiencia Nacional to establish — that it would have to be held that there is no contract and that, consequently, Directive 92/50 could not apply.

55 In the course of that examination, the Audiencia Nacional will have to consider, in particular, whether Correos is able to negotiate with the Ministerio the actual content of the services it has to provide and the tariffs to be applied to those services and whether, as regards non-reserved services, the company can free itself from obligations arising under the Cooperation Agreement, by giving notice as provided for in that agreement.

56 The other arguments submitted by the Spanish Government to show that a cooperation agreement like the one in issue in the main proceedings falls outside the rules on public procurement must also be rejected.

- 57 The Spanish Government submits, in particular, that the Cooperation Agreement cannot, in any event, be subject to the rules on public procurement because the ‘in-house’ criteria laid down in the case-law of the Court are fulfilled.
- 58 In this regard, it is important to recall that, according to the Court’s settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it (see Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; *Stadt Halle and RPL Lochau*, paragraph 49; *Carbotermo and Consorzio Alisei*, paragraph 33; and *Asemfo*, paragraph 55).
- 59 It is not necessary to analyse in greater detail whether the first of the two conditions referred to in the preceding paragraph is fulfilled, given that it is enough to hold that, in the case in the main proceedings, the second condition is not fulfilled. It is not contested that Correos, as provider of the universal postal service in Spain, does not carry out the essential part of its activities with the Ministerio or with public authorities in general, but that that company provides postal services to an unspecified number of customers of that postal service.
- 60 The Spanish Government submits however that the relationship between the public authority and a company with exclusive rights is, by its very nature, exclusive, which implies a degree of exclusivity that is higher than in the case of ‘essential activity’. Correos has an exclusive right because the company is required, pursuant to Article 58 of Law 14/2000, to provide public authorities with services connected with its company objects, which includes reserved and non-reserved services.

61 In this respect, it must be held that, assuming that that obligation could effectively be called an exclusive right, a matter which is for the Audiencia Nacional to determine, such a right cannot satisfy, in the context of the analysis that must be carried out in relation to the two conditions recalled in paragraph 58 of the present judgment, the requirement that the relevant service provider must carry out the essential part of its activities with the entity or the entities that control it.

62 That last requirement is aimed particularly at ensuring that Directive 92/50 remains applicable in the event that an undertaking controlled by one or more entities is active in the market and therefore likely to be in competition with other undertakings (see, by analogy, *Carbotermo and Consorzio Alisei*, paragraph 60). It is not contested that Correos is active on the Spanish postal market, where it is, except as regards reserved services within the meaning of Directive 97/67, in competition with other businesses active in the postal sector, of which, according to the submissions of the Spanish Government, there are approximately 2 000.

63 Therefore, it must be held that a cooperation agreement like the one in issue in the main proceedings does not fulfil the conditions noted in paragraph 58 of the present judgment and cannot on that basis fall outside the scope of Directive 92/50.

64 However, the existence of an exclusive right may justify non-application of Directive 92/50 given that, pursuant to Article 6 of that directive, the Directive ‘shall not apply to public service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 1(b) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision which is compatible with the Treaty’.

65 Without there being any need to examine whether Correos fulfils the first of those three conditions set out in Article 6 — concerning the status of Correos as a

contracting authority —, and assuming that Correos enjoys, pursuant to Article 58 of Law 14/2000, an exclusive right to provide public authorities with postal services connected with its company objects, it is enough to hold that, in any event, the third of those conditions is not met, namely that the provision granting the exclusive right must be compatible with the Treaty.

⁶⁶ That national provision — assuming that it does confer on the national provider of the universal postal service the exclusive right to provide to public authorities the postal services that, pursuant to Article 7 of Directive 97/67, are not reserved, and to which this analysis is limited — is incompatible with the purpose of that directive.

⁶⁷ As is apparent from the case-law of the Court, Member States do not have the option of extending the services reserved for the universal postal service provider pursuant to Article 7 of Directive 97/67, as such extension goes against the purpose of the Directive, which, according to recital 8, aims to establish gradual and controlled liberalisation in the postal sector (Case C-240/02 *Asempre and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería* [2004] ECR I-2461, paragraph 24).

⁶⁸ This finding applies not only to reserving a service that is horizontal, in other words reserving a certain type of postal service as such, but, in order to ensure the effectiveness of Article 7 of Directive 97/67, also applies to reserving a service which is vertical and which concerns, as is the case in the main proceedings, the exclusive provision of postal services to certain customers. As the Commission of the European Communities observed, applying the Spanish rules in issue in the main proceedings would mean that, in practice, all postal services needed by a Spanish public body could potentially be supplied by Correos, to the exclusion of all other postal operators, which would clearly be contrary to the purpose of Directive 97/67.

⁶⁹ Therefore, the answer to the question referred must be that Directive 92/50 must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies:

- reach the relevant threshold as provided for in Article 7(1) of Directive 92/50 and
- constitute contracts within the meaning of Article 1(a) of Directive 92/50 concluded in writing for pecuniary interest,

which are matters for the national court to establish.

- Requirements under the Treaty for the award of public service contracts

⁷⁰ In so far as the national legislation in issue in the main proceedings applies to contracts that do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, it must, in the second place, be examined whether such legislation meets the requirements under the Treaty for the award of public service contracts.

- 71 Although certain contracts are excluded from the scope of Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on grounds of nationality in particular (Case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32 and the case-law cited there).
- 72 That is particularly the case in relation to public service contracts whose value does not reach the thresholds fixed by Directive 92/50. The mere fact that the Community legislature considered that the strict special procedures laid down in the directives on public procurement are not appropriate in the case of public contracts of small value does not mean that those contracts are excluded from the scope of Community law (Order in Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 19, and *Commission v France*, paragraph 33).
- 73 Treaty provisions that specifically apply to public service contracts whose value does not reach the thresholds established by Directive 92/50 include, in particular, Articles 43 EC and 49 EC.
- 74 Besides the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers is also to be applied to such public service contracts even in the absence of discrimination on grounds of nationality (see, by analogy, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 20).
- 75 The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the contracting public

authority to verify that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the public service contract to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, by analogy, *Parking Brixen*, paragraph 49, and *ANAV*, paragraph 21).

⁷⁶ As a rule, a complete lack of any call for competition in the case of the award of a public service contract like that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency (see, by analogy, *Parking Brixen*, paragraph 50, and *ANAV*, paragraph 22).

⁷⁷ Furthermore, it follows from Article 86(1) EC that the Member States must not maintain in force national legislation which permits the award of public service contracts without a call for tenders since such an award infringes Article 43 EC or 49 EC or the principles of equal treatment, non-discrimination and transparency (see, by analogy, *Parking Brixen*, paragraph 52, and *ANAV*, paragraph 23).

⁷⁸ Admittedly, the combined effect of paragraphs (1) and (2) of Article 86 EC is that paragraph (2) of the Article may be relied upon to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to, inter alia, the provisions of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community (Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 52).

- 79 It is also necessary to point out that an undertaking like Correos, responsible by virtue of the legislation of a Member State for securing the universal postal service, constitutes an undertaking entrusted with the operation of services of general economic interest for the purposes of Article 86(2) EC (see, to that effect, *TNT Traco*, paragraph 53).
- 80 However, even on the assumption that the duty imposed on Correos, pursuant to Article 58 of Law 14/2000, to provide public authorities with services connected with its company objects could be considered to be an exclusive right for the benefit of Correos, the fact remains that Article 86(2) EC cannot be used to justify national legislation like that in issue in the main proceedings in so far as it concerns non-reserved postal services within the meaning of Directive 97/67.
- 81 As the Advocate General observed in paragraph 99 of his Opinion, Directive 97/67 implements Article 86(2) EC with regard to the possibility of reserving certain postal services to the provider of the universal postal service. As recalled in paragraph 67 of this judgment, the Court has already held that Member States do not have the option of extending the services reserved for the universal postal service provider pursuant to Article 7 of Directive 97/67, as such extension goes against the purpose of the Directive, which aims to establish gradual and controlled liberalisation in the postal sector.
- 82 In this context, it must be recalled that, within the framework of Directive 97/67, account is taken of whether, in order to enable the universal postal service to be carried out under economically acceptable conditions, it is necessary to reserve some postal services to the provider of that universal postal service (Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 50).

83 Therefore, as regards non-reserved postal services within the meaning of Directive 97/67, to which this analysis is limited, Article 86(2) EC cannot provide the basis for justifying an exclusive right for the provider of the universal postal service to provide such services to public authorities.

84 The Spanish Government submits, however, that the Cooperation Agreement cannot be subject to the rules governing the award of public service contracts because of its nature, which is instrumental rather than contractual. Correos is unable to refuse to enter into a cooperation agreement like the one in issue in the main proceedings, but is under an obligation to accept it.

85 In this respect, it must be noted that, as observed in paragraph 54 of this judgment, only if the Cooperation Agreement is in actual fact a unilateral administrative measure creating obligations solely for Correos and departing significantly from the normal conditions of a commercial offer made by that company — which it is for the Audiencia Nacional to establish — would it have to be held that such a contract falls outside the Community rules on the award of public service contract.

86 As regards the argument of the Spanish Government according to which the Cooperation Agreement cannot be subject to the rules governing public procurement because it concerns an ‘in-house’ situation, it is admittedly the case that, in the sphere of public service contracts, the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression, is precluded if the control exercised by the contracting public authority over the entity to which the contract was awarded is similar to that which the authority exercises over its own departments and if that entity carries out the essential part of its activities with the controlling authority (see, by analogy, *Parking Brixen*, paragraph 62, and *ANAV*, paragraph 24).

87 However, as held in paragraph 63 of the present judgment, a cooperation agreement like the one in issue in the main proceedings does not fulfil the second of the conditions referred to in the preceding paragraph and therefore cannot, on that basis, fall outside the application of the rules set out in Articles 12 EC, 43 EC and 49 EC, as well as the general principles of which they are the specific expression.

88 Therefore, the answer to the question referred must also be that Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination on grounds of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of universal postal service, in so far as the contracts to which that legislation applies

- do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, and
- do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by that company,

which are matters for the national court to establish.

Costs

- ⁸⁹ 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:

- 1. Community law must be interpreted as not precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of postal services reserved, in a manner consistent with 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, to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service.**
- 2. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Commission Directive 2001/78/EC of 13 September 2001, must be interpreted as precluding legislation of a Member State that allows public**

authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider of the universal postal service, in so far as the contracts to which that legislation applies

- reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and**

- constitute contracts within the meaning of Article 1(a) of Directive 92/50, as amended by Directive 2001/78, concluded in writing for pecuniary interest,**

which are matters for the national court to establish.

- 3. Articles 43 EC, 49 EC and 86 EC, as well as the principles of equal treatment, non-discrimination by reason of nationality and transparency, must be interpreted as precluding legislation of a Member State that allows public authorities to entrust, without regard to the rules governing the award of public service contracts, the provision of non-reserved postal services within the meaning of Directive 97/67 to a public limited company whose capital is wholly state-owned and which, in that State, is the provider**

of universal postal services, in so far as the contracts to which that legislation applies

- do not reach the relevant threshold as provided for in Article 7(1) of Directive 92/50, as amended by Directive 2001/78, and**
- do not in actual fact constitute a unilateral administrative measure creating obligations solely for the provider of the universal postal service and departing significantly from the normal conditions of a commercial offer made by that company,**

which are matters for the national court to establish.

[Signatures]