

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 15 January 2009<sup>1</sup>

**I — Introduction**

1. In these proceedings, the High Court of Justice of England and Wales (Administrative Court) requests the interpretation of Article 13A(1)(a) of the Sixth Value Added Tax Directive,<sup>2</sup> which provides for exemption for the services supplied by ‘public postal services’. In particular, it must be ascertained what significance attaches to that concept in a liberalised market for postal services.

2. In the main proceedings, TNT Post UK Limited (‘TNT’) objects to the fact that all postal services supplied by Royal Mail Group Limited (‘Royal Mail’), the universal service provider in the United Kingdom, are exempt from value added tax (‘VAT’), whereas the services supplied by all other providers are subject to VAT. In the applicant’s view, a ‘public postal service’ no longer exists in the fully liberalised market of the United Kingdom, so that there is now no scope for exemption. If, on the other hand, the exemption is applicable to the universal service

provider, the question then arises as to whether all its services must be exempted or only certain services and, if so, which.

3. The views of the Member States which took part in the proceedings differ considerably. The spectrum of opinion ranges from agreement with the United Kingdom’s practice to rejection of any exemption in a liberalised market. No guarantee can therefore be given that the Sixth Directive is being uniformly interpreted and applied in that respect. Consequently, the Commission has already brought Treaty infringement proceedings against three Member States, in some cases because they do not apply the exemption, and in others because they extend the exemption too far.<sup>3</sup>

4. The answers to the questions raised here not only affect all private consumers who use postal services. The determination of the scope of the exemption may also influence the development of the markets for postal services in the Member States. Depending on which conclusion the Court reaches, its

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

<sup>2</sup> — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), replaced with effect from 1 January 2007 by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

<sup>3</sup> — See Press Release IP/07/1164 of 24 July 2007.

answers may result in a strengthening of the established universal service provider and make it more difficult for competing providers to emerge or have the opposite effect.

the supply of goods incidental thereto; ...'<sup>4</sup>

## II — Legal framework

### A — *Community law*

5. Article 13A of the Sixth Directive, headed 'Exemptions for certain activities in the public interest', states inter alia:

'1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

(a) the supply by the public postal services of services other than passenger transport and telecommunications services, and

6. Directive 97/67/EC ('the Postal Directive')<sup>5</sup> lays down uniform rules for the internal market in postal services. It governs, inter alia, the conditions for the provision of a universal postal service.

7. Article 2 of the Postal Directive contains, inter alia, the following definitions:

'2. public postal network: the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:

— the clearance of postal items covered by a universal service obligation from access points throughout the territory;

4 — Article 132 of Directive 2006/112/EC is virtually identical in its wording and likewise provides for exemption of the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto.

5 — 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 (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176, p. 21).

- the routing and handling of those items from the postal network access point to the distribution centre; specified quality at all points in their territory at affordable prices for all users.

- distribution to the addresses shown on items;
2. To this end, Member States shall take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users.

...

13. universal service provider: the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with Article 4 ...'
3. They shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum:

8. The obligations of Member States as regards the provision of a universal service are laid down, inter alia, in Article 3 of Directive 97/67, which contains the following provisions:
- one clearance;

- one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations...

'1. Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of

7. The universal service as defined in this Article shall cover both national and cross-border services.'

B — *National law*

9. Until the entry into force of Directive 2008/6/EC<sup>6</sup> on 27 February 2008, Article 7(1) of Directive 97/67 has worded as follows:

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

6 — Directive of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3). The Directive abolishes the possibility of reserving certain services as from 1 January 2011 (a longer period for implementation, until the end of 2012, applies to 11 Member States).

10. In the United Kingdom, the exemption of postal services, provided for in the Sixth Directive, was implemented by section 31(1) in conjunction with Schedule 9, Group 3, Items 1 and 2, of the Value Added Tax Act 1994 as amended in 2000. Under those provisions, the conveyance of postal packets by the Post Office company and the supply by the Post Office company of any services in connection with the conveyance of postal packets are exempt from VAT.

11. The 'Post Office company' is Royal Mail Holdings plc which, as a pure holding company, is non-trading. However, as the referring court has stated, the Commissioners for Revenue and Customs have extended the exemption enjoyed by the 'Post Office company' under the Value Added Tax Act 1994 as amended by the Postal Services Act 2000 to any wholly-owned subsidiary of Royal Mail Holdings plc providing postal services.

12. Section 4 of the Postal Services Act 2000 defines a 'universal postal service'. This comprises a postal service, in principle covering all points in the national territory, which must guarantee (i) at least one delivery every working day to the home or premises of every person in the United Kingdom and (ii) at least one collection of postal packets every working day from the access points set up for that purpose. In addition, as part of the universal service, inter alia, a service of conveying relevant postal packets from one place to another and the incidental services of

receiving, collecting, sorting and delivering such packets must be provided at affordable prices determined in accordance with a public tariff which is uniform throughout the United Kingdom

are supplied with postal services at uniform and affordable tariffs.

13. For the purposes of the Postal Services Act 2000, a universal service provider is deemed to be any person whose identity has been notified as such by the relevant Secretary of State to the European Commission in accordance with Article 4 of the Postal Directive and who has been informed of that fact.

16. Furthermore, in providing postal services, Royal Mail is also bound to create a sufficient network of access points for the general public, to ensure delivery to any address in the United Kingdom and collection of postal items from every access point on every working day, as well as compliance with certain quality standards, in particular rapid delivery of first class letter post, as a rule on the next working day.

### **III — The facts, the questions referred and the proceedings**

14. The United Kingdom postal market has been fully liberalised since 1 January 2006. Any suitable applicant can be granted an appropriate licence to convey all postal items without restrictions as to weight.

17. The integrated and nationwide postal network maintained by Royal Mail serves approximately 27 million addresses, 113 000 pillar boxes, 14 200 post offices and 90 000 business premises six days per week. Royal Mail employs a total of approximately 185 000 people in the United Kingdom.

15. Royal Mail is at present the only universal service provider in the United Kingdom designated to the Commission. Pursuant to the licence granted for this purpose, Royal Mail must comply with a number of conditions, and in particular must ensure that all points in the territory of the United Kingdom

18. Measured by reference to revenue, taking into account its letterpost business, around 90% of Royal Mail's activities are subject to regulations and conditions that have been imposed only on Royal Mail and not on any other postal service provider operating in the United Kingdom.

19. Since December 2002, TNT has held a licence to provide postal services and, as a consequence of liberalisation, is allowed, like Royal Mail, to convey all letters without restriction within the United Kingdom. At present, TNT provides only 'upstream services'. These include the collection, the mechanised and, in certain cases, manual sorting and the processing of mail and its delivery to central access points which are maintained by Royal Mail.

20. Royal Mail and TNT are required to pay a turnover-based licence fee. However, some of the licence conditions of the two postal service providers are substantially different. Royal Mail is subject, in particular, to more extensive requirements in terms of price control, service frequency, coverage, customer access, quality standards, complaints handling and arrangements for changing the terms and conditions on which postal services are supplied.

21. Moreover, under its licence, Royal Mail is obliged to provide TNT with 'downstream services'. These include the transport and the delivery to the recipients of mail which TNT has delivered to Royal Mail's central access points after pre-sorting and processing it.

22. While the Value Added Tax Act 1994 in its current version exempts Royal Mail from VAT on the conveyance of postal packets, other postal service providers such as TNT are liable without restriction for VAT at the

standard rate of 17.5% on the services provided by them.

23. According to TNT's estimates, business mail accounts for approximately 85% of all mail volumes in the United Kingdom. Approximately 40% of such mail is from businesses that are unable to recover all of the input VAT incurred by them, such as, in particular, financial service providers, who represent TNT's principal market for business mail. It is therefore in TNT's interest to minimise the amount of VAT it has to charge its business customers.

24. TNT therefore made an application to the High Court of Justice of England and Wales (Administrative Court) for judicial review of the lawfulness of the VAT exemption enjoyed by Royal Mail under Schedule 9, Group 3, of the Value Added Tax Act 1994. In those proceedings, the High Court, by order of 12 July 2007, referred the following questions to the Court of Justice for a preliminary ruling:

- '1 (a) How is the expression "the public postal services" in Article 13A(1)(a) of the Sixth VAT Directive (Direct-

- ive 77/388/EEC) (now Article 132(1) (a) of Directive 2006/112) to be interpreted?
- (b) Is the interpretation of that expression affected by the fact that postal services in a Member State have been liberalised, there are no reserved services within the meaning of Council Directive 97/67/EC, as amended, and there is one designated universal service provider that has been notified to the Commission pursuant to that Directive (such as Royal Mail in the United Kingdom)?
- (c) In the circumstances of the present case (which are as set out in (b) above) does that expression include
- (i) only the sole designated universal services provider (such as Royal Mail in the United Kingdom) or
- (ii) also a private postal operator (such as TNT Post)?
2. In the circumstances of the present case, is Article 13A(1)(a) of the Sixth VAT Directive (now Article 132(1)(a) of Directive 2006/112) to be interpreted as requiring or permitting a Member State to exempt all postal services provided by “the public postal services”?
3. If Member States are required or permitted to exempt some, but not all, of the services provided by “the public postal services”, by reference to which criteria are those services to be identified?
25. In the proceedings before the Court of Justice, TNT, Royal Mail, Ireland, the Greek, German, Finnish, Swedish and United Kingdom Governments and the Commission have submitted observations.

## IV — Legal assessment

### A — *The first question*

26. The first question is subdivided into three parts which I shall examine together. It is aimed in essence at determining the personal scope of Article 13A(1)(a) of the Sixth Directive. Under that provision, Member States are to exempt ‘the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto’ from VAT.

27. The High Court wishes to know whether, on a fully liberalised market for postal services, there can now be any such thing as ‘public postal services’ whose services are exempt and, if so, which postal service providers are covered by that concept.

28. TNT and the Finnish and Swedish Governments submit, with reference to the Opinion of Advocate General Geelhoed in *Dansk Postordreforening*,<sup>7</sup> that the exemption of postal services is no longer justified

following abolition of the reservation of certain services. Royal Mail, the other Member States taking part and the Commission, on the other hand, contend that, under present conditions, the universal service provider(s) should be regarded as public postal services whose services are exempt.

— Interpretation of ‘public postal service’ in the light of the regulatory context and of the meaning and purpose of the exemption

29. A preliminary point to note is that the exemptions listed in Article 13A of the Sixth Directive relate to activities in the public interest, as is also apparent from the heading of Article 13A. In addition to postal services, health and social care services and services in the fields of religion, education, culture and sport are also exempt from VAT under the provisions of Article 13A.

30. What those services have in common is that they satisfy basic needs of the population and are often provided by public, not-for-

<sup>7</sup> — Case C-169/02 [2003] ECR I-13329, point 79. That case did not proceed to judgment, since the reference for a preliminary ruling was withdrawn after the Opinion had been delivered.



profit bodies. In 1977, the legislature also included among those basic needs the supply of postal services. Those essential services are intended to be provided to the general public at a reasonable price and without the addition of VAT.<sup>8</sup>

31. On the one hand, in choosing the services which were to be exempt from VAT under Article 13 of the Sixth Directive, the Community legislature took as its starting point the exemptions which already existed in the Member States at the time of the adoption of the Directive. On the other hand, it tried to limit the number of exemptions, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person.<sup>9</sup>

32. Given their nature as derogations, the exemptions are to be interpreted strictly.<sup>10</sup> Article 13A of the Sixth Directive therefore does not cover every activity performed in the public interest, but only those which are listed and described in considerable detail in that

provision.<sup>11</sup> However, it does not follow from this that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect.<sup>12</sup>

33. In order to restrict their scope further, many exemptions require that the services be performed by particular persons or bodies. Medical care, for example, is exempt only where it is provided by medical personnel specifically qualified for that purpose (Article 13A(1)(c) of the Sixth Directive).<sup>13</sup>

34. A number of further exemptions apply only where the services concerned are provided by bodies governed by public law or certain other State-recognised establishments (see Article 13A(1)(b), (g), (h), (i), (n) and (p) of the Sixth Directive). This is based on the view that only where such services are provided by an institution under State control does there exist a special public interest justifying an exemption. State control can guarantee, in particular, the quality of the service and the reasonableness of its price.

8 — See, to that effect, with regard to Article 13A(1)(b) and (c) of the Sixth Directive, Case C-307/01 *d'Ambrumenil and Dispute Resolutions Services* [2003] ECR I-13989, paragraph 58, and Case C-106/05 *L.u.P.* [2006] ECR I-5123, paragraph 25.

9 — See the Commission proposal of 29 June 1973 for a Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, *Bulletin of the European Communities*, Supplement 11/73, p. 16.

10 — *D'Ambrumenil*, cited in footnote 8, paragraph 52; Case C-498/03 *Kingscrest and Montecello* [2005] ECR I-4427, paragraph 29; Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18; and Case C-253/07 *Canterbury Hockey Club and Others* [2008] ECR I-7821, paragraph 17.

11 — Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 18; *d'Ambrumenil*, cited in footnote 8, paragraph 54; and Joined Cases C-394/04 and C-395/04 *Ygeia* [2005] ECR I-10373, paragraph 15.

12 — *Haderer*, cited in footnote 10, paragraph 18, and *Canterbury Hockey Club and Others*, cited in footnote 10, paragraph 17.

13 — See also, in that regard, my Opinion in Joined Cases C-443/04 and C-444/04 *Sollefeld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, points 39 and 49.

35. Similarly with regard to the exemption of postal services under Article 13A(1)(a) of the Sixth Directive, the Court has already pointed out, in *Commission v Germany*,<sup>14</sup> that that provision covers only services which are performed by public postal services in the organic sense. The services exempted under Article 13A are not defined by reference to purely material or functional criteria.<sup>15</sup>

36. The wording used in Article 13A(1)(a) thus ensures that only services provided by the postal organisation itself directly to customers are exempted. In contrast, parts of a supply which third parties provide to the postal organisation, such as, for example, the transport of postal items by rail and air between different post offices, are not exempt.<sup>16</sup>

37. The Court has not, on the other hand, inferred from the use of the term '*public postal service*' that it refers only to State providers. On the contrary, it has taken the view that the exemption is also applicable in relation to services provided by a licensed private undertaking.<sup>17</sup> Unlike the other exemptions, Article 13A(1)(a) of the Sixth Directive specifically does not require that the postal

services be provided by a *body governed by public law*.

38. It is true that, at the time of the adoption of the Directive in 1977, there was also no need to differentiate between State and private providers, since postal services were then mainly provided only by State monopoly providers.

39. Since then, however, the organisation of postal services has changed considerably. In the course of the implementation of the Postal Directive, the State monopolies were gradually abolished and the market was opened up to competing providers.

40. It would not be consistent with the objectives of the Sixth Directive to reserve exemption from VAT in that environment solely to State providers of postal services or no longer to apply the exemption at all where a State provider no longer exists. Rather, commercial undertakings too can, in principle, constitute a public postal service within the meaning of Article 13A(1)(a) of the Sixth Directive, in so far as they provide postal services in the public interest in addition to or in place of the former State monopoly.<sup>18</sup>

<sup>14</sup> — Case 107/84 [1985] ECR 2655, paragraph 11.

<sup>15</sup> — *Commission v Germany*, cited in footnote 14, paragraph 13, and Case C-401/05 *VDP Dental Laboratory* [2006] ECR I-12121, paragraph 25.

<sup>16</sup> — *Commission v Germany*, cited in footnote 14, paragraphs 11 and 19.

<sup>17</sup> — See *Commission v Germany*, cited in footnote 14, paragraph 16.

<sup>18</sup> — See the Opinion of Advocate General Geelhoed in *Dansk Postordreforening*, cited in footnote 7, points 70 to 76.

41. As is apparent from the position of the exemption in Article 13A of the Sixth Directive, its meaning and purpose are to avoid imposing VAT and thereby raising the price of postal services which are regarded as part of the public services and the supply of which at a reasonable price is therefore in the general interest.<sup>19</sup>

42. That objective has not lost its significance as a consequence of the liberalisation of the market for postal services.

43. Accordingly, Article 2(2) of the Postal Directive assumes the continued existence of a ‘public postal network’ and defines this as the system of organisation and resources of all kinds used by the universal service provider (s). Article 3 of the Postal Directive ensures that, even where there is no State postal monopoly, users are to 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. Article 12 requires that the prices for services forming part of the universal service must be affordable and geared to costs and grants the discretionary power to formulate them as a uniform tariff applicable throughout the national territory.

44. By laying down those requirements for the universal service, the Community legislature has specified those services in which there is a particular public interest. However, the Postal Directive establishes only minimum requirements in that regard.<sup>20</sup> No conclusive inference can therefore be made from its provisions as to which providers and which services fall within the scope of the exemption from VAT in the particular regulatory context of a Member State.

45. Moreover, it is true that the Postal Directive and the Sixth VAT Directive are to be classed as belonging to two quite different regulatory spheres and that they have different regulatory objects, as the Swedish Government points out. The Postal Directive forms the general framework for the organisation of the postal markets and makes no reference whatsoever to the VAT treatment of postal services. The Sixth Directive, for its part, introduces a Community-wide system for VAT and relates only peripherally to postal services.

46. However, that does not preclude the reasoning which forms the basis of the provisions of the Postal Directive concerning the universal services provided by the public postal network from being taken into account in the interpretation of the Sixth Directive. That is because the concerns underlying both pieces of legislation overlap on this point: the intention to ensure the general provision of postal services at affordable prices.

19 — See above, points 29 and 30 of this Opinion.

20 — See, for example, the wording of the first sentence of Article 3(3) of the Postal Directive.

47. Under present-day conditions, that is a consideration in favour of regarding the operators of the *public postal network* who provide the universal service as *public postal services* within the meaning of Article 13A(1)(a) of the Sixth Directive.

48. However, Royal Mail, Ireland and the Greek, Swedish and United Kingdom Governments object to the Postal Directive being taken into account in the interpretation of the Sixth VAT Directive. They submit that the Postal Directive, which is based on Article 95 EC, cannot lead to an amendment of tax provisions which, pursuant to Article 93 EC, must be adopted unanimously. If the legislature had intended to introduce an adaptation of the VAT exemption for postal services, it could, for example, have amended the provision in the course of replacing the Sixth Directive by Directive 2006/112.<sup>21</sup>

49. However, those objections cannot be upheld. What is at issue in this case is not an amendment of the Sixth Directive, but its interpretation in the light of the purpose of the rule. Within the limits of the wording, it is necessary in this connection to take account of the factual and Community-law context at the time of applying the exemption.<sup>22</sup>

21 — Cited in footnote 2.

22 — See, to that effect, Case 283/81 *Cifit and Others* [1982] ECR 3415, paragraph 20, and Case C-173/06 *Agrover* [2007] ECR I-8783, paragraph 17.

50. It is thus consistent with the practice of the Court, when interpreting individual concepts of the Sixth Directive, to refer to relevant rules of Community law outside the field of tax law, in so far as they pursue concordant objectives. In *Abbey National*, for example, the Court interpreted the concept of management of special investment funds within the meaning of Article 13B(d)(6) of the Sixth Directive in the light of the corresponding definition in Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).<sup>23 24</sup>

— Application of the exemption following abolition of the reservation of certain services

51. TNT and the Finnish and Swedish Governments further submit, with reference to the Opinion of Advocate General Geelhoed in *Dansk Postordreforening*,<sup>25</sup> that the exemption is applicable only so long as reserved postal services still exist for certain providers. The Advocate General actually took the view that postal undertakings perform an exempt public task only if they provide reserved services. Services which, while forming part

23 — OJ 1985 L 375, p. 3.

24 — Case C-169/04 *Abbey National* [2006] ECR I-4027, paragraph 61 et seq.; for more detailed observations regarding the Court's practice, see point 73 et seq. of my Opinion in that case.

25 — Cited in footnote 7.

of the universal service, are nevertheless not reserved exclusively to one provider, are provided under normal conditions of competition and are purely commercial in character.<sup>26</sup>

52. In fact, Article 7 of the Postal Directive does not yet require full liberalisation, but permits the reservation of a strictly limited range of services for one or more providers. However, the United Kingdom and a number of other Member States no longer avail themselves of that option.

53. Nevertheless, under Article 4 of the Postal Directive, the Member States continue to be responsible, in a liberalised market, for ensuring that the universal service is guaranteed. They must, in particular, ensure that the requirements in respect of the quality and price of postal services, laid down in Articles 3 to 6 and 12 of the Postal Directive, are complied with by the universal service provider(s).

54. The United Kingdom has complied with those obligations by entrusting Royal Mail with responsibility for guaranteeing the universal service and by imposing appropriate conditions in the licence granted for that purpose. Those conditions of the universal service licence differ significantly from the

conditions under which other postal service providers operate in the United Kingdom, as the referring court has explained.

55. Even without the conferring of exclusive rights, universal service providers therefore do not provide their services in a completely free market organised solely on the basis of economic considerations. Rather, they also perform a task in the public interest and in doing so are subject to specific State control. Consequently, it is consistent with the objective of Article 13A(1)(a) of the Sixth Directive to classify universal service providers as 'public postal services' within the meaning of that provision and to exempt their services from VAT.

56. It must be borne in mind in this connection that, as is clear from recital 16 in the preamble to the Postal Directive, the reservation of certain services is intended to ensure the operation of the universal service under financially balanced conditions. Reservation is thus aimed at maintaining the financial balance of the universal service provider, in order to allow it to perform its task in the general interest.<sup>27</sup> Apart from the financing of the special burdens of the universal service, the reservation of certain services is thus not based on any more far-reaching considerations geared to the public interest. There is therefore no reason to make the exemption in Article 13A(1)(a) of the Sixth Directive

<sup>26</sup> — Opinion in *Dansk Postordreforening*, cited in footnote 7, point 79.

<sup>27</sup> — See Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 31 et seq., with reference to Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16, and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 5, concerning Article 86(2) EC.

dependent on the reservation of certain services, since safeguarding the universal service is just as much in the public interest if the financial basis for it does not have to be established by conferring exclusive rights.

treated differently in relation to the levying of VAT.<sup>29</sup> It includes the principle of elimination of distortion in competition as a result of differing treatment for VAT purposes.<sup>30</sup>

57. Moreover, the interpretation based on the reservation of certain services would result in Article 13A(1)(a) of the Sixth Directive losing all effect in a number of Member States. Notwithstanding the requirement that exemptions fall to be strictly construed, such a result must be avoided as far as possible.<sup>28</sup>

— Interpretation in the light of the principle of fiscal neutrality

58. Finally, it remains for me to examine the objection put forward by TNT and the Swedish and Finnish Governments that, in a liberalised market, exemption of the universal service infringes the principle of fiscal neutrality and harms competition.

59. The principle of fiscal neutrality, which is inherent in the common system of VAT and in compliance with which the exemptions must be interpreted, precludes economic operators carrying out the same transactions from being

60. It must be conceded to those parties that the principle of neutrality is in any event observed where the exemption is applied only to providers who perform reserved postal services. This is because the conferring of exclusive rights on one provider makes it impossible from the outset for other economic operators to carry out similar transactions whose differing tax treatment infringes the principle of neutrality.

61. However, it does not follow from this that the principle of neutrality is automatically infringed if exemption is not based on the nature of the services as reserved services, but applies generally to universal services. It is in fact compatible with the principle of neutrality to exempt only the services performed by the universal service provider,

28 — See above, point 32 of this Opinion and the references in footnote 12.

29 — Case C-216/97 *Gregg* [1999] ECR I-4947, paragraphs 19 and 20; *Kingscrest and Montecello*, cited in footnote 10, paragraph 29; *L.u.P.*, cited in footnote 8, paragraph 24; and Case C-363/05 *JP Morgan Fleming Claverhouse* [2007] ECR I-5517, paragraph 46.

30 — Case C-481/98 *Commission v France* [2001] ECR I-3369, paragraph 22, and *JP Morgan Fleming Claverhouse*, cited in footnote 29, paragraph 47.

in so far as, by reason of the special legal requirements to which they are subject, those services are not comparable with the services performed by other postal service providers and, therefore, no distortions of competition arise.

62. The essence of the universal service guaranteed in the public interest by Royal Mail is that all users are offered a certain range of postal services at all points in their territory at a fixed tariff. Royal Mail is, in particular, obliged to provide a set number of access points (pillar boxes and post offices) from which the postal items are collected at least once every working day. It must deliver all permitted postal items at a reasonable and uniform price to every address in the United Kingdom and may not, for example, refuse to convey items to remote areas or to do so only at an increased price. Finally, post must be delivered on every working day to all private households and business customers.

63. TNT is not obliged to offer comparable services. The principle of fiscal neutrality therefore categorically does not require that TNT's and Royal Mail's transactions be treated equally for tax purposes. It may indeed be the case that TNT provides some services which are identical to those of Royal Mail, such as, for example, the collection and sorting of postal items. However, the tax-privileged universal service consists precisely in providing a public postal network as a system of infrastructure facilities and services of specified quality at a particular price. Consequently, the assessment of the comparability of the transactions hinges not only on the comparison of individual services, but on

the fact that they are part of a comprehensive range of provision offered by the public postal network.<sup>31</sup>

64. Whether that is true of all or only of certain activities of the universal service provider must be examined in the context of answering the second question.

65. It is in any event of no relevance for the purposes of tax treatment whether the identity of a universal service provider as such has been notified to the Commission in accordance with Article 4 of the Postal Directive. The sole decisive factor is that its services correspond in material respects to the features of the universal service and that their provision is guaranteed for a certain period by conditions in the licence granted to it or by legal requirements. That is because it would be incompatible with the principle of neutrality to treat substantially identical services unequally for tax purposes simply because the identity of the economic operator providing them has been notified to the Commission.

31 — It would certainly be conceivable for TNT to provide an integrated postal service covering all points in the national territory by cooperating with other providers, in particular Royal Mail. In so far as such a service also complied with the requirements concerning pricing, it could be regarded as an exempt universal service. In my view, it is not in fact necessary for a provider to provide with its own resources all the parts of a supply which together make up the universal service.

66. In the light of the above, the answer to the first question must be that ‘public postal services’ within the meaning of Article 13A(1)(a) of the Sixth Directive are the postal service providers who guarantee the universal service. Application of the exemption does not require that certain universal services be reserved to the provider(s).

B — *The second and third questions*

67. By its second question, the referring court wishes to know whether Article 13A(1)(a) of the Sixth Directive covers all of the transactions which a postal service provider falling under the exemption carries out. If not all of the provider’s services are exempt, the Court is requested by the third question to indicate criteria for distinguishing the exempt from the non-exempt services. Since these two questions are closely connected, I shall deal with them together.

68. In the view of Royal Mail, Ireland and the United Kingdom and Greek Governments, the wording of the exemption refers only to the service provider and requires no distinction between different transactions of the beneficiary. By contrast, in the view of the Commission and the German Government, the exemption is intended to apply only to those services of the universal service provider which count directly as part of the universal service provision. The Commission distinguishes from such services the conveyance of certain bulk postings, which should not be exempted. In the German Govern-

ment’s view, services which are provided according to freely negotiated terms and tariffs do not fall within the scope of the exemption.

69. It should again be recalled in this regard that, under Article 13A(1)(a) of the Sixth Directive, the supply by the public postal services of services and the supply of goods incidental thereto are to be exempted. Apart from passenger transport and telecommunications services, which are expressly excluded from the exemption, the exemption does not refer to particular services provided by public postal services.

70. The wording thus appears at first sight to corroborate the view of Royal Mail and the Governments supporting it. A further factor which supports their understanding of the exemption is that it would allow a clear delimitation of the privileged transactions, since in the absence of any further differentiation it would be necessary only to consider who carries out the transaction.

71. However, if the only criterion actually applied were that the service be provided by a public postal service, it would also be neces-



sary to exempt from VAT transactions which bear no relation to postal services, such as, for instance, the sale of stationery or giftware in post offices. That would obviously conflict with the meaning and purpose of the exemption, which is that VAT should not be charged on the supply of specific services in the public interest. Moreover, neither the principle of fiscal neutrality, nor the maxim that exemption from VAT, as a derogation, must be interpreted strictly, would be observed.

72. In order to take account of the latter requirements, the exemption must be applied only to the services provided by a public postal service, which it also provides *as such*. As was evident from the answer to the first question, the exemption is intended to benefit the services of the public postal network which are guaranteed in the public interest, and in that regard the approach adopted under the Postal Directive must be taken into account.

73. It is true that, in principle, a uniform interpretation of the concepts of the Sixth VAT Directive is necessary.<sup>32</sup> However, since the Postal Directive does not fully harmonise the universal service, there may be differences from Member State to Member State in the definition of the services which are part of the universal service and of their components,

which also affect the exemption from VAT of the postal services.

74. In *Commission v Germany*,<sup>33</sup> the Court has already pointed out that the Sixth Directive has avoided influencing the manner in which the Member States organise their postal systems, since Article 13A(1)(a) covers in the same way both State postal service undertakings and those organised under private law. It accords with the principle of subsidiarity for Member States to specify the postal services which must be guaranteed in the public interest in the light of their own individual geographical, social and economic characteristics.

75. It should however be noted that the Member States have a duty to grant the exemption where the requirements of Article 13A(1)(a) are satisfied.<sup>34</sup> That duty is matched by a corresponding right of the individual. In applying the VAT exemption, Member States must therefore adhere to the approach which they have adopted in the context of postal regulation. Were they to be free to define the public interest requirements for the purposes of the VAT exemption arbitrarily otherwise than by reference to the definition of the universal postal service, the right to the granting of the exemption would be called into question.

32 — See *Kingscrest and Montecello*, cited in footnote 10, paragraph 22; *Haderer*, cited in footnote 10, paragraph 17; and *Canterbury Hockey Club and Others*, cited in footnote 10, paragraph 16.

33 — Cited in footnote 14, paragraph 16.

34 — See, to that effect, *Commission v Germany*, cited in footnote 14, paragraph 10; Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 81; and *JP Morgan Fleming Claverhouse*, cited in footnote 29, paragraphs 61 and 62.

76. A universal service does not exist merely when it is provided by means of the infrastructure of a universal service provider. It must also be made available in accordance with the standardised terms and tariffs in force for the general public. Only then can it be regarded as a service which a public postal service as such provides and which benefits the public interest in a particular way.

77. As the German Government correctly points out, with reference to recital 15 in the preamble to the Postal Directive, universal service providers are free to negotiate contracts with customers individually. Such services are not provided by a provider acting as a *public* postal service, since the service on those terms is not available to every user in the same way, but only to users with particular purchasing power.

78. Moreover, with regard to those services, which are provided in addition to the universal service and are not subject to the obligations applicable to it, the universal service provider finds itself in the same position as any other provider of postal services. Consequently, both the principle of fiscal neutrality and the prohibition of distortions of competition preclude exemption.

79. In *Corbeau*, the Court has already pointed out that the conferring of exclusive rights is not justified by Article 90(2) of the EEC Treaty (now Article 86 EC) as regards specific services dissociable from the service of

general interest which meet special needs of economic operators.<sup>35</sup> Admittedly, Royal Mail does not hold exclusive rights in that sense. However, exemption from VAT constitutes the granting of a privilege to the universal service provider, which is likewise justified only by the latter's tasks in the public interest. It must not be widened to cover other services which are conceded to individual economic operators on an individual basis.

80. It is not without reason that Article 14(2) of the Postal Directive provides that the universal service providers must keep separate accounts within their accounting systems for services which are part of the universal service and for services which are not. Under the second sentence of Article 14(2), that also applies to non-reserved universal services. That requirement is intended to ensure transparency of costs and exclude any cross-subsidisation between the different categories, which could procure advantages for the universal service provider in competition with other providers.

81. A clear separation of the different categories of postal service is also necessary as regards the exemption, so as not to procure an advantage for the universal service provider in sectors in which it is in competition with other providers. Since separate accounts must be

35 — *Corbeau*, cited in footnote 27, paragraph 19.

kept for the different categories of service in any case, there is no reason to believe that differentiated application of the exemption to reflect that situation leads to greater practical difficulties.

telecommunications undertaking or account statements sent out by banks.

82. With regard to bulk mail services, which, in the Commission's view, should likewise not be exempt from VAT, it must first be observed that this is not a technical term which is defined, for instance, in the Postal Directive. On the contrary, the Postal Directive recognises only direct mail as a special category. It is defined in Article 2(8) of the Postal Directive as 'a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping'.

84. However the term may be understood, the exemption plainly cannot apply where such items are carried at individually negotiated prices.

85. Even in so far as a generally applicable postal tariff is applied, such services are without doubt not typical services which form part of the immediate necessities of life for private customers. However, in principle it is also in the public interest to provide commercial customers with a public postal network.

83. The term 'bulk mail service' could, on the one hand, be understood as a synonym for direct mail. In a wider sense, it could, in general, include within its scope business mail, which is posted in large volumes by a sender but contains individual communications such as, for instance, invoices from a

86. Private individuals also benefit from that indirectly, however. They have an interest in business mail being sent to them at reasonable prices, even when they live in remote regions of the Member State. If the sender of business mail were not entitled to deduct input VAT, like, for example, a bank, the VAT levied on the postage would ultimately affect the price charged to its customer by the sender for its services.

87. Finally, in the case of business mail which contains an individual communication and is carried at general tariffs, it is difficult to determine as from what quantity of posted items it should be regarded as a non-exempt bulk posting. Should that start at as low as 50 invoices, which a small or medium-sized enterprise sends out every day, or only as high as thousands of invoices, which a large public utility sends out? Such postal items should therefore not be treated differently from individually posted items with individual contents.

88. What can be differentiated, on the other hand, is direct mail within the meaning of Article 2(8) of the Postal Directive. This could be excluded from the exemption despite the application of a universal postal tariff, since, in the case of these items, the commercial interest in advertising for the sender's

products or services predominates. In the end, however, it is for Member States to decide how, in this case, they weight private and public interests. The interest of the undertakings competing with the universal service provider in obtaining access on equal terms to this lucrative market segment must also be taken into account in this context.

89. The answer to the second and third questions must therefore be that only those services of a public postal service which that service also provides as such, that is, the universal services provided in the public interest, are exempt from VAT in accordance with Article 13A(1)(a) of the Sixth Directive. By contrast, those services which are provided on individually negotiated terms and are not subject to the requirements of the universal service are not exempt.

## V — Conclusion

90. In the light of the foregoing considerations, I propose the following answers to the questions referred by the High Court:

- (1) 'Public postal services' within the meaning of Article 13A(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment are the postal service providers which guarantee the

universal service. Application of the exemption does not require that certain universal services be reserved to the provider(s).

- (2) Under Article 13A(1)(a) of the Sixth Directive, only those services of a public postal service which that service also provides as such, that is, the universal services provided in the public interest, are exempt from VAT. By contrast, those services which are provided on individually negotiated terms and are not subject to the requirements of the universal service are not exempt.