



COMMISSION OF THE EUROPEAN COMMUNITIES

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**TO THE PRESIDENT AND MEMBERS OF THE
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES**

WRITTEN OBSERVATIONS

submitted pursuant to Article 23, second paragraph, of the Statute of the Court of Justice of the European Community by the

COMMISSION OF THE EUROPEAN COMMUNITIES

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in Case C-357/07

TNT Post UK

v

THE COMMISSIONERS FOR H.M. REVENUE AND CUSTOMS

Reference to the Court under Article 234 of the EC Treaty from the High Court of Justice, Queen's Bench Division, (England and Wales) for a preliminary ruling on the interpretation of Article 13A(1)(a) of the Sixth VAT Directive.

I. RELEVANT PROVISIONS OF COMMUNITY AND NATIONAL LAW

Community VAT legislation

1. Article 2 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment ("the Sixth VAT Directive", OJ 1977 L 145/1) provides that

The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;
2. the importation of goods.

Substantially identical provisions are now contained in Article 2(1)(a) and (b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ("the VAT Directive", OJ 2006 L 347/1).

2. Article 4 of the Sixth VAT Directive (now, see Article 9(1) of the VAT Directive) provides that

1. 'Taxable person' shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.

...

3. Pursuant to Article 13A of the Sixth VAT Directive (now, see Articles 131 and 132(1)(a) of the VAT Directive),

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 the supply of goods incidental thereto;

...

Community legislation on postal services

4. 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 L.15, 21.1.98, p.14) as last amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176/21) lays down provisions aimed at establishing an internal market in the postal sector (see the first and second recitals in the preamble). It also contains common rules concerning the provision of a universal postal service within the Community and the rest of the European Economic Area.
5. Among other things, Directive 97/67 limits the previously existing national monopolies concerning the provision of postal services to certain defined postal products (see Article 7). The maintenance of monopolies restricted to these services is nevertheless regarded as a transitional stage on the way to complete liberalisation. Member States may reserve some or all the services listed in Article 7 to the extent necessary to ensure the maintenance of "universal postal service". All postal services which have not been so reserved are open to competition.
6. The "universal postal service" is a minimum range of services which are to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location (see recital 11 and Article 3). Member States are to designate one or more "universal service providers" ("USPs") which must provide that range of services.

National VAT legislation

7. Exemptions from VAT are provided for in section 31 of the Value Added Tax Act 1994, pursuant to which

(1) A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 [...].

8. Schedule 9, Group 3 to the VAT Act 1994 includes :

1. The conveyance of postal packets¹ by the Post Office Company.
2. The supply by the Post Office Company of any services in connection with the conveyance of postal packets.

9. The scope of the exemption is explained in Public Notice 48, a publication which describes the extra-statutory concessions made by HMRC, as follows :

3.33 VAT: Supplies previously made by the Post Office

The Postal Services Act 2000 replaced each reference to ‘the Post Office’ within VAT legislation with a reference to ‘the Post Office Company’. This concession maintains the scope of existing VAT reliefs following a restructuring of the Post Office corporation immediately prior to the transfer of the property, rights and liabilities of the corporation to the Post Office Company.

This concession extends the reference to ‘the Post Office Company’ to include a reference to any wholly owned subsidiary of the Post Office Company providing the public postal service, for the purposes of :

- (a) the VAT exemption provided for postal services in items 1 and 2 of Group 3, Schedule 9, Value Added Tax 1994,

...

10. All references to the “Post Office Company” now designate any wholly owned subsidiary of Royal Mail Holdings Plc, including in particular Royal Mail Group Ltd (until 20 March 2007, Royal Mail Group Plc).

¹ According to the explanatory notes, the expression "postal packet" means a letter, parcel, packet or other article transmissible by post.

National postal legislation

11. The legislation applicable to postal services is the Postal Services Act 2000 (PSA 2000), which implements Directive 97/67. Section 1 of the Act creates the Postal Services Commission (POSTCOMM), the national regulatory authority. Its function is to ensure the provision of the universal service while promoting effective competition between postal operators. Among its activities is the granting of licences for the provision of postal services. According to Section 6 of the Act, the conveyance of letters from one place to another requires the holding of an appropriate licence.
12. POSTCOMM has granted a number of licences, *inter alia* to Royal Mail Group Plc and to TNT Post UK Ltd. Originally, licensees other than Royal Mail were prevented from supplying certain kinds of postal services. However, the licences have recently been modified, so that from 1 January 2006 all operators holding a licence may supply a full range of postal services. The UK postal legislation thus does not now reserve any postal services to any particular operator.
13. Under Article 4 of Directive 97/67, the United Kingdom informed the Commission that its USP was the Post Office Company. Currently the requirement to provide the universal postal service throughout the United Kingdom is included in the licence held by Royal Mail Group plc. That company is a successor of the Post Office, the former statutory corporation established under the Post Office Act 1969. It is organized in four operating units: Royal Mail (which collects and delivers postal items and issues stamps), Post Office Ltd (a company which manages the branches providing postal access points and also provides non-postal services, such as financial services), General Logistics Systems B.V. (European parcels business, established in the Netherlands) and Parcelforce Worldwide (which collects and delivers parcels within and outside the United Kingdom). Only the first two of those

operating units (Royal Mail and the Post Office) are involved in the provision of the postal services which make up the universal service.

14. POSTCOMM has defined the scope of the universal postal services in the United Kingdom to include a series of "generic postal services that make up the universal service" and has identified the postal products provided by Royal Mail which correspond to each of those services. The resulting definition of the United Kingdom's universal postal service is included in Royal Mail's license and has been notified to the Commission pursuant to Article 4 of Directive 97/67. The main services concerned are the following :

Generic postal service	Royal Mail product
Priority mail for postal items up to 2 kg	1 st class mail
Non-priority mail for postal items up to 2 kg	2 nd class mail
Non-priority parcel service up to 20 kg	Standard parcel service
Registered and insured mail	Special delivery (next day) ; Recorded mail

15. In addition, the universal postal service includes certain bulk mail products, making up some 25% of Royal Mail's bulk mail business.

II. BACKGROUND TO THE CASE

16. Pursuant to UK VAT legislation, postal services supplied by Royal Mail are exempt from VAT. Postal services supplied by other licensees, including TNT POST UK, are subject to VAT at the standard rate of 17.5 %. In so far as such services are provided to final consumers and other customers (such as public bodies and operators who make supplies which are exempt from VAT under Article 13 of the

Sixth Directive), Royal Mail enjoys a significant competitive advantage. It is estimated² that such customers make up about half of the market for postal services.

17. This price advantage for Royal Mail represents a particular obstacle for new entrants to the market, who are dependent on the large volumes of mail which customers such as financial institutions and public bodies can provide. Moreover, the fact that Royal Mail enjoys such an advantage on a large market such as that of the United Kingdom is likely to reinforce its competitive position when it comes to making use of the new possibilities opened up by the liberalisation of postal services throughout the Community.
18. TNT Post UK currently provides what are called "upstream services" consisting in the collection, sorting (if necessary) and processing of mail before delivery to a Royal Mail depot. It seeks in future to provide a complete service including delivery of mail.
19. TNT Post UK has brought judicial review proceedings before the High Court of Justice challenging the lawfulness of the exemption from VAT for postal services supplied by Royal Mail.

III THE QUESTIONS REFERRED TO THE COURT

20. It was in those circumstances that the High Court of Justice, Queen's Bench Division, decided to refer the following questions to the Court for a preliminary ruling :

- 1.a) How is the expression "the public postal services" in Article 13A(1)(a) of the Sixth VAT Directive (Directive 77/388/EEC) (now Article 132(1)(a) of Directive 2006/112) to be interpreted?

² According to a review of Royal Mail special privileges carried out by POSTCOMM

- 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?

IV OBSERVATIONS

Preliminary remarks

- 21. The questions referred by the High Court imply a two-stage enquiry : first, into the question which body or bodies is meant by the expression "the public postal services", and secondly, which of the postal services supplied by that body or those bodies are exempt.

22. The response to those questions is of considerable importance for the achievement of the internal market in the postal sector. Those questions arise, moreover, throughout the Community. The interpretation of the applicable provisions varies in different Member States, and it is desirable that a uniform solution be found.
23. Furthermore, it should be borne in mind that one aim of the Sixth VAT Directive is the establishment of a uniform basis of assessment for the purpose of calculating the Community's own resources (see the second and eleventh recitals in the preamble ; now, recital 8 in the preamble to the VAT Directive). The calculation of own resources requires a common interpretation of those exemptions in all Member States.
24. In examining the present case regard should be had, first of all, to certain essential principles of the VAT system. VAT is a general tax which applies in principle to all economic activities of producers, traders and persons supplying services. Any person who independently carries out an economic activity is a taxable person for VAT purposes, whatever the purpose or results of that activity. It follows that provisions of the VAT Directive which are in the nature of exceptions to this general rule must be interpreted strictly, in particular provisions regarding exemption from the tax.
25. Moreover, the principle of neutrality is fundamental to the VAT system. Economic operators who carry out the same transactions should be treated in the same way as regards the levying of VAT. The importance of this principle was recognised from the beginning ; according to the fifth and eighth recitals in the preamble to the First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislations of Member States concerning turnover taxes (OJ 1967 No. 71, p. 1301),

... a system of value added tax achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution and the provision of services...

...

... the replacement of the cumulative multi-stage tax systems in force in the majority of Member States by the common system of value added tax is bound, even if the rates and exemptions are not harmonised at the same time, to result in neutrality of competition, in that within each country similar goods bear the same tax burden...

26. The Court has ascribed considerable importance to the principle of neutrality. For example, it has held that there can be no differentiation between lawful and unlawful transactions in the application of VAT except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded (cf. Case C-158/98 *Staatssecretaris van Financiën v Coffeeshop Siberië* [1999] ECR I-3971). Similarly, it has held that all forms of gaming should be subject to the same VAT treatment (Joined Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Edith Linneweber and Finanzamt Herne-West v Savvas Akritidis* [2005] ECR I-01131), that the terms "establishment" and "organisation" should be interpreted broadly so as to preclude any distinction in taxation depending on the nature of the taxable person (Case C-216/97 *Gregg* [1999] ECR 4947), that all types of investment fund should be treated in the same way for tax purposes (Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc and Association of Investment Trust Companies v Commissioners of HM Revenue and Customs*, judgment of 28 June 2007, not yet reported), and so on.
27. Nevertheless, where the VAT Directive clearly identifies the person or persons who are entitled to benefit from an exemption, the principle of neutrality does not make it possible to over-ride that legislative choice and extend the exemption to other persons (see Case C-401/05 *VDP Dental Laboratory NV v Staatssecretaris van Financiën* [2006] ECR 12121).
28. The postal services exemption was enacted when postal services were a public monopoly in all Member States. There was no difficulty in identifying the beneficiary of the exemption and little scope for controversy as to the extent of the

services covered. The interpretation of that exemption in a different environment, that of a liberalised postal services market in which former monopolists co-exist with other suppliers, requires a careful balance of the interests of suppliers and customers, having regard to the purpose of the exemption and the above-mentioned principles of neutrality and restrictive interpretation.

29. The need for an interpretation of the exemption which is as neutral as possible and avoids creating excessive obstacles for other market participants led the Commission to initiate infringement proceedings against three Member States, including the United Kingdom, in 2006. Those proceedings have reached the stage of the reasoned opinion. The arguments set out below are in line with the position advanced by the Commission in the infringement proceedings.
30. Two previous cases concerning the postal exemption have come before the Court, but only one of these reached the stage of a judgment. In Case 107/84 *Commission v Germany* [1985] ECR 2655 the question was raised whether the exemption applied to the mail transport services supplied to the German Post Office (Deutsche Bundespost) by German Railways (Deutsche Bundesbahn) and by Lufthansa.
31. Faced with the argument that the exemption should cover all services which performed part of the function of providing a postal service, the Court replied (point 11 of the judgment) that

Although it is true that in some of the language versions the expression "public postal services" may be understood, when considered in isolation, as referring to all postal activities, the syntax of the whole phrase clearly shows that the words in fact refer to the actual organizations which engage in the supply of the services to be exempted. In order to be covered by the wording of the provision the services must therefore be performed by a body which may be described as "the public postal service" in the organic sense of that expression. That is not so, for example, in the case of a transport undertaking which, without coming into contact with the public, is merely responsible for long-distance transportation between two post offices.

32. The Court went on (point 16) to state that

Moreover, the exemption provided for by Article 13 is still completely meaningful where a Member State assigns "postal activities" to an organization which is not a body governed by public law. In this way the Directive has specifically avoided influencing the manner in which the Member States organize their postal systems. Postal activities are still exempted even if they are carried out by a licensed undertaking. The provision restricts the exemption solely to the supply of services by the postal authority, whether it is a body governed by public law or a licensed undertaking, to the exclusion of services provided for the postal authority by other undertakings.

33. Case C-169/02 *Dansk Postordreforening v Skatteministeriet* concerned the application of the exemption, following the liberalisation of postal services pursuant to Directive 97/67, to certain services falling outside the scope of the universal service obligation. The reference for a preliminary ruling was withdrawn by the national court after the plaintiff discontinued the action, but not before Advocate General Geelhoed had delivered his opinion, which contains a thorough discussion of the interpretation of the exemption in the light of Directive 97/67. That discussion is relevant to the second and third questions in the present case.

The first question

34. In its first question the national court seeks essentially to determine whether the VAT exemption should apply only to supplies made by Royal Mail, to supplies made by all licensees, including Royal Mail and TNT Post UK, or to supplies made by none of those bodies.

35. The current practice of Member States on this issue varies to some extent. Most, like the United Kingdom, apply the postal exemption to supplies made by a single operator, that is to say the former monopolist, now the USP. A small number of Member States, however, consider that none of their postal operators qualify as the "public postal services".

36. In Case 107/84 *Commission v Germany* the Court recognised that the expression "public postal services" in Article 13A(1)(a) has two aspects : the nature of the services concerned and the identity of the provider of those services. In that case it was easy to identify the "postal authority" (cf point 16 of the judgment). Today, in a liberalised market, it is less simple to identify the subject of the exemption, the body which is to be regarded as the public postal service in what the Court called the "organic sense" of the expression.
37. One possibility would be to say that where the market for postal services has been thrown open to competition, it is no longer possible to identify an operator which constitutes the "public postal services" in this "organic" sense. Instead, there are several entities which compete on an equal basis to provide postal services, and none of them should be granted an advantage in the form of a VAT exemption.
38. For its part, the Commission considers that in interpreting the concept of "public postal services" in the present market situation, the Court should take into account a number of concepts contained in Directive 97/67 which are closely related to that of "public postal services". That is to say, the public interest which the exemption in Article 13A(1)(a) is intended to protect, namely the provision of an affordable postal service to the general public, is closely related to the obligation which Article 3(1) of Directive 97/67 imposes on Member States, namely "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." Member States discharge that obligation by designating a public or private entity which is required to provide the universal postal service. In the terminology of Directive 97/67, that entity is the "universal service provider".
39. This "universal service provider" is not in the same position as other market participants because it is subject to obligations with which the others do not have to

comply, for example the requirement to serve all areas of national territory, even the most remote, at a uniform and affordable price. Those obligations confer on the operator(s) concerned the character of a provider of public services. The Commission therefore submits that the universal service provider designated pursuant to Directive 97/67 may be regarded as the "public postal services" for the purposes of Article 13A(1)(a).

40. Having regard to the arguments summarised in the order for reference, it may be added that while both Royal Mail and the Commissioners deny that Directive 97/67 is relevant for the interpretation of the VAT exemption, they have no difficulty in stating that Royal Mail must be "the public postal services" because it is the United Kingdom's USP.

The second and third questions

41. The second and third questions of the national court concern the objective scope of the exemption. If there is such a thing as "the public postal services" (in the organic sense) in a liberalised market, it is necessary to determine whether the postal exemption applies to all or only some of the services provided by the entity or entities concerned, and if only some, to identify them.
42. It should be pointed out first of all that the postal exemption is not facultative in nature. Member States must exempt the services envisaged in Article 13A(1)(a). They may not, however, extend the exemption beyond its proper scope.
43. Despite the general wording of Article 13A(1)(a), which could be understood as exempting any services other than passenger transport and telecommunications, the Commission understands that all Member States which apply the postal exemption restrict the exemption to services which involve the clearance, sorting, transport and delivery of letters and parcels. The Commission submits that that limitation is correct ; there is no justification for extending the scope of the exemption to other

types of services which happen to be provided by the entity or entities defined as "the public postal services". However, within the general category of postal services there is considerable variation in practice. Leaving aside the small number of Member States which do not now apply the postal exemption at all, it appears that Member States interpret the objective scope of the exemption in one of three ways.

44. First, some Member States apply the exemption only to those services which are reserved to the USP in accordance with Article 7 of Directive 97/67. It may be noted that this is the option supported by Advocate General Geelhoed in his Opinion in Case C-169/02 *Dansk Postordreforening*.
45. Secondly, some Member States apply the exemption to all services which form part of the universal service obligation defined in implementation of Directive 97/67/EC. There is naturally considerable variation in the actual scope of the exemption even within this group of Member States, since Directive 97/67 leaves a large measure of discretion in defining the services included in the universal service obligation.
46. Finally, a third group of Member States, including the United Kingdom, apply the exemption to all postal services supplied by the entity identified as being the national "public postal services".
47. In order to arrive at a uniform interpretation of the objective scope of the exemption it is necessary first of all to have regard to its purpose, already mentioned above : the provision of an affordable postal service to the general public. In view of the close link, in this respect, between the guiding principles of the exemption and of the public service requirements envisaged by Directive 97/67, it is not unreasonable to focus on the latter in seeking to determine the proper scope of the exemption for "public postal services".
48. In his Opinion in Case C-169/02 *Dansk Postordreforening* Advocate General Geelhoed distinguished between services which are reserved to a particular operator

or operators pursuant to Article 7 of Directive 97/67, services which though not reserved nevertheless form part of the universal service envisaged by that directive and services which lie outside the scope of the universal service. Relying in part on the concept of public service which underlies Article 86(1) EC, he considered that only reserved services should properly be regarded as constituting "public postal services" for the purposes of the exemption.

49. Such a solution has the advantage that it restricts the scope of the exemption to postal services for which the USP retains a monopoly. Since other commercial operators cannot supply such services, the exemption cannot provoke distortions of competition in that part of the market. However, this interpretation also has serious disadvantages. A first obstacle is the general principle of harmonized exemptions and common tax base. Since Member States are not required to exercise the option in Article 7 of Directive 97/67, this interpretation would lead to the postal exemption not being applied at all in certain Member States. That would be true, for example, of the United Kingdom, since no services are now reserved to the USP in that Member State.
50. A second, perhaps more serious objection to that interpretation lies in the logic of Article 7 of Directive 97/67. The services which may be reserved to the USP are not necessarily the services which it is essential to provide to members of the public. On the contrary, they are services which, taken as a whole, are expected to be profitable for the entity which performs them. They are reserved to the USP in order to compensate for the financial charge represented by the obligations imposed on it.
51. The Commission submits instead that the concept of "public postal services" should be interpreted in the light of the special obligations imposed on the USP by the national regulator in order to ensure that the Member State complies with its obligations under Articles 3 to 6 of Directive 97/67. It is the services to which those

obligations relate that can be said to constitute a "public service", distinguishing the operator which is subject to those obligations from other providers of postal services. In the case of Royal Mail, its licence contains a number of obligations, including the requirement to offer to the general public, country-wide, certain postal services (including their clearance, sorting, transport and delivery) at a uniform and affordable tariff and at a level of quality established by POSTCOMM (see Condition 2 in conjunction with Condition 21, paragraph 38(a) of Royal Mail's licence). Those are the services to which the exemption should apply.

52. A strict interpretation of the postal exemption should exclude bulk mail services, whether or not they are included among the obligations imposed on the USP. Such services may not, by their nature, be regarded as services which must be made available to the general public at a uniform and affordable tariff. Instead, they partake of the nature of business services in relation to which the principle of neutrality requires that competition should not be distorted.

V CONCLUSION

The Commission therefore submits that the questions posed by the High Court of Justice should be answered as follows:

1. In so far as it concerns the identity of the beneficiary of the exemption, the expression "public postal services" in Article 13A(1)(a) of the Sixth VAT Directive 77/388/EEC (now Article 132(1)(a) of Directive 2006/112/EC) should be interpreted as including only the designated universal service provider(s), that is to say the operator(s) required in accordance with Article 3 of Directive 97/67/EC to guarantee that users enjoy the right to the permanent provision of a postal service of specified quality at all points in the territory of the Member State at affordable prices for all users.

2. Article 13A(1)(a) of the Sixth VAT Directive requires Member States to exempt those postal services which have been assigned to the universal service provider. A postal service has been assigned to the universal service provider when the USP is required to provide that service under price and quality conditions available to the general public. Bulk mail services and more generally postal services which are supplied to certain customers under individual agreements on prices are not covered by the exemption in article 13A(1)(a).

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