

OPINION OF ADVOCATE GENERAL

TIZZANO

delivered on 23 October 2003 ^{1 1}

I — Introduction

II — Legal background

A — *The relevant provisions of Directive 97/67/EC*

1. By an order of 16 May 2002 the Tribunal Supremo (Supreme Court) (Spain) referred to the Court for a preliminary ruling pursuant to Article 234 EC two questions on the interpretation of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (hereinafter ‘Directive 97/67’).² In particular, the Tribunal Supremo seeks to ascertain: (i) whether, in certain circumstances, the 21st recital of that directive makes it possible to exclude postal services carried out personally by the sender (or by a third party acting solely on behalf of that person) from the concept of ‘self-provision’; and (ii) whether it is possible to include money order services among those reserved to the provider of the universal postal service.

2. By its first article, Directive 97/67 establishes 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 and the conditions governing the provision of non-reserved services’.

3. Pursuant to Article 2(1) of the directive, ‘postal services’ mean ‘services involving the clearance, sorting, transport and delivery of postal items’. The sixth paragraph then states that ‘postal item’ means ‘an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value’. In the seventh paragraph, by contrast, an ‘item of correspondence’ is defined as ‘a commu-

¹ — Original language: Italian.

² — OJ 1998 L 15, p. 14. The directive was amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176, p. 21) after the applications had been lodged in the main proceedings.

nication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence’.

4. The rules on the ‘harmonisation of the services which may be reserved’ to universal service providers are laid down in Article 7 of the directive. The first paragraph of that article, in the version in force when the applications in the main proceedings were lodged, provided in particular that ‘to the extent necessary to ensure the maintenance of universal service, the services which [could] be reserved by each Member State for the universal service provider(s) [were] the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which [was] 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 [existed], provided that they [weighed] less than 350 grams. In the case of the free postal service for blind and partially sighted persons, exceptions to the weight and price restrictions [could] be permitted’. The second paragraph added that, also to the extent necessary to ensure the maintenance of universal service, ‘cross-border mail and direct mail [could] continue to be reserved within the price and weight limits laid down in paragraph 1’. Finally, the fourth paragraph stated that ‘document exchange [could] not be reserved’.

5. With regard to the services that may be reserved, it is also important to bear in mind the 21st recital of the directive, to which the national court makes express reference in its first question. That recital, after stating that ‘new services (services quite distinct from conventional services) and document exchange do not form part of the universal service and consequently there is no justification for their being reserved to the universal service providers’, then adds — in so far as it is relevant to the present case — that ‘this applies equally to self-provision (provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person), which does not fall within the category of services’.

B — *The Spanish legislation*

6. Directive 97/67 was transposed into Spanish law by means of Law No 24/1998 of 13 July 1998 on the universal postal service and the liberalisation of postal services (hereinafter ‘Law No 24/1998’). The general provisions of that law were subsequently implemented by means of Royal Decree No 1829/1999 of 3 December 1999 approving the regulation to govern postal services (hereinafter the ‘Royal Decree’).

7. The provisions of these items of legislation on ‘self-provision’ and ‘money orders’ need to be recalled for the present purposes.

For the purposes of the preceding paragraph, the originator and the receiver of the items shall be deemed to be the same natural or legal person when the senders and the addressees are linked through their work or act for and on behalf of the natural or legal person carrying out the self-provision.

8. With regard to the first aspect, Article 2 (2) of the Law states that ‘a self-provision system is deemed to exist when the same natural or legal person is both the originator and the receiver of the items, and when that person provides the service itself or uses a third party who acts solely on his behalf, employing different methods from those of the universal postal service provider. Under no circumstances may self-provision disrupt the ... services’ reserved to the universal postal service provider (the Entidad Publica Empresarial Correos y Telégrafos, hereinafter ‘Correos’). In that regard, Article 2(2) of the Royal Decree lays down the following more detailed provisions:

In order for the originator and the receiver to be deemed to be the same natural or legal person, it shall also be necessary that the items be transported and distributed solely between the various centres, subsidiaries, residencies or headquarters of the natural or legal person effecting that self-provision and distributed only within those aforementioned premises.

Postal services provided to third parties by natural or legal persons in the exercise of their commercial or business activity shall not be regarded as self-provision.

‘Services supplied under the self-provision system are excluded from the scope of these rules.

When self-provision is carried out using the mailbag system or similar methods, it may not include items belonging to the range of services reserved to the universal postal service provider.

A self-provision system is deemed to exist when the same natural or legal person is both the originator and the receiver of the items, and when that person provides the service itself or uses a third party who acts solely on its behalf, employing different methods from those of the universal postal service provider.

Under no circumstances may this scheme disrupt the services reserved to the universal postal service provider.’

9. As to the second aspect, it must be pointed out that in Article 18 of the Law the money order service is mentioned among services reserved to the universal service provider. In that regard, Article 53 (1) of the Royal Decree states that 'the money order service, the provision of which is reserved exclusively to the universal service operator, is the service by which payments are made to natural or legal persons on behalf and on the order of others, through the public postal network'.

infringe the 21st recital and Article 7 of Directive 97/67 in that they contain an excessively broad definition of the legal monopoly granted to Correos. First, they maintain that this includes in the monopoly certain activities or methods of providing postal services that fall within the concept of self-provision set out in the 21st recital of the directive and which, in accordance with that provision, can therefore not be reserved to the universal service provider. Secondly, they contend that the money order service is included in the monopoly, despite the fact that it is not mentioned among the services which under Article 7 of the directive can be reserved to the universal service provider.

Facts and procedure

10. The applicants in the dispute before the Tribunal Supremo are two associations of private operators in the postal services field, the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (hereinafter 'Asempre') and the Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería. In two separate applications, which were subsequently joined, the associations brought actions before the Tribunal Supremo challenging various provisions of the Royal Decree, including — in so far as they are of relevance here — those contained in Articles 2(2) and 53(1).

12. In the light of these questions, the court of reference considered that there was reasonable doubt as to the interpretation of the abovementioned Community rules and, specifically, as to the ability of the national authorities to include particular postal services among those reserved to the operator of the universal postal service.

In order to resolve the dispute before it, the court of reference therefore considered it necessary to put the following questions to the Court of Justice for a preliminary ruling:

11. According to the applicants, those latter provisions are unlawful as they

'1. Does the interpretation of the 21st recital to Directive 97/67/EC and permit the exclusion from "self-provi-

sion” of postal services provided by the sender (or another person acting exclusively on his behalf), if that person is not also the receiver, if the services are provided in the course of his commercial or business activity, or carried out using the mailbag system or other similar methods, or if self-provision disrupts the services reserved to the universal service provider?

that the concept of self-provision appears only in the 21st recital of Directive 97/67 and is not to be found anywhere in the text of the directive. According to settled case-law, such a concept therefore has no legal value and cannot create obligations for Member States.

2. May money order services be included amongst those reserved to the universal postal service provider?’

13. In the proceedings before the Court, the Kingdom of Spain, the Kingdom of Belgium and the Commission submitted written observations. In addition, the Kingdom of Spain, the Commission and Asempre appeared at the hearing held on 26 June 2003.

15. In any case, according to the Spanish Government, there is no contradiction between the 21st recital of the directive and Article 2(2) of the Royal Decree, in that in its view these provisions serve different objectives and purposes. It points out that, whereas the 21st recital of the directive lists the services that do not form part of the universal service, Article 2(2) of the Royal Decree merely defines the scope of that regulation, specifying the services that are excluded from it.

IV — Legal assessment

— *The first question*

A — Arguments of the parties

14. With regard to the first question, the Spanish Government begins by observing

16. The Spanish Government goes on to claim that the definition of self-provision in Article 2(2) of the regulation plainly does not differ from that contained in the 21st recital of the directive, as both provisions essentially consider that the recipients of self-provision services are the same (natural or legal) persons who originated the correspondence.

17. The Belgian Government, the Commission and Asempre, on the other hand, consider that the Spanish legislation is contrary to Directive 97/67.

18. In this regard, the Belgian Government observes first that handling one's own correspondence does not create a postal service. For that reason, according to that government, self-provision is not one of the services which, for the purposes of Article 7 of the directive, can be reserved to the universal service provider.

19. The Belgian Government then points out that the 21st recital of the directive lays down that self-provision occurs if the sender himself provides the postal services (or entrusts them to a third party acting solely on his behalf), without requiring — unlike the Spanish legislation — that the sender also be the recipient of the correspondence. For the purposes of the 21st recital of the directive, the Belgian Government continues, it is in any case irrelevant whether self-provision is linked to the sender's commercial activity (obviously on condition that that activity relates to his items of correspondence), is carried out using the mailbag system or similar methods, or may disrupt the services reserved to the universal postal service provider.

20. The Commission, for its part, considers that the 21st recital of Directive 97/67 should be used as an aid to interpretation of Article 7 of the directive so that the latter provision is read as meaning that self-provision services, as defined in the 21st recital, cannot be reserved to the universal service provider.

21. On that basis, the Commission observes that, in order to qualify an activity as self-provision, the Spanish legislation sets four conditions that are not contained in the 21st recital of the directive, thereby adopting a more restrictive concept of self-provision than that laid down in the said provision. In particular, the Commission points out that the 21st recital of the directive:

- does not impose the condition that the sender and recipient of the correspondence be the same person, requiring only that the correspondence be distributed by the sender or his exclusive agent (which does not even constitute a 'service');
- does not require that self-provision employ 'different methods from those of the universal postal service provider'

(which would moreover infringe the principle of non-discriminatory access to the universal postal service enshrined in Article 5 of the directive);

city. In other words, many users have chosen to avoid Correos' out-of-town services, personally undertaking part of the transport of the correspondence, in order to benefit from the lower prices of urban services.

— does not preclude any means of carrying out self-provision and, in particular, does not provide that 'when self-provision is carried out using the mailbag system or similar methods, it may not include items belonging to the range of services reserved to the universal postal service provider';

23. Against that background, according to Asempre, the Spanish legislature adopted the disputed provisions precisely in order to reduce the scope for users to choose between urban and out-of-town services, forcing them to use the monopoly services provided by Correos. To that end, the scope for self-provision was unlawfully made subject to a series of conditions not contained in the 21st recital of the directive.

— does not take account of the effect that self-provision may have on the provision of the universal service and does not make self-provision subject to the condition that it does not 'disrupt the services reserved to the universal postal service provider'.

2. Assessment

22. Lastly, Asempre points out that, since the sixties, the postal services, including the basic services, have been completely liberalised within cities, so that Correos' monopoly relates only to out-of-town postal services. The reduction in the prices of the urban services open to competition has thus encouraged many users to transport their own correspondence themselves to the destination city (performing a kind of 'self-provision') and then to entrust it to one of the postal operators working in that

24. In the question under examination, which makes clear reference to the last three subparagraphs of Article 2(2) of the Royal Decree, the national court seeks in essence to ascertain whether the 21st recital of Directive 97/67 excludes the clearance, sorting, transport and delivery of items of correspondence by the sender (or by a third party acting solely on his behalf) from the concept of 'self-provision' if:

(a) such operations are carried out in the course of the sender's commercial activity, where the sender is not also the recipient of the items;³

(b) the operations in question are carried out using the mailbag system or similar methods, in other words — so far as may be understood — using procedures that make it possible to handle a large number of items simultaneously;

(c) the carrying-out of such operations by the sender (or by a third party acting solely on his behalf) disrupts the services reserved to the universal postal service providers.

25. In posing this question, the court of reference appears to assume that the activities falling within the concept of 'self-provision' under Article 2(2) of the Royal Decree are excluded from the legal monopoly granted to the universal service

provider (and not simply from the scope of that regulation, as the Spanish Government maintains). Hence, according to that court, by providing that, in the three cases indicated above, the clearance, sorting, transport and delivery of items of correspondence by the sender (or by a third party acting solely on his behalf) fall outside the concept of 'self-provision', the national legislature may indirectly have widened the scope of the postal monopoly beyond that permitted by the directive, and in particular by its 21st recital. Indeed, the order for reference clearly states that the relevance of the question submitted for a preliminary ruling lies in the fact 'that, by means of that exclusion, certain postal services which, under the directive, constitute self-provision, might be included as services reserved to the universal service operator'.⁴

26. Having clarified that point, and moving on to analyse the question, I must immediately explain that, although self-provision is mentioned only in the 21st recital of the directive, that concept must nevertheless also be taken into account — as the Belgian Government and the Commission have rightly observed — when interpreting Article 7 of the directive on the 'harmonisation of the services which may be reserved' to the universal service provider.⁵

3 — In this regard, as has been seen, the third and fourth subparagraphs of Article 2(2) of the Royal Decree state that 'the originator and the receiver of the items shall be deemed to be the same natural or legal person when the senders and the addressees are linked through their work or act for and on behalf of the natural or legal person carrying out the self-provision. In order for the originator and the receiver to be deemed to be the same natural or legal person, it shall also be necessary that the items be transported and distributed solely between the various centres, subsidiaries, residences or headquarters of the natural or legal person effecting that self-provision and distributed only within those aforementioned premises'.

4 — Paragraph 5.1.

5 — In this regard, see, for example, the judgment in Case C 355/95 P *TWD v Commission* [1997] ECR I 2549, where it is stated that 'the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption' (paragraph 21).

27. The 21st recital states that there is no justification for including ‘self-provision’ among the services which according to Article 7 can be reserved to the universal service provider, in that it ‘does not fall within the category of services’ or, put another way, does not constitute a provision of services. Read in the light of the 21st recital, Article 7 of the directive therefore acknowledges that the clearance, sorting, transport and delivery of postal items can be carried out freely under a ‘self-provision’ regime and that, as a consequence, the Member States cannot require the originators of correspondence to have such activities performed by the universal service provider since that would constitute an unjustified extension of the latter’s legal monopoly.

28. That being so, I can but agree with the Commission, the Belgian Government and Asempre that a Member State cannot adopt a more restrictive concept of ‘self-provision’ than that contained in the 21st recital of the directive and cannot make the carrying-out of certain postal activities under ‘self-provision’ arrangements subject to conditions not laid down in that provision.

29. Hence, given that the 21st recital defines ‘self-provision’ as the ‘provision of postal services [or more correctly the carrying-out of postal activities] by the

natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person’, it seems clear to me:

- first, that that concept covers any operation involving the clearance, sorting, transport and delivery of items of correspondence by the sender (or by a third party acting solely on his behalf), irrespective of the identity of the recipient;
- secondly, that it is incompatible with the directive to permit such operations to be carried out by the sender (or by a third party acting solely on his behalf) only on condition that the mailbag system or similar methods are not used or that the services reserved to the universal postal service provider are not disrupted.

30. Accordingly, I consider that the reply to the first question submitted for a preliminary ruling must be that Article 7 of the directive, read in the light of the 21st recital, should be interpreted as not allowing the clearance, sorting, transport and delivery of items of correspondence by the sender (or by a third party acting solely on his behalf) to be excluded from the concept

of 'self-provision' when: (a) such operations are carried out in the course of the sender's commercial activity, where the sender is not also the recipient of the items; (b) the operations in question are carried out using the mailbag system or similar methods; (c) the carrying-out of such operations by the sender (or by a third party acting solely on his behalf) disrupts the services reserved to the universal postal service providers.

to the universal service provider. While acknowledging that this service is eminently financial in nature, the association emphasises that it is nevertheless a service that consists in using the public postal network to send something (money) to a destination determined by the user, and hence — it seems — a postal service governed by Directive 97/67.

B — *The second question*

31. By its second question the national court asks in essence whether, on the basis of Article 7 of the directive, the services reserved to the universal service provider may also include the money order service, in other words the service 'by which payments are made to natural or legal persons on behalf and on the order of others, through the public postal network'.

33. However, along with the Commission and the Governments of Spain and Belgium, I consider that a money order service of the kind in question, which consists in making payments via the public postal system, is not a postal service covered by Directive 97/67. There is no need to expatiate on this point, as it is obvious that the directive does no more than lay down common rules on the provision of postal services, in other words 'services involving the clearance, sorting, transport and delivery of postal items' (Article 2(1)); it does not therefore relate to payment services that may be offered by postal operators.

32. Asempre proposes that the reply to this question be in the negative, pointing out that the money order service is not one of those that Article 7 permits to be reserved

34. I therefore consider that the reply to the second question must be that money order services, consisting in the making of payments via the public postal network, are not governed by Directive 97/67.

V — Conclusions

35. In the light of the considerations set out above, I propose that the reply to the questions from the Tribunal Supremo be as follows:

- (1) Article 7 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, read in the light of the 21st recital, should be interpreted as not allowing the clearance, sorting, transport and delivery of items of correspondence by the sender (or by a third party acting solely on his behalf) to be excluded from the concept of 'self-provision' where: (a) such operations are carried out in the course of the sender's commercial activity, where the sender is not also the recipient of the items; (b) the operations in question are carried out using the mailbag system or similar methods; (c) the carrying-out of such operations by the sender (or by a third party acting solely on his behalf) disrupts the services reserved to the universal postal service providers.
- (2) Money order services, consisting in the making of payments via the public postal network, are not governed by Directive 97/67.