Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 16 March 2016[1]

Case C-2/15

DHL Express (Austria) GmbH
v
Post-Control-Kommission(Request for a preliminary ruling

from the Verwaltungsgerichtshof (Higher Administrative Court, Austria))

(Reference for a preliminary ruling — Freedom to provide services — Postal services in the European Union — Rules of a Member State under which all postal service providers are obliged to contribute to the operational costs of the regulatory authority for the postal sector)

1. Does 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,[2] as amended, most recently,[3] by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008[4] ('Directive 97/67') authorise Member States to require all postal service providers to contribute to the financing of the national regulatory authority responsible for the postal sector? That is the point at issue in this reference for a preliminary ruling.

I – **Legal framework**

A – *Directive 2008/6*

2. Recital 27 of Directive 2008/6 states that 'postal service providers may be required to contribute to the financing of the universal service in cases where provision is made for a compensation fund. In order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.'

1 — Original language: French.

2 — OJ 1998 L 15, p. 14.

3 — Prior to Directive 2008/6, Directive 97/67 had also been amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ 2002 L 176, p. 21) and by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1).

4 — OJ 2008 L 52, p. 3.

3. Recital 28 of Directive 2008/6 states that 'in order to comply with the principle of proportionality when determining the contribution to be made to the costs of the provision of the universal service in a Member State required from these undertakings, Member States should use transparent and non-discriminatory criteria such as the share of these undertakings in the activities falling within the scope of the universal service in this Member State. Member States may require those providers which are required to contribute to a compensation fund to introduce appropriate accounting separation in order to ensure the functioning of the fund.'

4. Recital 47 of Directive 2008/6 states that 'the role of national regulatory authorities is likely to remain crucial, in particular in those Member States where the transition to competition still needs to be completed. In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States and to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in [Article 345 TFEU]. National regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks.'

B – *Directive 97/67*

5. Article 2 of Directive 97/67 is worded as follows:

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

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

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

…

13. *universal service provider*: the public or private postal service provider 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;

14. *authorisations*: any permission setting out rights and obligations specific to the postal sector and allowing undertakings to provide postal services and, where applicable, to establish and/or operate their networks for the provision of such services, in the form of a general authorisation or individual licence as defined below:

    — 'general authorisation': an authorisation, regardless of whether it is regulated by a 'class licence' or under general law and regardless of whether such regulation requires registration or declaration procedures, which does not require the postal service provider concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation,

    — 'individual licence': an authorisation which is granted by a national regulatory authority and which gives a postal service provider specific rights, or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the postal service provider is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority;

…

18. *national regulatory authority*: the body or bodies, in each Member State, to which the Member State entrusts, inter alia, the regulatory functions falling within the scope of this Directive;

…'

6. Article 9 of Directive 97/67 is worded as follows:

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

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

— be made subject to universal service obligations,

— if necessary and justified, impose requirements concerning the quality, availability and performance of the relevant services,

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

— where appropriate, be subject to an obligation to make a financial contribution to the national regulatory authority's operational costs referred to in Article 22,

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

Obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers.

…

3. The procedures, obligations and requirements referred to in paragraphs 1 and 2 shall be transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria. Member States shall ensure that the reasons for refusing or withdrawing an authorisation in whole or in part are communicated to the applicant and shall establish an appeal procedure.'

C – *Austrian law*

1. The PMG

7. Section 24(1) of the Bundesgesetz über die Regulierung des Postmarktes (Federal Law regulating the postal market; 'Postmarktgesetz' ('PMG'))[5] provides that 'any person shall be entitled to propose and supply postal services subject to the conditions laid down by this Federal Law'.

5 — BGBl. I No 123/2009, in the version published in BGBl. I 111/2010.

8. Section 25(1) of the PMG provides that 'postal service providers shall be required to declare to the regulatory authority the intended provision of a postal service, as well as changes in its operation and cessation thereof, prior to the commencement, change or cessation of that operation. …'

9. Section 26(1) of the PMG states that 'the commercial routing of items of correspondence up to 50 g on behalf of third parties must be the subject of a concession.'

10. Section 37(2) of the PMG provides that 'the regulatory authority for the purposes of this Law and of Directive [97/67], for the tasks mentioned in Section 40, shall be the Post-Control-Kommission and, for all other tasks, Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH).'

2. The KOG

11. Section 34(3) of the Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria ('KommAustria') und eines Bundeskommunikationssenates (Federal Law on the establishment of a communications authority 'Austria' ('KommAustria') and a Federal communications board) ('the KOG')[6] provides that 'financial contributions shall be determined and collected on the basis of the relationship between the turnover of each contributor and the total turnover specific to the sector, in which respect the calculation shall be based on the turnover as a whole made in the country from the provision of telecommunications services.'

12. Section 34a of the KOG provides as follows:

'(1) The costs borne by RTR-GmbH in the performance of the tasks … relating to the postal sector shall be financed, on the one hand, by financial contributions and, on the other hand, by resources from the Federal budget. The grant from the Federal budget of an annual amount of EUR 200 000 shall be paid to RTR-GmbH in two equal instalments … The total amount of the other costs incurred by RTR-GmbH and covered by financial contributions may reach a maximum amount of EUR 550 000 per year.

(2) Financial contributions shall be paid from the postal sector. The postal sector includes those postal service providers which are subject to an obligation to declare under Section 25 [of the PMG] or which benefit from a concession under Section 26 of that Law.

(3) Section 34(3) to (15) shall apply *mutatis mutandis*, replacing 'Telekom-Control-Kommission' with 'Post-Control-Kommission'.'

II – **The main proceedings and the questions referred for a preliminary ruling**

13. DHL Express (Austria) GmbH ('DHL Express'), an Austrian branch of the Deutsche Post DHL group, is an undertaking operating in the field of courier and express postal services and, on that basis, provides in particular the clearance, sorting, transport and distribution of parcels of up to 31.5 kg and of printed matter and documents, in conjunction with extensive value-added services (relating, for example, to guaranteed observance of certain delivery times, packaging, and tracking and tracing).

14. By a decision of 23 April 2012, the Post-Control-Kommission (Commission monitoring postal services; the 'PCK') required DHL Express to contribute to the financing of RTR-GmbH for the period from 1 July to 31 December 2011. In its decision PCK took the view that DHL Express was liable to contribute financially to the operations of the postal sector's regulatory authority. As well as

6 — BGBl. I No 32/2001, in the version published in BGBl. 50/2010.

partial financing of public origin, Austrian law also provides for financial contributions to be paid by all postal service providers, irrespective of whether they are responsible for the universal service. Based on DHL Express's projected annual turnover for 2011, the PCK therefore calculated that undertaking's share in the total turnover of the postal sector before determining the proportion of RTR's financing which was to be borne by DHL Express.

15. DHL Express brought an action challenging that decision before the Verwaltungsgerichtshof. It maintains that it does not provide any service falling within the scope of the universal service within the meaning of Directive 97/67 and that Article 9(2) of that directive limits the right for Member States to require that providers in the postal sector contribute to the financing of the national regulatory authority responsible for that sector to only those providers which supply services falling within the scope of the universal service. It argues that national law which requires all postal service providers without distinction to contribute to that financing is therefore contrary to that directive.

16. Against that background and faced with a difficulty connected with the interpretation of EU law, the Verwaltungsgerichtshof (Higher Administrative Court) decided to stay the proceedings before it and, by a decision received at the Court Registry on 7 January 2015, refer the following questions to the Court for a preliminary ruling:

'(1) Does Directive 97/67 …, as amended by Directive 2008/6 …, in particular Article 9 thereof, preclude national rules under which postal service providers are obliged to contribute to the financing of the national regulatory authority's operational costs irrespective of whether they provide universal services?

(2) If the first question is answered in the affirmative:

(a) Is it sufficient, for a financing obligation to exist, that the provider concerned provides postal services which are to be classified under the national rules as universal services, but which go beyond the mandatory minimum range of universal services under the directive?

(b) When determining an undertaking's share of the financial contributions, is one to proceed in the same way as when determining the financial contributions to the compensation fund under Article 7(4) of the directive?

(c) Do the requirement to respect the principles of non-discrimination and proportionality within the meaning of Article 7(5) of the directive and the taking account of "inter-changeability … with the universal service" within the meaning of recital 27 of Directive 2008/6 … then mean that shares of turnover which are attributed to value-added services, hence postal services not assignable to the universal service but which are connected with the universal service, are excluded and are not taken into account when determining the share?'

III – **Procedure before the Court**

17. The appellant and the respondent in the main proceedings, the Austrian, Belgian, French, Norwegian and Spanish Governments, and the European Commission have all submitted written observations on this reference for a preliminary ruling.

IV – **Legal assessment**

A – *The first question referred for a preliminary ruling*

18. By its first question referred to the Court for a preliminary ruling the referring court is seeking, in essence, to establish whether Directive 97/67 precludes Member States from requiring all service providers in the postal sector to contribute to the financing of the regulatory authority responsible for that sector.

1. The argument put forward by the appellant in the main proceedings

19. DHL Express, supported in its line of reasoning by the French Government, maintains that both the wording and the general scheme of Article 9 of Directive 97/67 dictate that Article 9(2), second subparagraph, fourth indent of the directive must be interpreted as meaning that Member States may impose such a contribution only on those undertakings which provide services falling within the scope of the universal service.

20. As regards its wording, Article 9 of Directive 97/67 sets out the conditions governing the provision of postal services and access to the network generally. Paragraph 2 of that provision is specifically and exclusively given over to services which fall within the scope of the universal service. Article 9(2), second subparagraph, of Directive 97/67 provides that the granting of authorisations may be made subject to obligations listed in the various indents. The term 'authorisations' refers to a system of rules applying only to those undertakings responsible for services falling within the scope of the universal service. Furthermore, as regards its general scheme, a parallel must be made between the obligation to contribute to the financing of the regulatory authority responsible for the postal sector, mentioned in Article 9(2), second subparagraph, fourth indent, of Directive 97/67, and the obligation to make a financial contribution to the compensation fund laid down in Article 9(2), second subparagraph, third indent, of that directive. The personal scope of the latter obligation is set out in recitals 27 and 28 of Directive 2008/6 from which it is apparent that only those undertakings providing services falling within the scope of the universal service are concerned. This is, moreover, the approach adopted by the Commission itself. Thus, since Article 9(2), second subparagraph, third indent of Directive 97/67 concerns only those undertakings providing services coming under the universal service, the same conclusion must be drawn for the other aspects set out in Article 9(2), second subparagraph, and therefore also for the obligation to contribute to the financing of the regulatory authority responsible for the postal sector. Article 9(2), third subparagraph, of Directive 97/67 for its part confirms that the second subparagraph of that article is in effect given over to obligations that may involve undertakings providing services which fall within the scope of the universal service, whether or not they are designated as such.[7]

2. Assessment

21. The Court has consistently held that where a literal interpretation is not particularly enlightening as regards the meaning of a provision of EU law contained in a directive, it is necessary, for the purpose of interpreting that provision, to have regard also to its context, the general scheme and the aim of the directive of which it forms part.[8]

7 — For the purposes of Article 4 of Directive 97/67.

8 — See, inter alia, judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 55 and the case-law cited).

22. I willingly concede to the appellant in the main proceedings that Article 9 of Directive 97/67 is a provision of poor drafting quality and the interpretation of which, focusing on its wording, gives rise to confusion. To my mind, the Court will therefore have to undertake a complete overhaul of the provision, as the wording of Article 9 of Directive 97/67 is not — by any stretch of the imagination — drafted in such a manner as to facilitate its immediate comprehension.

23. That will be all the more necessary as, currently, and according to the Commission's written pleadings, 18 Member States require all postal service providers to contribute to the financing of their national regulatory authority. [9]

24. To highlight the actual scope of Article 9(2), second subparagraph, fourth indent, of Directive 97/67, I shall, initially, consider that provision by assessing its wording, then its general scheme, which I shall attempt to explain by reflecting briefly on the origin of that provision. Then, secondly, I will have to identify the tasks of the national regulatory authority responsible for the postal sector and explain my continued conviction that, contrary to the efforts made to this end by the appellant in the main proceedings, the arrangements for financing that authority cannot be considered to be the same as the arrangements for financing the compensation fund.

a) Textual, systematic and historical interpretation

25. Article 9 of Directive 97/67 is included in the chapter of the directive devoted to conditions governing the provision of postal services and access to the network. That article is divided into three paragraphs.

26. Article 9(1) of Directive 97/67 states that, for services which fall outside the scope of the universal service, Member States may introduce 'general authorisations'. Article 9(2), first subparagraph, of the directive provides that, for services which fall within the scope of the universal service, Member States may introduce 'authorisation procedures including individual licences'. The second subparagraph of that provision provides that the granting of 'authorisations' may be made subject to compliance with various conditions, which are listed in the five separate indents within that subparagraph.

27. On a first view, because the list of the various conditions to which the granting of 'authorisations' may be subject is contained in Article 9(2) and because that paragraph, in its first subparagraph, refers to 'services which fall within the scope of the universal service', it could be inferred that the 'obligation to make a financial contribution to the national regulatory authority's operational costs' mentioned in Article 9(2), second subparagraph, fourth indent, of Directive 97/67, may be imposed only on the providers of services falling within the scope of the universal service.

28. However, it is worth noting that Article 9(2), second subparagraph, of Directive 97/67 refers to 'authorisations' without further clarification. That subparagraph may therefore be read not in isolation; but, on the contrary, in the light of Article 2, point 14, of Directive 97/67, which defines the term 'authorisations'. It is clear from a reading of that article that it is a generic term for 'any permission setting out rights and obligations specific to the postal sector and allowing undertakings to provide

9 — Irrespective of the form that contribution takes. The Spanish Government described, as far as it was concerned, the mechanism applying specifically to the Kingdom of Spain. The contribution required thus takes the form of a charge or fee levied on entry or on renewed entry in the register of postal service undertakings.

postal services and, where applicable, to establish and/or operate postal networks for the provision of such services, in the form of a 'general authorisation' or 'individual licence'…'[10] Recital 22 and Article 9(3) of Directive 97/67 are further examples of use, by the legislature, of the term 'authorisation'[11] in its generic sense.

29. Therefore, the literal interpretation proposed by the appellant in the main proceedings is, in my view, clearly too narrow.

30. Furthermore, recourse cannot be had, in support of the argument put forward by DHL Express, to Article 9(2), third subparagraph, of Directive 97/67, under which '[o]bligations and requirements referred to in the first indent [of Article 9(2), second subparagraph, of that directive] and in Article 3 may only be imposed on designated universal service providers'. Nevertheless, and in view of the general scheme of Article 9 of Directive 97/67, considered in its entirety, it would make no sense to limit the other indents in the second subparagraph of Article 9(2) of the directive.

31. I shall now address the various indents concerned.

32. The outcome of the first indent is governed by Article 9(2), third subparagraph, of Directive 97/67 as cited above. Universal service obligations may, evidently, be imposed only on designated universal service providers for the purposes of Article 4(2) of the directive.

33. The second indent provides for the possibility of making the 'authorisations' subject to requirements relating to the quality, availability and performance of the relevant services. There is nothing to prevent the imposition of such conditions on all postal service providers. In that regard, I note that Article 9(1) of Directive 97/67 provides that Member States may introduce general authorisations — for services which fall outside the scope of the universal service — if they consider them to be necessary 'to guarantee compliance with the essential requirements'. Those requirements, defined in Article 2, point 19, of Directive 97/67, cover 'general non-economic reasons which can induce a Member State to impose conditions on the supply of *postal services*',[12] including, for example, the confidentiality of correspondence. I can absolutely accept that requiring, as part of the general authorisation spanning the sector, providers of postal services — even those falling outside the scope of the universal service — to meet certain standards in terms of quality, availability or performance of those services, might help to safeguard and maintain essential requirements.

34. The third indent concerns the possibility of subjecting 'authorisations' to compliance with the obligation to make a financial contribution to the compensation fund, the establishment of which is provided for in Article 7(4) of Directive 97/67. I shall return at a later stage of my assessment to this obligation but I am already inclined to consider that, on account of the link *expressly* established[13] by the legislature between that obligation and the providers only of services falling within the scope of the universal service, that indent must be interpreted as not concerning, as a rule, all providers of postal services.

35. The fourth indent is the relevant indent for the purpose of this reference for a preliminary ruling. Directive 97/67 does not contain any express provision from which it can be inferred that its scope is limited to only those undertakings which provide services falling within the scope of the universal service.

10 — Article 2, point 14, of Directive 97/67 goes on to define the two specific categories of 'authorisations' which are general authorisations and individual licences (see point 5 of this Opinion).

11 — According to that recital, 'Member States should be able to regulate, by appropriate authorisation procedures, on their territory, the provision of postal services which are not reserved to the universal service providers …'.

12 — My emphasis. The reference to the supply of postal services generally is important.

13 — See, inter alia, recital 27 of Directive 2008/6. On the absence of relevance of the similarity between the arrangements for financing the fund and those for financing the national regulatory authority, see point 49 et seq. of this Opinion.

36. The fifth indent envisages the possibility of subjecting the granting of 'authorisations' to the obligation to respect working conditions laid down by national law. I have difficulty believing that such a possibility is itself strictly limited to only those undertakings which provide services falling within the scope of the universal service. Here too, the strict interpretation proposed by the appellant in the main proceedings would lead to the consideration that Member States are not entitled to require undertakings the activity of which is governed by general authorisations — those issued in respect of the provision of postal services falling outside the scope of the universal service — to respect the working conditions established by national law. Furthermore, like the second indent, the fifth indent must be read in conjunction with Article 9(1) and Article 2, point 19, of Directive 97/67. The latter provision expressly mentions 'respect for the terms and conditions of employment' as an essential requirement.

37. A reading of Article 9(2), second subparagraph, of Directive 97/67, whereby the possibility for Member States to subject the granting of authorisation to compliance with the obligations listed therein would not necessarily be limited to only those providers of services falling within the scope of the universal service — unless expressly provided otherwise –, is not disproved by the assessment of the background to that provision.

38. In its written pleadings the Commission supplied certain information regarding the circumstances in which the Council of the European Union sought, on Ireland's initiative, to introduce Article 9(2), second subparagraph, fourth indent, of Directive 97/67. Like the Commission, I tend to the view that the EU legislature accordingly sought to open up an additional financing option for the Member States and that the non-compulsory nature of those options supports a relatively broad interpretation of the relevant provisions. I would also point out that, in the original directive, that is to say Directive 97/67 in its original version, the legislature already considered the term 'authorisation' in its generic sense, the amendments introduced by Directive 2008/6 having no bearing on the initial definition of the term 'authorisation'. [14]

39. Beyond those aspects relating to the wording, general scheme and origin of Article 9 of Directive 97/67, assessment of the tasks entrusted to the national authorities regulating the postal sector shows that the Union legislature did not conceive their role as being confined only to those postal services falling within the scope of the universal service.

b) The tasks entrusted to the national regulatory authorities

40. Under Article 9(2), second subparagraph, fourth indent, of Directive 97/67, Member States may avail themselves of the right to require postal service providers to make a financial contribution to the national regulatory authority. Article 22(1) of Directive 97/67 provides that Member States are to designate 'one or more national regulatory authorities *for the postal sector*'. [15] Article 22(2) of the directive further sets out their duties. Under that provision, those authorities are to have as '*a particular* task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service'. [16] Nevertheless, that task in connection with the universal service is not exclusive since Article 22(2) of Directive 97/67 further states that the national regulatory authorities 'may also be charged with ensuring compliance with competition rules in the postal sector'. Those authorities also play an

14 — See Article 2, point 14, of Directive 97/67 in its original version.

15 — My emphasis.

16 — My emphasis.

important role in terms of gathering information for auditing or statistical purposes.[17] Here too, the obligation for postal service providers to provide that information to the national regulatory authorities is not limited to only those providers of services falling within the scope of the universal service,[18] as was already stated in the statement of reasons for Directive 2008/6.[19]

41. Furthermore, while the role of the national regulatory authorities is to guarantee compliance with the obligations under the directive, it is relevant to note that Article 1 of Directive 97/67, which defines the objective and scope of the directive, provides in particular, in its first indent, that the directive establishes common rules concerning the provision of postal services, understood in the general sense.

42. It must also be noted that Directive 2008/6, which introduced substantial amendments to Directive 97/67, involves a paradigm shift in the Community approach to the postal sector. In adopting Directive 2008/6, the EU legislature aims to 'set the "last step" towards Full Market Opening (FMO) by removing all remaining exclusive or special rights in force for (a) universal service provider(s) and all other obstacles to the postal services provision'.[20] This marks the end of a monopolistic approach and a gradual move towards free competition.[21]

…'

43. The national regulatory authorities must be a part of that paradigm shift. At recital 47 of Directive 2008/6, the role of those authorities is considered to be 'crucial, in particular in those Member States where the transition to competition still needs to be completed … National regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks'.[22] All postal service providers may therefore be involved in providing the means necessary to finance the operations of those authorities.

44. The role of the national regulatory authorities, as conceived by the EU legislature, therefore extends beyond the universal service alone. Under Directive 97/67, those authorities are entrusted with upholding the general interest in the postal sector, verifying in particular that operators on the market which is opening up act in a manner consistent with the requirements of Directive 97/67.

45. Moreover, it must also be acknowledged that the EU legislature conferred significant discretion on Member States in terms of defining the tasks and conferring powers on the national regulatory authorities. Thus, the Commission observed, in its Report to the Council and the European Parliament on the application of the Postal Directive, that 'the mandate, resources and powers of the [national regulatory authorities] vary significantly among Member States and there are justified doubts whether all [national regulatory authorities] are adequately equipped to (efficiently) fulfil their tasks'.[23]

17 — See Article 22a of Directive 97/67.

18 — See, for example, Article 22a(2) of Directive 97/67 as amended.

19 — At point III.2.(viii) of the Statement of the Council's Reasons in Common Position (EC) No 19/2007 adopted by the Council on 8 November 2007 (OJ 2007 C 307E, p. 22), the Council noted that '[n]ational regulatory authorities are focused on *postal markets* monitoring, including by appropriate information provision by *all market players*' (my emphasis).

20 — See point II of the Statement of the Council's Reasons in Common Position (EC) No 19/2007 adopted by the Council on 8 November 2007 (OJ 2007 C 307E, p. 22).

21 — That paradigm shift is in particular illustrated in recital 23 of Directive 2008/6, under which 'Directive 97/67 … established a preference for the provision of the universal service through the designation of universal service providers … Greater competition and choice means that Member States should be given further flexibility to determine the most efficient and appropriate mechanism to guarantee the availability of the universal service, while respecting the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market. Member States may apply one or a combination of the following: the provision of the universal service by market forces, the designation of one or several undertakings to provide different elements of the universal service or to cover different parts of the territory and public procurement of services.

22 — The Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (COM(2008) 884 final of 22 December 2008) confirmed that well-functioning National Regulatory Authorities 'are crucial for the accomplishment of the internal market for postal services' (see p. 6 of that report).

23 — COM(2008) 884 final.

46. Given that the EU legislature intended the role and tasks devolved to the national regulatory authorities as having to be of benefit to all operators in the postal sector, it would be illogical, if not pointlessly discriminatory, as the Norwegian Government and the Commission maintain, to interpret Article 9(2), second subparagraph, fourth indent, of Directive 97/67 as meaning that only those undertakings providing services which fall within the scope of the universal service may be made subject to the obligation to contribute to the financing of the operations of those authorities.

47. Lastly, do I need to point out that although, as DHL Express mentions, in accordance with the case-law in *Corbeau*,[24] express postal and courier services constitute specific services with features that distinguish them fundamentally from universal postal services, the fact remains that the Court clearly held that those express postal and courier services come under the postal sector? In those circumstances, since *all* postal service providers may be required to contribute to the financing of the national regulatory authority, it must therefore also be possible for express postal and courier undertakings to be subject to that obligation.

48. The foregoing considerations relating to the role and tasks devolved to the national regulatory authorities cause me, lastly, to question the relevance of the arguments put forward by DHL Express and the French Government with regard to the analogy that should be drawn between the arrangements for financing those authorities and those for financing the compensation fund.

c) No analogy with the arrangements for financing the compensation fund

49. Still from the point of view of a paradigm shift, the intention of Directive 2008/6 was to bring a gradual end to the exclusive or special rights that could be enjoyed by the designated providers of the universal service[25] in favour of establishing an obligation of solidarity in the form of a mechanism to compensate or a mechanism for the sharing of the net cost of the universal service obligations.[26]

50. Where the Member State concerned opts to introduce a mechanism for the sharing of the cost, that Member State may 'establish a compensation fund which may be funded by service providers' and/or users' fees … Member States may make the granting of authorisations to service providers under Article 9(2) subject to an obligation to make a financial contribution to that fund or to comply with universal service obligations. …'[27] However, recital 27 of Directive 2008/6 states that '[i]n order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service …'

51. Thus, and unlike with regard to the financing of the national regulatory authorities' operations, a clear connection between the compensation fund and the undertakings providing services falling within the scope of the universal service was established. This is attributable to the objectives pursued through the establishment of a compensation fund differing substantially from those pursued through the establishment and promotion of the role and tasks of the national regulatory authorities.

24 — C-320/91, EU:C:1993:198.

25 — See Article 7(1) of Directive 97/67.

26 — See Article 7(3) of Directive 97/67.

27 — Article 7(4) of Directive 97/67.

52. After all, as its name suggests, the compensation fund is intended to offset the economic imbalance which may be created, that is to say, 'to compensate the universal service provider for the provision of services representing an unfair financial burden'.[28] On any analysis, the obligation to compensate should therefore be limited to those providers only of services which fall, or may fall, within the scope of the universal service[29] since, contrary to my earlier illustration regarding the national regulatory authorities, the benefits of the compensation fund are limited to the universal service.

53. Accordingly, the obligation to contribute to the financing of the compensation fund cannot be compared with the obligation to contribute to the financing of the national regulatory authorities, and what is true for one is not necessarily true for the other. Contrary to the appellant's argument, there is therefore no possible analogy between those two obligations.

d) Concluding remark

54. It is apparent from my assessment that there is nothing in Article 9 of Directive 97/67 to prevent a Member State from requiring all postal service providers, irrespective of whether they provide services falling within the scope of the universal service, to contribute to the financing of the operations of the regulatory authority responsible for the postal service.

55. If the Court is still not fully convinced by the foregoing arguments, I should like to make one final comment.

56. Even if Article 9(2), second subparagraph, second indent, of Directive 97/67 were interpreted in its entirety as concerning only the services falling within the scope of the universal service, that would not mean, *a contrario*, that Member States cannot make the providers of postal services not falling within the scope of the universal service subject to an obligation to contribute to the financing of the national regulatory authorities' operations.

57. I shall explain that comment.

58. The situation of providers of services not falling within the scope of the universal service would continue to be governed by Article 9(1) of Directive 97/67. In the light of the Court's findings with regard to the complaints procedures for which Directive 97/67 provides,[30] the directive did not harmonise fully the conditions under which general authorisations may be issued to those providers. With Article 9(1) of Directive 97/67 remaining silent in the matter, it would fall to the discretion of the Member States to decide whether to make all postal service providers contribute to the financing of the national regulatory authority's operations. It would be difficult to criticise them for this, however, in view of the wording of recital 47 of Directive 2008/6.[31]

e) Conclusions of the assessment

59. In the light of the foregoing considerations, it is clear from my analysis that Article 9 of Directive 97/67 does not preclude national rules under which postal service providers are obliged to contribute to the financing of the national regulatory authority responsible for the postal sector irrespective of whether they provide services falling within the scope of the universal service.

28 — Recital 23 of Directive 97/67. Article 9(2), second subparagraph, third indent, of Directive 97/67 provides for the right to make the granting of authorisations subject to the obligation to be involved in the compensation fund 'if the provision of the universal service entails a net cost and represents an unfair burden on the universal service provider(s), designated …'.

29 — That is to say to providers of 'non-reserved services which are within the scope of the universal service', to reproduce the vocabulary of Directive 97/67 in its initial version (see, inter alia, Article 9(2) of that directive).

30 — See judgment in *DHL International* (C-148/10, EU:C:2011:654, paragraphs 35 and 36 and the case-law cited).

31 — See points 4 and 43 of this Opinion.

B – *The second question referred for a preliminary ruling*

60. Since the referring court addresses its second question to the Court only in the event that it answers the first question in the affirmative, and in view of the answer I suggest giving to that first question, there is no need for the Court to state its views on that second question.

V – **Conclusion**

61. In the light of the foregoing considerations, I propose that the Court give the following answer to the first question referred by the Verwaltungsgerichtshof (Higher Administrative Court) for a preliminary ruling: Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, and in particular Article 9 thereof, do not preclude national rules under which postal service providers are obliged to contribute to the financing of the national regulatory authority responsible for the postal sector irrespective of whether they provide services falling within the scope of the universal service.