JUDGMENT OF THE COURT (First Chamber)

6 March 2008 *

In Joined Cases C-287/06 to C-292/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Köln (Germany), made by decision of 28 April 2006, received at the Court on 3 July 2006, in the proceedings

Deutsche Post AG (C-287/06, C-288/06 and C-291/06),

Magdeburger Dienstleistungs- und Verwaltungs GmbH (MDG) (C-289/06),

Marketing Service Magdeburg GmbH (C-290/06),

Vedat Deniz (C-292/06)

v

Bundesrepublik Deutschland,

* Language of the case: German.

intervening parties:

Marketing Service Magdeburg GmbH (C-287/06),

Citipost Gesellschaft für Kurier- und Postdienstleistungen mbH (C-288/06),

Deutsche Post AG (C-289/06, C-290/06 and C-292/06),

Magdeburger Dienstleistungs- und Verwaltungs GmbH (MDG) (C-291/06),

THE COURT (First Chamber),

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

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2007,

after considering the observations submitted on behalf of:

— Deutsche Post AG, by J. Sedemund and S. Gerstner, Rechtsanwälte,

— Marketing Service Magdeburg GmbH, Citipost Gesellschaft für Kurier- und Postdienstleistungen mbH and Magdeburger Dienstleistungs- und Verwaltungs GmbH (MDG), by C. Freiherr von Ulmenstein, Rechtsanwalt,

— Vedat Deniz, by T. Brach, Rechtsanwalt,

— the German Government, by M. Lumma, acting as Agent, assisted by T. Lübbig, Rechtsanwalt,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Commission of the European Communities, by G. Braun and K. Simonsson, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 47(2) EC and 95 EC, and of Article 7(1) and the fifth indent of Article 12 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 (OJ 1998 L 15, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 (OJ L 176, p. 21; 'Directive 97/67').

2 The references were made in the ontext of proceedings between, first, Deutsche Post AG ('Deutsche Post'), as provider of the universal postal service in Germany, and, second, Magdeburger Dienstleistungs- und Verwaltungs GmbH (MDG), Marketing Service Magdeburg GmbH and Vedat Deniz ('the intermediaries concerned'), on the one hand, and the Bundesrepublik Deutschland, on the other hand, concerning decisions of the Bundesnetzagentur (Federal Network Agency; 'BNA') relating to the grant and conditions of access of those intermediaries to the partial services of the Deutsche Post postal network.

Legal context

Community legislation

3 Directive 97/67 initiated the process of gradual liberalisation of the market in postal services. According to recital 2 in the preamble to Directive 2002/39, Directive 97/67 'established a regulatory framework for the postal sector at Community level, including measures to guarantee a universal service and the setting of maximum limits for the postal services which Member States may reserve to their universal service provider(s) with a view to the maintenance of the universal service, and a timetable for decision-making on the further opening of the market to competition, for the purposes of creating a single market in postal services'.

4 Directive 2002/39 continues this liberalisation and, according to recitals 14 and 24 in the preamble thereto, it provides a timetable for a gradual and controlled opening of the letters market to competition, giving 2009 as the probable date for the full accomplishment of the internal market for postal services.

5 Article 2 of Directive 97/67 provides:

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

(1) *postal services*: services involving the clearance, sorting, transport and delivery of postal items;

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

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

— the routing and handling of those items from the postal network access point to the distribution centre,

— distribution to the addresses shown on items;

(3) *access points*: physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers;

(4) *clearance*: the operation of collecting postal items deposited at access points;

…'

6 With regard to the services which may be reserved for the provider(s) of the universal postal service, the first, third and fourth subparagraphs of Article 7(1) of Directive 97/67 provide:

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

…

To the extent necessary to ensure the provision of universal service, direct mail may continue to be reserved within the same weight and price limits.

To the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits.'

7 Articles 9 and 10 of Directive 97/67 lay down the conditions governing the provision of non-reserved services. In that regard, provision is made for general authorisations and individual licences for competitor undertakings.

8 Under Article 11 of that directive:

'The European Parliament and the Council, acting on a proposal from the Commission and on the basis of Articles 57(2), 66 and 100a of the Treaty, shall adopt such harmonisation measures as are necessary to ensure that users and the universal service provider(s) have access to the public postal network under conditions which are transparent and non-discriminatory.'

9 With regard to the tariff principles to be observed by the providers of the universal postal service, the fourth and fifth indents of Article 12 of that directive impose on the Member States the obligation to take steps to ensure that the tariffs for each of the services forming part of the provision of that service comply with the principles of transparency and non-discrimination.

National legislation

10 Directive 97/67 was transposed into German law by the Law on postal services (Postgesetz) of 22 December 1997 (BGBl. 1997 I, p. 3294), as subsequently amended ('the Law on postal services'). This law lays down that Deutsche Post is the universal postal service provider for the purposes of Article 7 of that directive. The BNA is the German regulatory authority for the purposes of Article 22 of the directive.

11 Paragraph 51 of the Law on postal services provides, with regard to the licences to be granted to the universal postal service provider on the one hand and to the competitor undertakings on the other:

'(1) Until 31 December 2007, Deutsche Post … shall have the exclusive right to handle on a commercial basis postal items and addressed catalogues with an individual weight of less than 50 grams, the unit price of which is less than two and a half times the price applicable to corresponding postal items in the lowest weight category (exclusive statutory licence). The first sentence shall not apply:

…

5. to anyone who at the request of the sender collects mail at his premises in order to deposit it at the nearest Deutsche Post collection point …or at another Deutsche Post collection point … situated in the same local authority area;

…'

12 The competitor undertakings may also request the universal postal service provider, subject to certain conditions, to give them access to parts of its handling services. In that regard, Paragraph 28(1) of the Law on postal services states:

'If the holder of a licence occupies a dominant position on a market for postal services which are subject to licensing, he must, if requested, offer parts of his handling

services separately on that market, to the extent that he can afford to do so. The obligation stated in the first sentence shall apply in respect of another provider of postal services only if the undertaking making the request does not occupy a dominant position and if competition would otherwise be restricted disproportionately on that or another market. The holder of the licence has the right to refuse partial provision of services if that is likely to put at risk the efficient functioning of his facilities or the security of the business, or if as the case may be he no longer has sufficient capacities to carry out the requested service.'

The main proceedings and the question referred for a preliminary ruling

13 The intermediaries concerned are private undertakings operating in the postal services sector. They are holders of a licence under the fifth point of the second sentence of Paragraph 51(1) of the Law on postal services which authorises them to handle items of correspondence collected from the sender's premises, at his request and in his name, in order to deposit them at the nearest Deutsche Post office or at another Deutsche Post office situated in the same local authority area.

14 The mail handling system set up by the universal postal service provider in Germany, Deutsche Post, is organised as follows: the mail deposited by senders in letter boxes and at post offices is collected and then transported to the 'sorting office' (internal distribution unit which is not usually open to the public) closest to the sender, where the mail is first of all pre-sorted by destination and format. It is then transported to the sorting office nearest to the addressee, where detailed sorting takes place and, finally, it is delivered to the addressees.

15 By decision of the BNA of 15 September 2000, Deutsche Post was ordered to agree to special tariffs for business customers who carry out certain preparatory operations themselves, that is who deliver guaranteed minimum quantities of mail, pre-sorted as to destination and format, directly to the sorting offices of despatch. Those special tariffs were set out in the General Terms and Conditions offered by Deutsche Post.

16 On 27 June 2001, Vedat Deniz asked Deutsche Post to make it an offer for partial services under Paragraph 28 of the Law on postal services. That request related in particular to the possibility of depositing at a sorting office, on a commercial basis, in its own name and at the same special rates applicable to Deutsche Post business customers, bulk quantities of mail collected from various customers, consolidated and pre-sorted.

17 Since Deutsche Post refused to make Vedat Deniz such an offer, the latter applied to the BNA to fix the conditions of access to partial services. By decision of 5 September 2001, the BNA rejected Vadat Deniz's request, finding that the licence granted pursuant to point 5 of the second sentence of Paragraph 51(1) of the Law on postal services does not authorise its holder to provide services forming certain parts of the mail handling chain.

18 On 10 October 2001, Vedat Deniz brought an action before the referring court against the decision rejecting its application.

19 Some years later, by decision of 11 February 2005, the Bundeskartellamt (Federal Cartel Office), prohibited Deutsche Post from refusing intermediaries access to partial services to the extent that it grants such access and discounts to bulk mailers

under 'customer partial service contracts', irrespective of the weight and price limits under the exclusive licence, and to intermediaries under 'competitor partial service contracts' for the delivery of items of correspondence over those weight and price limits.

20 Following that Bundeskartellamt decision, the intermediaries concerned asked Deutsche Post to make them an offer for partial services for postal items which they handle for their customers at rates in line with those offered by Deutsche Post to its customers.

21 A few weeks later, those intermediaries applied to the BNA to fix the conditions for access to those partial services. Their requests were based on the fact that, according to them, Deutsche Post discriminates against them by not granting them the same tariffs as those enjoyed by its customers.

22 By decisions of 24 October 2005, the BNA allowed the applications to the extent that, in particular, it ordered Deutsche Post to grant the intermediaries access to the sorting offices on the General Terms and Conditions applicable to business intermediaries. The decision was revocable in the event that the Bundeskartellamt's decision were annulled in appeal proceedings or by reason of a decision of the Commission of the European Communities or a judgment of the Court of First Instance of the European Communities or of the Court of Justice.

23 The intermediaries concerned, with the exception of Vedat Deniz, and Deutsche Post brought actions for different reasons before the referring court against those decisions of the BNA.

24 Since the Verwaltungsgericht (Administrative Court) Köln has doubts concerning the interpretation to be given to the fifth indent of Article 12 of Directive 97/67 in conjunction with Article 7 of the directive, it decided to stay the proceedings and to refer to the Court for a preliminary ruling the following question, which has the same wording in Cases C-287/06 to C-292/06:

'Is Article 47(2) EC, in conjunction with Article 95 EC, the fifth indent of Article 12 and Article 7(1) of Directive [97/67], to be interpreted as meaning that, where a universal service provider applies special tariffs for business customers who give postal items to the sorting office pre-sorted for the postal network, that universal service provider is obliged to apply those special tariffs also to undertakings which collect postal items from the sender and give them pre-sorted for the postal network at the same access points and on the same terms and conditions as business customers, without the universal service provider being permitted to refuse to do so, having regard to its obligation to provide a universal service?'

25 By order of the President of the Court of 31 October 2006, Cases C-287/06 to C-292/06 were joined for the purposes of the written and oral procedure and the judgment.

Question referred for a preliminary ruling

26 By its question, the referring court asks essentially whether Directive 97/67 must be interpreted as precluding refusal to apply to businesses which consolidate, on a commercial basis and in their own name, postal items from various senders the special tariffs which the national universal postal service provider grants, within the scope of its exclusive licence, to business customers for the deposit of minimum quantities of pre-sorted mail at its sorting offices.

27 At the outset, it must be pointed out that, with regard to the application of special tariffs, Directive 97/67 expressly provides, in the fifth indent of Article 12, that 'Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

…

— whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to private customers who post under similar conditions.'

28 It is clear from that provision that, if a universal postal service provider applies special tariffs, it must, in order to observe the principles of transparency and non-discrimination, apply them equally in particular as between third parties. Thus, contrary to the claim of Deutsche Post and the German Government, whenever such a provider applies special tariffs to businesses and/or bulk mailers, consolidators of mail from different customers are entitled to enjoy the same tariffs under the same conditions.

29 That finding cannot be invalidated by the arguments of Deutsche Post and the German Government to the effect that the fifth indent of Article 12 of Directive 97/67 does not require that the intermediaries concerned and the business customers of the universal postal service provider must be treated equally.

30 In that regard, Deutsche Post and the German Government contend first that the activity of clearance, transport and sorting carried out by the intermediaries concerned falls within the field which can be reserved pursuant to Article 7(1) of Directive 97/67 and which, in fact, was reserved in the public interest by the German legislature to Deutsche Post until 31 December 2007. As a result, those intermediaries are not authorised to offer the services for which they request special tariffs. On the other hand, business customers act as 'self-providers', for the purposes of recital 21 in the preamble to that directive, and cannot, therefore, encroach on Deutsche Post's exclusive licence.

31 It must be pointed out that, under the first subparagraph of Article 7(1) of Directive 97/67, Member States may, to the extent necessary to ensure the maintenance of universal service, continue to reserve services, within certain price and weight limits, to one or more universal service providers. Those services are to be limited to the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence. To the extent necessary to ensure the provision of universal service, direct mail and outgoing cross-border mail may, in accordance with the third and fourth subparagraphs of Article 7(1), also continue to be reserved within the same weight and price limits as those defined in that paragraph.

32 Nevertheless, as is apparent from the wording of the second sentence of the first subparagraph of Article 7(1) of Directive 97/67, the handling chain which may be reserved to the provider of the universal postal service starts only with clearance. According to Article 2(4) of the directive, 'clearance' means the operation of collecting postal items deposited at access points, which are defined, in Article 2(3), as 'physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers'.

33 Physical facilities such as the sorting offices of Deutsche Post are access points within the meaning of Article 2(3). It is common ground that Deutsche Post's business customers may deposit there their postal items with the public postal network maintained by it as universal postal service provider. Contrary to the claim of Deutsche Post, whether the partial services provided by those business customers themselves or in their name up to the point of deposit of their items in the sorting offices can or cannot be classified as 'self-provision' is not relevant in that regard.

34 Moreover, as the German Government points out in its written observations, beyond the scope of Deutsche Post's exclusive licence, on the basis of the Law on postal services, its competitors also have access to the sorting offices and the discounts granted for partial services. Such access seems to be necessary because, as Vedat Deniz explains in its written observations, without being contradicted on that point, the letter boxes and post offices of Deutsche Post are too small to receive or deal with large quantities of items.

35 It must therefore be stated that an activity such as the collection by intermediaries at the premises of various senders of postal items, their pre-sorting and transport to access points such as Deutsche Post sorting offices does not fall within the field which may be reserved under Article 7(1) of Directive 97/67. Consequently, that provision cannot be relied upon to justify treatment of the intermediaries concerned which is different from that enjoyed by Deutsche Post's business customers.

36 Deutsche Post and the German Government nevertheless contend that permitting intermediaries access to the sorting offices and the corresponding discounts for a partial service with regard to the postal items which, owing to their weight and their price, fall within that company's exclusive licence would threaten the financial stability of Deutsche Post. Those intermediaries would then be able to offer a lucrative group of customers, namely businesses, from which approximately 80% of all items come, the entire postal handling chain, at tariffs lower than those of Deutsche Post. For more expensive services, in particular distribution in rural areas, those intermediaries would then be able to turn to the services of the universal postal service provider, acting as sub-contractor, which would be bound to maintain in full its structure in terms of operations and personnel.

37 In that regard, it is sufficient to point out that, under the fifth indent of Article 12 of Directive 97/67, the special tariffs 'shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items'. Those tariffs can therefore be set in such a way that they cover the specific costs linked to the provision of the universal postal service and do not differ from the normal tariffs except due to the fact that the costs actually avoided are deducted from the latter tariffs, with the result that the grant of special tariffs does not affect the financial stability of the universal postal service provider.

38 Thus, if it were to turn out that the grant to the intermediaries of the discounts currently agreed only for the business customers of Deutsche Post means that those discounts are excessive compared with the avoided costs, it would be open to the company to reduce those discounts to the extent necessary for all recipients.

39 Furthermore, it is not disputed that the distribution of postal items which fall within the scope of the exclusive licence of the universal postal service provider remains, as a rule, reserved to that provider and that the discounts currently agreed by Deutsche Post for its business customers for the deposit, at sorting offices, of minimum quantities of pre-sorted mail vary between 3% and a maximum 21%.

40 Deutsche Post and the German Government also contend that the fifth indent of Article 12 of Directive 97/67 is concerned only with tariffs and it cannot, therefore, have the effect of compelling a Member State to open up, within the scope of the exclusive licence of the universal postal service provider, access to partial services to competitors. Access to the public postal network is the subject of Article 11 of that directive, which makes regulation of such access dependent on subsequent action by the Community legislature, which has however not yet used that power.

41 It is true that the fifth indent of Article 12 of Directive 97/67 is not intended to determine the question of principle whether a universal postal service provider is or is not obliged to grant access to the postal chain under conditions and at points different from those which apply to the traditional service for letter post. Nevertheless, as is apparent from the wording of that provision, it imposes on the Member States a strict obligation to apply the principles of transparency and non-discrimination where such access to special tariffs is in fact granted by that provider.

42 Both Deutsche Post and the German Government concede that Deutsche Post grants its business customers, in an even more liberal way than required by the directive, access to its postal network at points other than the traditional access points and agrees special tariffs for them on that basis.

43 It is precisely such a situation that the fifth indent of Article 12 of Directive 97/67 is intended to regulate. Whenever a provider of the universal postal service applies special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, the tariffs, together with the associated conditions, are to apply equally as between third parties in particular.

44 Having regard to all of the foregoing, the answer to the question referred must be that the fifth indent of Article 12 of Directive 97/67 is to be interpreted as precluding refusal to apply to businesses which consolidate, on a commercial basis and in their own name, postal items from various senders the special tariffs which the national universal postal service provider grants, within the scope of its exclusive licence, to business customers for the deposit of minimum quantities of pre-sorted mail at its sorting offices.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The fifth indent of Article 12 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, as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002, must be interpreted as precluding refusal to apply to businesses which consolidate, on a commercial basis and in their own name, postal items from various senders the special tariffs which the national universal postal service provider grants, within the scope of its exclusive licence, to business customers for the deposit of minimum quantities of presorted mail at its sorting offices.

[Signatures]