OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 26 May 2011 [1]

I — Introduction

1. The Hof van Beroep te Brussel (Belgium) refers for a preliminary ruling two questions concerning 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. [2] Specifically, it raises the question of the scope to be given to the provisions of Article 19 of that directive, in particular in the light of the subsequent amendments to that legislation. [3] The national court also asks the Court of Justice to interpret Article 56 TFEU et seq. on the freedom to provide services.

2. The cause of the dispute before the national court, between Express Line NV, now DHL International NV ('Express Line'), and Belgisch Instituut voor Postdiensten en Telecommunicatie (Belgian Institute for Postal Services and Telecommunications) ('the BIPT'), is the fact that the BIPT sought to place that company's express delivery services within the remit of the Belgian ombudsman service for the postal sector and required the company to pay a fee on that account.

3. The present reference for a preliminary ruling asks the Court to determine whether the Member States are permitted to extend an external scheme for dealing with complaints from users of postal services to providers of postal services which are outside the scope of the universal service, in the light of the provisions of Directive 97/67, principally Article 19, which provides for such a scheme for universal postal service providers.

4. If the answer to the first question is in the affirmative, the national court also questions whether such an extension is consistent with the principles relating to the freedom to provide services laid down by the FEU Treaty. None the less, taking into account the particular facts of this case, it seems that the principles inherent in the freedom of establishment are more likely to be applicable and

1 — Original language: French

2 — OJ 1998 L 15, p. 14.

3 — The first question referred relates to the amendments made by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67 with regard to the further opening to competition of Community postal services (OJ 2002 L 176, p. 21) and by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67 with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3).

would therefore be more usefully interpreted by the Court of Justice.

5. However, in the light of the course taken by the dispute in the main proceedings as a result of the applicant's withdrawal of a plea after the national court made its reference for a preliminary ruling, it is necessary first and foremost to determine whether there is still any need to answer the questions raised in what may no longer be a real dispute.

II — Legal context

A — *European Union law*

Directive 97/67

6. Recitals 35 and 41 in the preamble to Directive 97/67 provide:

'(35) ... the need for improvement of quality of service means that disputes have to be settled quickly and efficiently;... in addition to the forms of legal redress available under national and Community law, a procedure dealing with complaints should be provided, which should be transparent, simple and inexpensive and should enable all relevant parties to participate;

...

(41) ... this Directive does not affect the application of the rules of the Treaty, and in particular its rules on competition and the freedom to provide services.'

7. Article 1 of Directive 97/67 provides:

'This Directive establishes common rules concerning:

...

— the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,

...

— the creation of independent national regulatory authorities.'

8. Article 2(1) of Directive 97/67 states that, '[f]or the purposes of this Directive, the following definitions shall apply:... "postal services": services involving the clearance, sorting, transport and delivery of postal items.'

9. Under Articles 3 and 4 of Directive 97/67, Member States are to designate one or more universal service providers, universal service being defined as involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users. [4]

10. Until 31 December 2010, the time-limit for transposing Directive 2008/6, Member States were able to reserve certain services to their universal service provider(s), in accordance with Article 7 of Directive 97/67, although those providers may also offer services falling outside the scope of the universal service.

11. As regards undesignated providers, Article 9 of that directive allowed Member States to introduce either general authorisations, for postal services falling outside the scope of the universal service, or authorisation procedures, including individual licences, for non-reserved postal services falling within the scope of the universal service.

12. Under Article 19 of Directive 97/67:

'Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards.

Member States shall adopt measures to ensure that those procedures enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.

Without prejudice to other possibilities of appeal under national and Community legislation, Member States shall ensure that users, acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers, may bring before the competent national

4 — In accordance with recitals 11 and 12 in the preamble to Directive 97/67, the aim of universal services is to provide all users with easy access to the postal network, in particular by offering a sufficient number of access points and ensuring satisfactory conditions with regard to the frequency of collections and deliveries.

authority cases where users' complaints to the universal service provider have not been satisfactorily resolved.

In accordance with Article 16, Member States shall ensure that the universal service providers publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with.'

— Directive 2002/39

13. Recital 28 in the preamble to Directive 2002/39 states:

'(28) It might be appropriate for national regulatory authorities to link the introduction of licences to requirements that consumers of the licensees' services are to have transparent, simple and inexpensive procedures available to them for dealing with their complaints, regardless of whether they relate to the services of the universal service provider(s) or to those of operators holding authorisations, including individual licence-holders. It might be further appropriate for these procedures to be available to users of all postal services, whether or not they are universal services. Such procedures should include procedures for determining responsibility in case of loss of, or damage to, mail items.'

14. That directive replaced the first and second subparagraphs of Article 19 of Directive 97/67 with the following text:

'Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved).

Member States may provide that this principle is also applied to beneficiaries of services which are:

— outside the scope of the universal service as defined in Article 3, and

— within the scope of the universal service as defined in Article 3, but which are not provided by the universal service provider.

Member States shall adopt measures to ensure that the procedures referred to in the first subparagraph enable disputes to be

settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation'.

— Directive 2008/6

15. Directive 2008/6, which provides for the full opening of the internal postal services market, also amended Directive 97/67.

16. In particular, recital 42 in the preamble to that directive provided, first, that, in order to increase consumer protection, it was appropriate to extend the application of minimum principles concerning complaint procedures beyond universal service providers and, secondly, that, with a view to increasing the effectiveness of complaint handling procedures, it was appropriate to encourage the use of out-of-court settlement procedures. The amendments made, lastly, by that directive to Article 19 of Directive 97/67 meet those stated objectives.

17. The date by which the Member States were required to transpose Directive 2008/6 was set by Article 2(1) of that directive at 31 December 2010, subject to the transitional provisions laid down in Article 3, which are irrelevant in the present case. Since that time-limit had not yet expired at the material time in the main proceedings and transposition into the Belgian legal system did not take place until the entry into force of a law adopted on 13 December 2010, [5] the directive in question is not applicable in this case.

B — *National law*

18. The Law of 21 March 1991 on the reform of certain public commercial undertakings [6] ('the 1991 Law'), as amended on several occasions, in particular by Royal Decree of 9 June 1999 implementing that law [7] ('the Royal Decree of 1999'), transposes Directive 97/67 into the Belgian legal system.

19. The 1991 Law designates a single universal service provider, namely 'DE POST', [8] and reserves to it the provision of certain postal services. An individual licence must be obtained in order to provide a postal service which is not reserved but which falls within the scope of the universal service. [9] On the other hand, the provision of a postal service

5 — *Moniteur belge* of 31 December 2010, p. 83267.

6 — *Moniteur belge* of 27 March 1991, p. 6155.

7 — Royal Decree transposing the obligations arising from Directive 97/67 (*Moniteur belge* of 18 August 1999, p. 30697).

8 — Pursuant to Article 131(14) of that law, following the amendment made by the Royal Decree of 1999.

9 — Article 148(e) of the 1991 Law.

which is outside the scope of the universal service is subject to the requirement, inter alia, of a declaration to the BIPT. [10]

20. Title I of that law, entitled 'Autonomous public undertakings', contains a Chapter X, concerning the ombudsman services of such undertakings, and is subdivided into two sections, one relating to the responsibilities of those services, and the other to their composition and operation.

21. With regard to the responsibilities of the ombudsman service for the postal sector, Article 43b of the 1991 Law, as inserted by a law of 21 December 2006, [11] ('the 2006 Law'), provides:

'*1.* An ombudsman service for the postal sector shall be set up within the [BIPT], which shall be responsible for matters relating to the users of the following undertakings:

1. DE POST;

2. undertakings which provide postal services... and which are subject to licensing requirements...;

3. undertakings which provide postal services... and which are subject to declaration requirements....

Matters relating to users are matters relating to the interests of users who do not themselves provide postal services.

...

3. The ombudsman service for the postal sector shall have the following tasks:

1 examining all user complaints relating to:

(a) the activities of DE POST...

(b) the postal activities of the undertakings referred to in paragraph 1(2) and (3) of the present article;

...

10 — Article 148a of the 1991 Law. With regard to the two categories of non-reserved postal services under Belgian law, see the commentary on Article 24 of the Royal Decree of 1999 in the report to the King by the Minister for Telecommunications, Mr Di Rupo (*Moniteur Belge* of 18 August 1999, in particular p. 30702).

11 — Loi portant des dispositions diverses en vue de la création du service de médiation pour le secteur postal et modifiant la loi du 13 juin 2005 relative aux communications électroniques (Law laying down various provisions for the creation of an ombudsman service for the postal sector, amending the Law of 13 June 2005 on electronic communications) (*Moniteur belge* of 23 January 2007, p. 2965). That law entered into force on 2 February 2007.

3 acting as mediator in order to facilitate an amicable settlement in disputes between the undertakings referred to in paragraph 1 of the present article and users;

4 making a recommendation to the undertakings referred to in paragraph 1 of the present article in the event that an amicable settlement cannot be reached. A copy of the recommendation shall be sent to the complainant;

5 providing users who contact them verbally or in writing with the best available advice on their rights and interests;....

4. The complaints of end-users shall be admissible only where the complainant has lodged a complaint in accordance with the internal procedure of the undertaking concerned. The complaints of end-users shall be inadmissible where they were lodged anonymously or were not lodged in writing with the ombudsman service for the postal sector.

...

7. If a user's complaint is declared admissible by the ombudsman service for the postal sector, recovery proceedings shall be suspended by the operator for a maximum period of four months from when the complaint was lodged with the ombudsman service or until such time as the postal sector ombudsman service has drawn up a recommendation or an amicable settlement can be reached.'

22. As regards the operation of the postal sector ombudsman service, Article 45b of the 1991 Law, as inserted by the 2006 Law, [12] lays down the method for financing the services provided by that body. To that end, provision is made for an 'ombudsman fee', to be paid annually to the BIPT by the undertakings referred to in Article 43b(1) of the 1991 Law on the basis of the information which they are required to provide in accordance with Article 45b(4) of that law.

23. Article 45b(5) of that law states that the amount of the individual fee payable by an undertaking is to be determined annually by the BIPT in accordance with a complex algebraic formula which, in essence, takes into account in particular, first, the turnover achieved by the undertaking at issue during the preceding year from activities which fall

12 — The most recent changes made to the abovementioned two articles of the 1991 Law concerning the postal sector ombudsman service were introduced by Articles 2 to 4 of the Law of 13 December 2010, referred to above. That law, which transposes Directive 2008/6 into the Belgian legal system, is not applicable to this case *ratione temporis*.

within the remit of the ombudsman service, [13] and, secondly, the number of complaints relating to that undertaking that were processed during the preceding year by the ombudsman service. Under the second paragraph of Article 45b(6), any fees not paid by the due date are automatically to bear interest at the statutory rate plus 2 %.

III — The dispute in the main proceedings and the questions referred for a preliminary ruling

24. Express Line is part of the DHL group of companies, the principal place of business of which is in Germany. Its main activity consists in providing express delivery services, that is to say, by its own account, the individualised transport for customers, by air or road, of documents, parcels, pallets or wagon loads.

25. Following receipt of a request from the BIPT, on 23 December 2006 Express Line made a declaration, in relation to some of its services, in respect of the provision of postal services falling outside the scope of the universal service, in accordance with Article 148a(1)(1) of the 1991 Law. However, it added to that declaration the qualification that it did not accept the classification of its express delivery services as 'postal services'.

26. By letter of 11 July 2007, the BIPT informed Express Line that it fell within the remit of the postal sector ombudsman service and that it was therefore regarded as liable to pay the fee intended to finance that service. Furthermore, it asked Express Line for information regarding the turnover which it had generated in the 2006 financial year from activities falling within the remit of the ombudsman service for the purpose of calculating the fee that it would have to pay on that account.

27. Express Line objected to being made subject to the remit of the postal sector ombudsman service on the ground that its express delivery services were not postal services but added-value transport and logistics services directed at businesses.

28. By letter of 13 November 2008, the BIPT stated that Express Line had contravened Articles 43b to 45b of the 1991 Law and gave it formal notice to supply, within 15 days, the information required to calculate the ombudsman fee, failing which it would be

13 — Paragraph 5, *in fine*, of Article 45b of the 1991 Law states that '[u]ndertakings whose turnover from activities falling within the scope of the ombudsman service is less than or equal to EUR 500 000 shall not contribute to the financing of the ombudsman service'. That threshold is to be compared with the threshold, fixed at the same amount, for contributing towards the financing of the BIPT (Article 148f of that law).

required to pay an administrative fine ('the contested act').

29. After sending the requested financial information, in order not to incur that fine, Express Line brought an action before the Hof van Beroep te Brussel against the letter of formal notice. [14] It sought, principally, annulment of the contested act and, in the alternative, the referral of questions to the Court of Justice of the European Union for a preliminary ruling.

30. Against that background, by decision of 23 March 2010, the Hof van Beroep te Brussel decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the provisions of Directive 97/67/EC... as amended by Directive 2002/39/EC, and in particular, but not exclusively, Article 19 thereof, in view of the amendments introduced by Directive 2008/6... which must be transposed into national law by 31 December 2010 at the latest, be understood and interpreted as precluding Member States from imposing a mandatory external complaints scheme on providers of non-universal postal services on the ground that:

(i) as regards the applicable complaints procedures for the protection of the users of postal services, the Directive provides for full harmonisation; or on the ground that:

(ii) that obligation was imposed by Directive 2002/39/EC only on the universal service provider and, since Directive 2008/6..., on all universal service providers, even though, according to the wording of the [third] subparagraph of Article 19(1) of... Directive 2008/6..., Member States may only encourage, but may not impose, the development of independent schemes for the resolution of disputes between the providers of postal services, other than universal postal services, and end-users?

(2) If the answer to the first question is that the Postal Directive does not, as such, preclude Member States from imposing on the providers of non-universal postal services a mandatory external complaints scheme as envisaged by the first subparagraph of Article 19(2) [of Directive 97/67] for the providers of

14 — Article 2(1) of the Law of 31 May 2009 amending the Loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et telecommunications belges (Law of 17 January 2003 concerning legal remedies and dispute resolution under the Law of 17 January 2003 on the rules governing the regulator of the Belgian post and telecommunications sectors) (*Moniteur belge* of 10 July 2009, p. 47845) states that 'decisions of the [BIPT] shall be challengeable by an action before the Cour d'appel de Bruxelles (Brussels Court of Appeal), exercising unlimited jurisdiction, whose decision shall be in the form of an interim order'.

universal postal services, must the principles relating to the free movement of services (Article 49 et seq. EC; now Article 56 et seq. TFEU) be interpreted in such a way that restrictions on the free movement of services, introduced by a Member State on grounds of overriding reasons in the public interest relating to consumer protection, whereby the providers of non-universal postal services are made subject to a mandatory external complaints scheme as envisaged by the first subparagraph of Article 19(2) [of Directive 97/67] for the providers of universal postal services, can be considered compatible with the FEU Treaty even if, in the application of the complaints scheme concerned, no distinction is made between the complaints of consumers and those of other end-users, although the vast majority of the users of those services (in the present case, express and courier services) are business users[?]'

IV — The procedure before the Court

31. The reference for a preliminary ruling was lodged on 29 March 2010.

32. Written observations were submitted to the Court by Express Line, the Belgian and Polish Governments and the European Commission.

33. By letter of 14 January 2011, Express Line informed the Court that, in the proceedings pending before the national court, it had withdrawn the plea in law which it had raised on the basis of the principles of the free movement of services and Directive 97/67 as amended by Directive 2002/39. It asked the Court, consequently, to take formal notice that there was no longer any need to answer the questions referred for a preliminary ruling in this case.

34. By letter received at the Court Registry on 18 February 2011, the BIPT argued that Express Line could not make such a request, on the ground that, under Belgian law, it was not permissible for the applicant in the main proceedings to make a decision on the national court's behalf as to whether or not the two questions referred for a preliminary ruling still need to be answered in order to enable it to give a ruling on the subject-matter of the case. It pointed out that, although the first of those questions paraphrased a question proposed by Express Line, the second was formulated by the Hof van Beroep te Brussel itself and is dependent on the answer given to the first.

35. By fax of 9 March 2011, the national court informed the Court of Justice that the

plea in law based on Article 56 TFEU and on Directive 97/67, which had been the reason for its reference for a preliminary ruling, had been withdrawn. It stated that, in accordance with the Court's case-law, that development was probably not without consequence with respect to the Court's jurisdiction to answer the questions referred.

36. At the hearing held on 17 March 2011, neither the BIPT nor the Polish Government was represented.

37. Express Line reiterated its view that it was no longer necessary to answer the questions referred, given the status of the main proceedings. Accordingly, it asked the Court to terminate the proceedings and, in the alternative, to stay them until the national court had responded, in the main proceedings, to its request to withdraw its plea in law based on European Union law ('EU law').

38. The Belgian Government and the Commission did not comment on that procedural issue, only on the substance of the case.

39. After the hearing, by letter of 25 March 2010 Express Line sent to the Court of Justice an order of the Hof van Beroep te Brussel of 9 March 2011 which stated that the parties to the main proceedings had been heard by the latter court on 8 February 2011 on the subject of Express Line's withdrawal of its first plea in law alleging infringement of Article 56 TFEU and Directive 97/67, and its request that the stay of proceedings ordered by that court be terminated and the proceedings reinstated at the earliest convenient date.

40. Notwithstanding the foregoing, the national court has not formally withdrawn its reference for a preliminary ruling.

V — Analysis

A — *The procedural status of the case*

41. In the light of the recent developments in the proceedings brought before the national court, in particular the fact that Express Line has withdrawn the plea in law which, according to the Hof van Beroep te Brussel, prompted it to make a reference for a preliminary ruling, it is appropriate to ask whether it is necessary for the Court to rule on the questions referred to it for a preliminary ruling.

42. I would point out that, for the parties to the main proceedings, the reference proceedings are a step in the action pending before the national court. [15] It is only the request for interpretation or the request for an assessment of validity, as the case may be, which is addressed to the Court of Justice, not the case itself. The national court does not therefore relinquish jurisdiction in the case. The only effect of the order for reference submitted to the Court of Justice is to stay the proceedings, which remain pending before the national court, until the Court of Justice has delivered its ruling on the reference. [16]

43. For its part, the Court may not rule on a reference for a preliminary ruling on interpretation if there is not (or there is no longer, as may be the case here) a dispute in the main proceedings that raises questions falling within the scope of EU law which the national court is required to resolve.

44. After all, it is clear from both the wording and the structure of Article 267 TFEU and Article 23 of the Statute of the Court of Justice of the European Union that the national courts are not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a dispute is pending before them, in the context of which they are called upon to give a decision which could take into account the preliminary ruling. Therefore, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when at the time it is made the procedure before the court making it has already been terminated. [17]

45. Furthermore, the justification for a preliminary reference, and hence for the jurisdiction of the Court, is not that it enables advisory opinions on general or hypothetical questions to be delivered, [18] but rather that it is necessary for the effective resolution of an actual dispute. If that dispute ends, it is therefore no longer necessary to answer the questions referred.

46. It is true that, in preliminary ruling proceedings, the national court is, in the light of the particular circumstances of the case, in the best position to assess both the need for that reference in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice. [19]

15 — See, in particular, Case C-472/99 *Clean Car Autoservice* [2001] ECR I-9687, paragraph 24, and the order of the President of the Court of 15 February 2011 in Case C-269/10 *Accor Services France*. See, also, the information note on references from national courts for a preliminary ruling (OJ 2009 C 297, p. 1), which states that '[t]he decision by which a national court or tribunal refers a question to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps'.

16 — Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 28.

17 — Case 338/85 *Pardini* [1988] ECR p. 2041, paragraph 11, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 12.

18 — Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 17, and *Zabala Erasun and Others*, cited above (paragraph 29), and case-law cited.

19 — Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 21 et seq., and case-law cited, and Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 28.

47. Nevertheless, the problems which may be entailed by the national court's exercising of its discretion and the relations which it maintains in that connection with the Court of Justice are governed exclusively by the provisions of EU law. Therefore, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, [20] it must be in a position to make any assessment inherent in the performance of its own duties, in particular in order to determine, where appropriate, as all courts must, whether it has jurisdiction. [21]

48. As that jurisdiction is dependent on the existence of an action in the main proceedings, the Court of Justice may even verify it of its own motion, [22] given that the right of the national court to hold that the case has been terminated and to withdraw the questions referred for a preliminary ruling does not fall under national law, but relates to the interpretation of Article 267 TFEU, the provisions of which are absolutely binding on the national court. [23]

49. The Court has held that, although it is in principle for the national court alone to withdraw its request for a preliminary ruling if it deems that such a ruling is no longer necessary to enable it to decide the action before it, the claimant in the main proceedings may also cause the reference to be withdrawn by discontinuing its action. [24] Even a partial discontinuance, which does not therefore cause the main proceedings to be terminated, may be sufficient for the Court no longer to have jurisdiction to give a ruling on the questions referred to it. [25]

50. In the present case, it is apparent from the information brought to the Court's attention after the reference for a preliminary ruling was made that, even though Express Line did not fully withdraw its action before the national court, it abandoned the only plea in law raised before that court which was relevant under EU law, which is to say that it no longer claims that there has been an infringement of Article 56 TFEU and of Directive 97/67.

51. It seems to me that, because the reference for a preliminary ruling is no longer relevant to the resolution of the dispute in the main proceedings, it now has no purpose. None the less, even though its position remains ambiguous, possibly on account of the difficulties

20 — In the same spirit of cooperation between the courts concerned, in the event of an action against the decision to refer, the Court must abide by that decision and the preliminary ruling procedure must continue for as long as the Court of Justice has not been informed that that decision has been revoked (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139).

21 — *Zabala Erasun and Others* (paragraphs 15 and 16) and *Fluxys* (paragraphs 29 and 31), cited above.

22 — Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others*, [2008] ECR I-6747, paragraph 40.

23 — *Zabala Erasun and Others*, (paragraphs 26 and 27).

24 — Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 10, read *a contrario*; order of 13 March 1997 in Case C-202/96 *Laboratoires Valda* [1997] and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 34,

25 — *Fluxys*, (paragraphs 33 and 34).

created by national procedural law in this regard, [26] the national court appears to be asking the Court to give such a ruling.

52. In its order of 9 March 2011, the Hof van Beroep te Brussel emphasises that 'the withdrawal of a plea in law which has given rise to a reference for a preliminary ruling is a fact which, in accordance with the case-law of the Court of Justice, has an impact on the Court's jurisdiction to answer the question referred'. Moreover, it concludes that decision by stating that 'the handling of the case is automatically postponed until the Court of Justice has given judgment to the effect that the question referred for a preliminary ruling has become devoid of legal purpose'.

53. If, notwithstanding the position which it appears to have taken, the reasons why the Hof van Beroep te Brussel has refrained from withdrawing its reference for a preliminary ruling are not clear, it is fair to assume that they have to do with procedural constraints. The Court has already shown that it is willing to assist the national court in such circumstances. It has held that, where the national court considers that it does not have the power, under the national rules of procedure, to withdraw its reference for a preliminary ruling, it is possible for the Court of Justice to find that the case pending before the national court has no purpose and to conclude that it is no longer necessary to answer the question referred. [27]

54. Whatever the cause of the national court's reticence, given the course taken by the dispute in the main proceedings, it is my view that it is no longer necessary for the Court of Justice to answer the questions referred to it in the present case in order to resolve the dispute before the national court. It is therefore appropriate to find that there is no need to adjudicate.

55. It is only in the alternative, should the Court see fit not to endorse my proposal that there is no need to adjudicate, that I shall set out below the basis for a reply on the substance of the case.

B — *The meaning of postal services*

56. Express Line disputes the contested act's classification of the services in respect of which it made a declaration as 'postal services', on the ground that such an approach is contrary to EU law. It argues that, since its

26 — As was the case in *Fluxys*, where the national court stated that 'pursuant to Article 825 of the Belgian Judicial Code, the validity of Fluxys' partial abandonment of the action "[was] subject to its acceptance by the opposing party"' (judgment cited above, paragraph 21).

27 — Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 16 et seq., and Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 27 et seq., in which the Court considered that an answer to the question referred would be of no use to the national court because the claims of the claimant in the main proceedings had been met in their entirety.

services are restricted to the transport and logistics activities connected with its express delivery business, they cannot constitute 'postal services' within the meaning of Article 2(1) of Directive 97/67, which lists four activities which, in the appellant's submission, must all be performed. [28] It claims that the 1991 Law, which provides that the activities listed are alternatives, [29] extends its scope beyond that of the directive and thus transposes the directive incorrectly into the Belgian legal system.

57. As pointed out by the national court, that complaint should be examined at the outset since the existence of a supply of services falling within that classification is a precondition for the applicability of the ombudsman system the implementation of which is contested.

58. I will say here and now that, in my view, it is not necessary for the Court of Justice to give a ruling on this matter, since the Hof van Beroep te Brussel has already rejected the part of the plea in law based on this submission and expressly concluded as a result that, in the circumstances of the dispute before it, it was not necessary to refer a question for a preliminary ruling on this issue. In accordance with the case-law, it would be incompatible with the function of the Court of Justice under Article 267 TFEU for it to answer an additional question raised in essence in the observations of the applicant in the main proceedings when the national court, which has sole jurisdiction to assess the extent to which it requires an interpretation of EU law in order to deliver judgment, took the view that no purpose was served in referring that question in the present case. [30]

59. That said, I agree with the view taken by the Hof van Beroep te Brussel [31] that the Belgian legislation applicable in the present case gives a definition of the term 'postal services' which is consistent with that laid down

28 — Namely 'services involving the clearance, sorting, transport and delivery of postal items'. Express Line infers that there is a requirement of cumulative performance from the fact that the conjunction 'and' rather than 'or' is used in the French, English and German versions of the provision concerned.

29 — Article 131(1) of the 1991 Law, as provided for in the Royal Decree of 1999, states that 'postal services' within the meaning of that law are 'services relating to addressed items and involving *one of the following operations or a combination of several of them*: – clearance; – sorting; – transport; – delivery' (emphasis added). I would point out that that paragraph was amended by the Law of 13 December 2010 as follows: 'postal services: services involving the clearance, sorting, transport and delivery of postal items', but that that version is not applicable *ratione temporis* to the dispute in the main proceedings.

30 — See, in particular, Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraphs 23 and 24, and the Opinion of Advocate General Léger in that case (points 29 et seq.), as well as Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29, and Case C-537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-6525, paragraph 24.

31 — That court has also held in other cases (in particular, the judgment of 3 December 2009, 2007/AR/2742, www.juridat.be: *Reflets*, No 2/2010, p. 9) that, in the absence of any indication to the contrary in Directive 97/67, the term 'and' should be accorded its generally accepted meaning and, therefore, be understood as an ordinary coordinating conjunction, not a cumulative conjunction.

in Article 2(1) of Directive 97/67, given that the wording of that article gives no indication as to the cumulative nature of the list it contains. I would add that the way in which that provision has changed over time supports the view that it is not necessary for the operator concerned to carry out all four of the activities listed. [32]

C — *The first question referred*

60. In its first question, the national court asks the Court whether Directive 97/67, in the version resulting from Directive 2002/39, and principally, but not exclusively, Article 19 of that directive, is to be interpreted as meaning that it precludes legislation which imposes a mandatory external complaints scheme on providers of non-universal postal services.

61. Only Express Line claims that this question, which was worded in accordance with its request, should be answered in the affirmative. The Belgian and Polish Governments, on the other hand, like the Commission, consider that Directive 97/67 does not preclude the contested scheme. I too shall adopt that position.

62. In the present case, the postal services provided by Express Line, in respect of which it made a declaration to the BIPT, are services which are outside the scope of the universal service. That being the case, the applicant in the main proceedings refuses to be subject to the remit of the Belgian ombudsman service for the postal sector and to be required to pay, on that account, the fee payable for that service, as it is requested to do by the BIPT in the contested act. Express Line criticises the fact that the 1991 Law provides that even non-universal postal service providers must be covered by the external complaints scheme offered by the ombudsman service.

63. It bases its claims, in particular, on Article 19 of Directive 97/67, as amended by Directive 2002/39, the fourth paragraph of which provides that Member States must ensure that users [33] are able to have recourse to a competent national authority, as part of an external complaints procedure, in the event that the complaints they lodged directly with

32 — Although Directive 2008/6 is not applicable in the present case, it may none the less be relevant to the interpretation of Directive 97/67 in so far as it added to Article 2 paragraph 1a, which defines 'postal service provider' as an 'undertaking that provides *one or more* postal services' (emphasis added).

33 — Acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers.

the universal service provider [34] have not been satisfactorily resolved. [35] It is clear from that provision that the providers at whom the external complaints scheme to be established by the Member States is specifically directed are universal service providers.

64. However, the harmonisation of national provisions achieved by Directive 97/67 is only minimal, in so far as it is not designed to lay down common rules covering the entire postal sector. [36] In particular, the fourth paragraph of Article 19, in the version applicable in the present case, begins with the following reservation: '[w]ithout prejudice to other possibilities of appeal under national and Community legislation'. That provision therefore seeks only to establish a minimum framework beyond which the Member States are authorised to legislate further, provided that they comply with the other rules of EU law. As pointed out by the Commission, there is nothing in the wording of Article 19 of Directive 97/67 to suggest that Member States are not permitted to impose the external complaints procedure on service providers other than universal service providers.

65. The specific purpose of that article, which seeks to strengthen the protection afforded to the interests of all users of postal services by guaranteeing them a better quality of service, as the general title of Directive 97/67 indicates, also leads me to conclude that that directive does not preclude Member States from making provision for other dispute resolution procedures. [37]

66. In my view, that analysis is supported by both the preamble to Directive 97/67 and the preamble to Directive 2002/39, which amended it in this area. Recital 35 in the preamble to Directive 97/67 states that the complaints procedure provided for in Article 19 applies only 'in addition to the forms of legal redress available under national and Community law'. Moreover, when recital 28 to Directive 2002/39 refers to the aforementioned complaints scheme, it views complaints relating

34 — The first and second paragraphs of Article 19 of Directive 97/67 deal with the internal procedure for making complaints to universal service provider(s) that is to be introduced by the Member States; the Member States can also impose it on users of postal services which fall outside the scope of the universal service or of postal services which do fall within the scope of that service but which are not provided by the universal service provider.

35 — Recital 35 in the preamble to Directive 97/67 justifies the introduction of two mechanisms for dealing with complaints by users of postal services, one internal and one external, by stating that '... the need for improvement of quality of service means that disputes have to be settled quickly and efficiently;... a procedure dealing with complaints should be provided, which should be transparent, simple and inexpensive and should enable all relevant parties to participate'.

36 — See, in particular, the Report from the Commission to the European Parliament and the Council of 18 October 2006 on the application of Directive 97/67 as amended by Directive 2002/39 (COM(2006) 595 final) which points out '[t]he present Postal Directive is based on the principle of minimum harmonisation'.

37 — See to this effect the Communication on the Single Market Act dated 13 April 2011 refers, among the '[t]welve levers to boost growth and strengthen confidence', to the adoption of legislation on alternative dispute resolution 'to establish simple, fast and affordable out-of-court settlement procedures for consumers' (COM(2011) 206 final, p. 9).

to the services of universal service providers in the same way as complaints relating to the services of other providers, namely 'operators holding authorisations, including individual licence-holders'. The same recital adds that it is appropriate for 'these procedures to be available to users of all postal services, whether or not they are universal services'.

67. That stated intention by the European legislature to extend the protection introduced by Article 19 of Directive 97/67 to a broad group of postal service users is reflected in the amendments made by Directive 2002/39 to the first and second paragraphs of that article. [38]

68. The same intention governed the adoption of Directive 2008/6. As stated above, the provisions of that directive are not applicable *ratione temporis* in the context of the present case. None the less, they may shed some useful light on the interpretation of Directive 97/67, the content of which they change to some extent. Recital 42 in the preamble to Directive 2008/6 provides that 'in order to increase consumer protection, it is appropriate to extend the application of minimum principles concerning complaint procedures beyond universal service providers', which highlights the fact that Directive 97/67 was not intended to achieve full harmonisation of the relevant legislation of the Member States.

69. I infer from that interpretation [39] that the provisions of Directive 97/67 as amended by Directive 2002/39, in particular Article 19, do not preclude a Member State from adopting measures such as those at issue in the main proceedings.

D — *The second question referred*

70. By its second question, referred in the alternative, the national court asks, in essence, whether Article 56 TFEU et seq., concerning the freedom to provide services, preclude a

38 — In accordance with the case-law (see, recently, Case C-16/10 *The Number and Conduit Enterprises* [2011] ECR I-691, paragraph 28), in order to ascertain the meaning and scope of a provision contained in a directive, it must be viewed against its legislative background and it must be interpreted by having regard to its wording, the overall scheme of the directive concerned and the objectives pursued by the legislature.

39 — Namely that 'Member States may provide that [the] principle [according to which transparent, simple and inexpensive procedures are made available for dealing with users' complaints] is also applied to beneficiaries of services which … are outside the scope of the universal service as defined in Article 3, and … within the scope of the universal service as defined in Article 3, but which are not provided by the universal service provider'.

Member State from introducing restrictions on that freedom by imposing on the providers of non-universal postal services a mandatory external complaints scheme on grounds relating to consumer protection, even though that scheme makes no distinction between the complaints of consumers and those of other end-users, and the vast majority of the users of those services are business users.

71. First of all, I would note that, with the exception of the applicant in the main proceedings, all the parties which have submitted observations agree that the provisions of the FEU Treaty do not preclude the national legislation at issue. That is also my opinion, for the reasons set out below.

72. The directives adopted by the EU legislature in the postal sector bring about a minimal degree of harmonisation. It is the provisions of the treaties, more specifically the FEU Treaty in this case, which are binding on the Member States otherwise, that is to say in those areas in which they have retained full legislative discretion. Nevertheless, as recital 42 in the preamble to, and Article 26 of, Directive 97/67 reiterate, [40] even though they are free to legislate, Member States are required to comply with the principles of EU law when exercising the powers reserved to them.

73. In the light of the information relating to the dispute in the main proceedings, I take the view, like the Commission, that the rules of EU law at issue are those relating to freedom of establishment, defined by Article 49 TFEU et seq., rather than those relating to the freedom to provide services. [41] After all, the postal services concerned are generally provided from an establishment situated in the Member State of destination. Accordingly, Express Line, which is part of a German group of companies, is established in Belgium.

74. In accordance with settled case-law, the Court of Justice is able to interpret provisions which are not mentioned in the questions

40 — Those provisions state that there is nothing to prevent a Member State from maintaining in force or introducing measures for the postal sector which are more liberal than those provided for by the directive, nor, should that directive lapse, from maintaining in force measures which they have introduced in order to implement it, provided in each case that such measures are compatible with the Treaty.

41 — On the combination of the provisions applicable to those two freedoms of movement, see, by analogy, Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 44 et seq., and Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 57 et seq.

referred, [42] in order, in a spirit of cooperation with the national court, to provide that court with any answers that may be useful for resolving the dispute before it.

75. It will be for the national court to determine, having regard to the specific facts of the case, whether the situation at issue in the main proceedings falls within the scope of the freedom of establishment or the freedom to provide services. However, in the light of the foregoing, the questions referred should, in my view, be examined with reference to both Article 49 TFEU and Article 56 TFEU. [43]

76. Whichever one of those two freedoms of movement is to be adopted, the first stage of argument for the purposes of answering the question referred is to establish whether or not imposing an external complaints scheme on non-universal service providers, as provided for in Articles 43b and 45b of the 1991 Law, constitutes an obstacle to the freedom concerned.

77. The obligation to participate in a scheme of that kind cannot be regarded in itself as constituting an obstacle to the freedom of establishment or the freedom to provide services. In my view, an undertaking operating within the EU internal market cannot expect Member States not to have structures in place which afford legal protection to the interests of its customers and provide means of dispute resolution other than recourse to the courts. I would point out, moreover, that, like the Kingdom of Belgium, many States have opted to extend the external complaints schemes to providers of postal services operating outside the universal service sector. [44]

78. On the other hand, the duty to participate in the financing of such a scheme may give rise to a restriction, which is contrary to EU law, on one of those fundamental freedoms safeguarded by the FEU Treaty. As a general rule, structures of this kind are funded by the State, not by a group of undertakings including providers which operate outside the universal service sector, as in the present case. It is true that the obligation requiring undertakings to finance the budget for administrative regulatory and review structures cannot be regarded as exceptional in the regulated sectors of the national economy. None the less, those undertakings may legitimately expect

42 — See, in particular, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-230/98 *Schiavon* [2000] ECR I-3547, paragraph 37, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 47.

43 — See, by analogy, *Winner Wetten* (paragraphs 51 and 52) and *Stoß and Others* (paragraphs 64 and 65).

44 — See '*Main developments in the postal sector (2008-2010), Final Report 29 November 2010*', p. 79 (http://ec.europa.eu/internal_market/post/doc/studies/2010-main-developments_en.pdf), which study, commissioned by the Internal Market and Services Directorate General of the European Commission, covers not only the Member States of the EU but also those of the European Economic Area and the Swiss Confederation.

the resulting financial burden to be divided between the various operators concerned in a non-discriminatory, proportionate and transparent manner.

79. It is true that, in the present case, the burden in question does not harm providers from other Member States more than Belgian providers, as it is borne by all undertakings covered by the activities of the Belgian ombudsman service for the postal sector, without distinction as to nationality or place of establishment. However, although not discriminatory in that respect, it is capable of adversely affecting, by impeding them or rendering them less advantageous, the activities of undertakings established in a Member State other than that in which the recipient of the service is established, where they provide similar services, [45] or of deterring undertakings from other Member States which would otherwise have established themselves in Belgium. [46] It seems to me that both Article 49 TFEU et seq. and Article 56 TFEU et seq. preclude such a deterrent to access to the Belgian market in postal services. [47]

80. Nevertheless, it is settled case-law that that restriction may be allowed under the heading of derogations expressly provided for by the FEU Treaty, such as those set out in Article 52(1) TFEU, or justified, in accordance with the Court's case-law, by overriding reasons in the public interest. Freedom of establishment and the freedom to provide services, as fundamental principles of the FEU Treaty, may be restricted only by rules which are justified by overriding reasons in the public interest which apply to any person or undertaking pursuing an activity in the territory of the host Member State. [48]

81. In the present case, the curb placed on the exercise of those freedoms of movement may be legitimately based on grounds relating to consumer protection, which is specifically relied on by the Kingdom of Belgium.

45 — See, in particular, Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 23, and case-law cited.

46 — See, recently, Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 45, and Case C-565/08 *Commission* v *Italy* [2011] ECR I-2101, paragraph 45, and case-law cited.

47 — The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for economic operators from other Member States (see, in particular, *Commission* v *Italy*, paragraph 46).

48 — See, in particular, Joined Cases C-447/08 and C-448/08 *Sjöberg* [2010] ECR I-6921, paragraph 35 et seq., and Case C-64/08 *Engelmann* [2010] ECR I-8219, paragraphs 29 and 47.

82. I am of the view, like the Belgian and Polish Governments and the Commission, that it is irrelevant in this regard that the national legislation does not distinguish between complaints from private individuals and those from businesses. Even though Express Line's customer base is made up largely of businesses, EU law, and in particular Article 19 of Directive 97/67,[49] makes no distinction according to whether end-users who have used the ombudsman service entered into the disputed contracts for private purposes or on a commercial basis.[50] Furthermore, the effectiveness of the work of that service, which seeks to enhance the quality of services within the postal sector, is better guaranteed if all categories of users are able to make complaints to it.

83. I therefore consider this to be a valid justification, provided that the obstacle identified is genuinely proportionate, that is to say that the arrangements for financing the Belgian ombudsman service for the postal sector are such as to make it possible to attain the objective pursued but do not go beyond what is necessary for doing so, and are applied in a consistent and systematic manner.[51] It will be for the national court to assess whether, in the present case, the burden borne by Express Line is indeed appropriate to the work undertaken on its behalf by the ombudsman service to protect the interests of its customers, or whether that burden is so excessive as to make the Belgian postal market less attractive to that category of service providers.

84. In my view, the national legislation as described in the reference for a preliminary ruling would be capable of having an effect equivalent to that of a cross-subsidy to DE POST if it were the case, which it will be for the national court to ascertain, that the vast majority of the complaints made to the ombudsman service in question related to DE

49 — The third paragraph of Article 19 refers to 'the interests of users and/or consumers', which alternatives support the view that the directive does not adopt a narrow interpretation of the concept of end-users of postal services.

50 — The travaux préparatoires for Directive 97/67 support that view: see, in particular, Council Resolution of 7 February 1994 on the development of Community postal services (OJ 1994 C 48, p. 3), which refers to '*users, including consumers*', and the Communication from the Commission on the set of measures proposed for the development of Community postal services, where it is observed that Article 2(16) of the proposal for a directive contained therein defines 'users' as including '*professional users* [and] *domestic consumers*' [COM(95) 227 final, p. 17 and p. 25]. Likewise, the Report from the Commission to the European Parliament and the Council of 25 November 2002 on the application of the Postal Directive (Directive 97/67/EC) [COM (2002) 632 final, in particular footnote 8] refers to 'all users of postal services *(i.e. private and business users)*'. Furthermore, Commission Decision of 10 August 2010 establishing the European Regulators Group for Postal Services (OJ 2010 C 217, p. 7) states that that group's task is, *inter alia*, 'to consult … with market participants, *consumers and end-users*' (emphasis added in all the foregoing quotations).

51 — See *Sjöberg* and *Gerdin*, (paragraph 40 and the case-law cited), and Case C-134/10 *Commission* v *Belgium* [2011] ECR I-1053, paragraph 43 et seq., and the case-law cited.

POST, while those relating to Express Line were few and far between, namely only two or three out of a total of around 9 000 complaints in 2008 and 2009. That said, in order to safeguard the full exercise of the fundamental freedoms laid down by the FEU Treaty, account must be taken not only of the formal rules contained in the laws of the Member States, but also of the concrete results to which those rules lead.

85. However, I would point out that the latter observation will no longer be of any practical bearing in the light of the changes made to the legislation in question following the transposition of Directive 2008/6 into the Belgian legal system. It appears from the documents in the case and from the provisions of the law adopted on 13 December 2010, [52] in other words after the reference for a preliminary ruling was made, that the criteria for contributing to the costs of operating the Belgian ombudsman service for the postal sector have changed, in particular inasmuch as they take into account in a more proportionate manner not only the turnover achieved by an undertaking but also the number of complaints registered against that undertaking during the year prior to the determination of any contribution.

86. In short, I consider that the provisions of the FEU Treaty concerning the free movement of services and the freedom of establishment do not preclude a Member State from adopting measures such as those at issue in the main proceedings which may give rise to effects which, although restrictive, are justified by the need to protect users of postal services, provided that the contribution made by an undertaking to the financing of the relevant ombudsman service bears a sufficient correlation with the number of complaints received from persons who have used the undertaking concerned as compared with those received in respect of other providers falling within the remit of that service.

52 — See the new algebraic formula laid down in Article 45b in the version provided for in that law. Express Line gives an account of that formula in the letter which it sent to the Court of Justice to explain the withdrawal of its plea in law alleging infringement of EU law as follows: 'whilst, previously, all undertakings with a turnover of more than EUR 500 000 had to contribute to the financing of the Belgian ombudsman service for the postal sector, that obligation to contribute will henceforth be confined to those undertakings in the aforementioned category against which more than 12 complaints were made in the preceding year. Furthermore, the undertakings referred to are now required to contribute only towards the financing of the operational costs linked to the processing of complaints by the ombudsman service (in proportion to the number of complaints concerning the undertaking concerned), not towards the general operating costs of that service (in proportion to the turnover of the undertaking concerned)'.

VI — Conclusion

87. In the light of the foregoing, I propose, principally, that the Court should rule that there is no longer any need to answer the questions referred for a preliminary ruling by the Hof van Beroep te Brussel and order that the case be removed from its register.

88. In the alternative, in the event that the Court considers it appropriate to answer the questions referred, I suggest that it does so as follows:

(1) The provisions 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, are to be interpreted as meaning that they do not preclude a Member State from imposing a mandatory external complaints scheme such as that at issue in the main proceedings on providers of non-universal services.

(2) The principles inherent in the free movement of services, as defined by Article 56 TFEU et seq., and the freedom of establishment, as defined by Article 49 TFEU et seq., are to be interpreted as meaning that they do not preclude a Member State, for overriding reasons in the public interest relating to the protection of users of postal services, from imposing a mandatory external complaints scheme, such as that at issue in the main proceedings, on providers of non-universal services, even if, in the application of that scheme, no distinction is made between the complaints of consumers and those of other end-users. However, this is the case only where the method of financing the ombudsman service concerned takes into consideration in a sufficiently proportionate manner, which it will be for the national court to ascertain, the relative significance of the number of complaints relating to the various providers of postal services falling within the jurisdiction of that service.