JUDGMENT OF THE COURT (Fifth Chamber)

11 March 2004 *

In Case C-240/02,

REFERENCE to the Court under Article 234 EC by the Tribunal Supremo (Spain) for a preliminary ruling in the proceedings pending before that court between

Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Asempre),

Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería

and

Entidad Pública Empresarial Correos y Telégrafos,

Administración General del Estado,

* Language of the case: Spanish.

on the interpretation of Directive 97/67/EC of the European Parliament and of the Council, of 15 December 1997, on the 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),

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, C.W.A. Timmermans and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: M. Múgica Arzamendi, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Spanish Government, by R. Silva de Lapuerta, acting as Agent,

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

— the Commission of the European Communities, by K. Simonsson and L. Escobar Guerrero, acting as Agents,

having regard to the Report for the Hearing

after hearing the oral observations of the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Asempre), represented by J. Piqueras Ruiz, abogado, of the Spanish Government, represented by N. Díaz Abad, acting as Agent, and the Commission, represented by K. Simonsson and J.L. Buendía Sierra, acting as Agent, at the hearing on 26 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 23 October 2003,

gives the following

Judgment

1 By order of 16 May 2002, received at the Court on 1 July 2002, the Tribunal Supremo referred to the Court, pursuant to Article 234 EC, two questions for a preliminary ruling on the interpretation of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on the 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) ('the Directive').Those questions were raised in the course of an action brought by two associations of postal service operators in Spain, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia ('Asempre') and Asociación Nacional de

Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería, against Royal Decree No 1829/1999 of 3 December 1999 approving the regulation to govern postal services (BOE No 313, of 31 December 1999, p. 46433) ('the Royal Decree').

Legal background

Community law

2 The Directive aims to ensure, according to recital 8 of the Directive, the gradual and controlled liberalisation of the postal sector. Under Article 1, the Directive lays down the common rules for the provision, inter alia, of a universal postal service within the Community, the criteria defining the services which may be reserved for universal service providers, and the conditions governing the provision of non-reserved services.

3 As is evident from recital 10, the Directive constitutes, in accordance with the principle of subsidiarity, a set of general principles adopted at Community level, the choice of the exact procedures being a matter for the Member States, which are free to choose the system best adapted to their own circumstances.

4 The postal services are defined in Article 2(1) of the Directive as 'services involving the clearance, sorting, transport and delivery of postal items'.

5 According to Article 2(6) of the Directive, a postal item is defined as 'an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value'.

6 So far as concerns the harmonisation of services which may be reserved by each Member State for universal service providers, Article 7 of the Directive provides:

'1. To the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category where such category exists, provided that they weigh less than 350 grams. In the case of the free postal service for blind and partially sighted persons, exceptions to the weight and price restrictions may be permitted.

2. To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.

...

4. Document exchange may not be reserved.'

7 Furthermore, as regards services which do not form part of the universal service, recital 21 of the Directive states:

'Whereas new services (services quite distinct from conventional services) and document exchange do not form part of the universal service and consequently there is no justification for their being reserved to the universal service providers ... this applies equally to self-provision (provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person), which does not fall within the category of services'.

National law

8 The Directive was transposed into Spanish law by Ley 24/1998 del Servicio Postal Universal y de Liberalización de los Servicios Postales (Law No 24/1998 on the universal postal service and the liberalisation of postal services) of 13 July 1998 (BOE No 167, of 14 July 1998, p. 23473, 'the Postal services law'), and by the Royal Decree.

9 According to Article 2(2) of the postal services law:

'... a self-provision system is deemed to exist when the same natural or legal person is both the originator and the receiver of the items, and when that person provides the service itself or uses a third party who acts solely on his behalf, employing different methods from those of the universal postal service provider. Under no circumstances may this scheme disrupt the reserved services referred to in Article 18.'

10 Article 2(2) of the Royal Decree provides:

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

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

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

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

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

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

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

11 As regards the money order service, defined as 'the service by which payments are made to natural or legal persons on behalf of and on the order of others, throughout the public postal network', Article 18 A of the postal services law and Article 53(1) of the Royal Decree include it in the services reserved to the universal service provider.

The main proceedings and the questions referred for a preliminary ruling

12 According to the order for reference, Asempre and the Asociación Nacional de Empresas de Externalización y Gestión de Envíos y de Pequeña Paquetería have brought an action against the Royal Decree seeking the annulment of several of its provisions. The defendants in the main proceedings are the universal service providers in Spain, the Entidad Pública Empresarial Correos y Telégrafos, and the Administración General del Estado.

13 The provisions of the Royal Decree, whose annulment is sought by those associations, concern services reserved for the universal service provider, namely, self-provision and the money order service.

14 The applicants in the main proceedings take the view that those services, as defined in the Royal Decree, cannot be reserved for the universal service provider. They allege, in support of their application for annulment, infringement of Community rules, in particular that in recital 21 of the Directive and Article 7 thereof.

15 Taking the view that the resolution of the dispute depends to a large extent on the interpretation of those provisions, and having doubts as to their correct interpretation, the Tribunal Supremo decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'1. Does the interpretation of recital 21 permit the exclusion from "self-provision" of postal services provided by the sender (or another person acting exclusively on his behalf), if that person is also not the receiver, if the services are provided in the course of his commercial or business activity, or carried out using the mailbag system or other similar methods, or if self-provision disrupts the services reserved to the universal service provider?

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

The first question

16 By its first question the national court asks, essentially, whether Article 7 of the Directive, read in the light of recital 21 thereof, must be interpreted as meaning

that it allows self-provision, that is postal services provided by the sender or a third party acting on his behalf, to be subject to the following conditions:

— the receiver must be the same person as the sender;

— the services must not be provided to third parties in the course of commercial or business activity of the service provider;

— the services must not be provided by the mailbag system or other similar methods;

— such operations must not disrupt the services reserved to the universal service provider.

Observations submitted to the Court

17 The Spanish Government argues that the definition of self-provision appears only in recital 21 and not in the body of the Directive. The recital in the preamble of a legal act cannot, by itself, impose obligations on the Member States.

18 In the same way, the 21st recital of the directive and the provisions at issue in the Royal Decree have different objectives and functions: recital 21 mentions the services which do not form part of universal service, and the Royal Decree defines the scope of self-provision by specifying the services which are excluded. Furthermore, a careful reading of the Directive and the Royal Decree shows that the definitions given in those two texts do not differ substantially since, in both cases, the senders are regarded as the receivers of the self-provision services. The definition of self-provision in the Royal Decree is therefore compatible with that of the Directive.

19 Asempre, the Belgian Government and the Commission take the opposite view. They argue that the national law at issue contradicts the Directive in that it unjustifiably extends the monopoly of Entidad Pública Empresarial Correos y Telégrafos. By significantly limiting the definition of self-provision in the Royal Decree a greater number of services are deemed to be reserved to the universal service provider than if the Directive had been correctly transposed.

20 They submit that recital 21 of the Directive does, in fact, have legal effect in so far as Article 7, which permits only a limited number of postal services to be reserved, must be read in the light thereof. The latter clearly defines self-provision and the additional conditions established in the Royal Decree are not mentioned in it. The conditions referred to by the national court constitute, therefore, an infringement of the Directive.

Reply of the Court

21 It is common ground that self-provision is not mentioned in Article 7 of the Directive, which sets out the different services which may be reserved for universal

service providers. The concept of self-provision appears, however, in recital 21 of the Directive, in which it is stated that that definition 'does not fall within the category of services' within the meaning of Article 7 of the Directive. Self-provision is therefore included in new services, defined as the services which are 'quite distinct from conventional services', together with the exchange of documents, which, according to recital 21 also do not form part of universal service and cannot, therefore, be reserved for universal service providers.

22 By that reasoning, relating to the services which are excluded from the outset of the scope of Article 7 of the Directive, recital 21 of the Directive gives certain clarifications, of which, as the Advocate General stated in point 26 et seq. of his Opinion, account must be taken in interpreting the Directive.

23 Recital 21 defines self-provision as the 'provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person'. It follows that, in accordance with Article 7 of the Directive, the Member States are not entitled to reserve the clearance, sorting, transport and delivery of postal items carried out in that way for universal service providers.

24 If it is accepted that the Member States are free to impose additional conditions on the definition of self-provision, and thereby limit the situations which are covered by it, they would have the option of extending the services reserved for the universal service provider. However such extension would go against the purpose of the Directive, which, according to recital 8, aims to establish gradual and controlled liberalisation in the postal sector.

25 Therefore, the Member States are not entitled to add more restrictive conditions to the concepts defined by the Directive. The conditions defining self-provision, laid down in Article 2(2) of the Royal Decree, which are the subject of this reference for a preliminary ruling, are not in the Directive. As is clear from the Advocate General's analysis, in point 29 of his Opinion, they restrict all self-provision as defined in the Directive. The additional conditions at issue are, therefore, contrary to the Directive.

26 Therefore, the answer to the first question referred by the national court must be that Article 7 of the Directive, read in the light of recital 21 thereof, must be interpreted as meaning that it does not permit self-provision to be subject to the following conditions:

— the receiver must be the same person as the sender;

— the services must not be provided to third parties in the course of commercial or business activity of the service provider;

— the services must not be provided by the mailbag system or other similar methods; and

— such operations must not disrupt the services reserved to the universal service provider.

The second question

27 By its second question, the national court asks, essentially, whether the provisions of the Directive preclude a Member State from reserving for the universal service providers the money order service. By 'money order', the national law at issue means, as the national court stated, the service by which payments are made to natural or legal persons on behalf of and on the order of others, through the public postal network.

Observations submitted to the Court

28 Asempre submits that a Member State cannot reserve the money order service for universal service providers, in so far as that service does not feature among the services which may be so reserved, as one of those set out in Article 7 of the Directive.

29 The Spanish and Belgian Governments and the Commission argue, however, that the scope of the Directive is limited to postal services, which, in accordance with Article 2(1) of the Directive, do not include financial services provided by postal companies. Article 7 of the Directive cannot therefore be relied on either to justify or to dispute the fact that a Member State reserves such services for the universal service providers.

Reply of the Court

30 It must be observed that, under Article 1, the Directive lays down the common rules on the provision of a universal postal service. As is clear from recital 10, the Directive at present constitutes a framework of general principles adopted at Community level, the determination of the exact procedures being a matter for the Member States.

31 The postal services are defined in Article 2(1) of the Directive. That provision provides an exhaustive list of the services consisting in clearance, sorting, transport and delivery of postal items. Article 2(6) of the Directive gives a more detailed description of the definition of postal item. Neither Article 2 nor any other provision of the Directive mentions financial services which may also be provided by the postal services providers.

32 Those financial services are, therefore, not covered by the wording of the Directive and, in the light of its precise and exhaustive character, there is nothing to support an interpretation that the Directive extends to situations which do not in fact fall within its scope.

33 The fact that Article 7 of the Directive does not mention money orders among the services which may be reserved for universal service providers is not decisive in so far as money orders do not feature among the postal services which are the only services covered by that provision. The Member States therefore remain free to regulate the financial services which may be provided by the universal postal service providers.

34 Therefore, the answer to the second question referred by the national court must be that the money order services, which consist in making payments through the public postal network to natural or legal persons on behalf of and on the order of others, are not within the scope of the Directive.

Costs

35 The costs incurred by the Spanish and Belgian Governments and the Commission, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Supremo by order of 16 May 2002, hereby rules:

1. **Article 7 of Directive 97/67/EC of the European Parliament and of the Council, of 15 December 1997, on the common rules for the development of**

the internal market of Community postal services and the improvement of quality of service, read in the light of recital 21 thereof, must be interpreted as meaning that it does not permit self-provision to be subject to the following conditions:

— the receiver must be the same person as the sender;

— the services must not be provided to third parties in the course of commercial or business activity of the service provider;

— the services must not be provided by the mailbag system or other similar methods; and

— such operations must not disrupt the services reserved to the universal service provider.

2. Money order services, which consist in making payments through the public postal network to natural or legal persons on behalf of and on the order of others, are not within the scope of Directive 97/67.

Jann Timmermans von Bahr

Delivered in open court in Luxembourg on 11 March 2004.

R. Grass V. Skouris

Registrar President