

Case C-357/07

The Queen, on the application of

TNT Post UK Ltd

v

The Commissioners for Her Majesty's Revenue and Customs

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court))

(Sixth VAT Directive – Exemptions – Article 13A(1)(a) – Services supplied by the public postal services)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Exemption of services supplied by the public postal services*

(Council Directive 77/388, Art. 13A(1)(a) and European Parliament and Council Directive 97/67, Art. 3)

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Exemption of services supplied by the public postal services*

(Council Directive 77/388, Art. 13A(1)(a))

1. The concept of 'public postal services' in Article 13A(1)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted to cover operators, whether they are public or private, who undertake to provide, in a Member State, all or part of the universal postal service, as defined in Article 3 of Directive 97/67 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.

First, in order to be covered by the wording of Article 13A(1)(a) of the Sixth Directive, the supplies of services to be exempted must be performed by a body which may be described as 'the public postal service' in the organic sense of that expression. The fact that Article 132(1)(a) of Directive 2006/112 on the common system of value added tax is drafted in terms precisely identical to those in Article 13A(1)(a) of the Sixth Directive shows that the exemption provided for in the latter provision has been maintained in the form in which it was originally enacted, notwithstanding the liberalisation of the postal sector. It follows that the exemption laid down in Article 13A(1)(a) of the Sixth Directive cannot be interpreted so as to cover, in essence, supplies of postal services, such as the reserved services within the meaning of Article 7 of Directive 97/67, regardless of the status of the provider of those services.

Secondly, the exemptions provided for in Article 13A(1)(a) of the Sixth Directive are intended to encourage certain activities in the public interest. That general objective takes the form, in the

postal sector, of the more specific objective of offering postal services which meet the essential needs of the population at a reduced cost. As Community law now stands, such an objective is the same, in essence, as that of Directive 97/67 to offer a universal postal service. Under Article 3(1) of that directive, such a service involves the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users. Therefore, notwithstanding the fact that it cannot be used as a basis for the interpretation of Article 13A(1)(a) of the Sixth Directive, the legal basis of which differs from that of Directive 97/67, the latter directive nevertheless constitutes a useful point of reference for the purposes of interpreting the term 'public postal services' within the meaning of that provision.

(see paras 27-30, 32-36, 40, operative part 1)

2. The exemption provided for in Article 13A(1)(a) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes applies to the supply by the public postal services acting as such – that is, in their capacity as an operator who undertakes to provide all or part of the universal postal service in a Member State – of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

(see para. 49, operative part 2)

JUDGMENT OF THE COURT (Second Chamber)

23 April 2009 (*)

(Sixth VAT Directive – Exemptions – Article 13A(1)(a) – Services supplied by the public postal services)

In Case C-357/07,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 12 July 2007, received at the Court on 31 July 2007, in the proceedings

The Queen, on the application of:

TNT Post UK Ltd

v

The Commissioners for Her Majesty's Revenue and Customs,

interested party:

Royal Mail Group Ltd,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. C. Bonichot, K. Schiemann, J. Makarczyk and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2008,

after considering the observations submitted on behalf of:

- TNT Post UK Ltd, by D. Milne QC, and P. Hamilton, barrister, instructed by C. Russell, solicitor,
- Royal Mail Group Ltd, by P. Lasok QC, and J. Herberg, barrister, instructed by D. Finkler, solicitor,
- the United Kingdom Government, by C. Gibbs, I. Rao and M. Hall, acting as Agents, and by C. Vajda QC and N. Shaw, barrister,
- the German Government, by M. Lumma, acting as Agent,
- the Greek Government, by S. Spyropoulos and by S. Trekli and M. Tassopoulou, acting as Agents,
- Ireland, by D. O'Hagan, acting as Agent, assisted by D. Barniville SC and N. Travers BL,
- the Finnish Government, by J. Heliskoski and A. Guimaraes-Purokoski, acting as Agents,
- the Swedish Government, by A. Falk, acting as Agent,
- the Commission of the European Communities, by M. Afonso and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13A(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

2 The reference was made in the course of proceedings between TNT Post UK Limited ('TNT Post'), the claimant in the main proceedings, the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners'), the defendants in the main proceedings, and Royal Mail Group Limited ('Royal Mail'), an interested party in the main proceedings, regarding the legality of the exemption from value added tax (VAT) of postal services supplied by Royal Mail.

Legal context

Community legislation

3 Article 13 of the Sixth Directive, entitled 'Exemptions within the territory of a country', provides:

'A. Exemptions for certain activities in the public interest

1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:

(a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto;

...'

4 Article 132(1)(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) is worded in identical terms to Article 13A(1)(a) of the Sixth Directive.

5 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 2002 L 176, p. 21; 'Directive 97/67'), establishes, pursuant to Article 1 thereof, common rules concerning, among other matters, the provision of a universal postal service within the Community and the criteria defining the services which may be reserved for universal service providers.

6 Recital 15 in the preamble to Directive 97/67 states:

'... the provisions of this Directive relating to universal service provision are without prejudice to the right of universal service operators to negotiate contracts with customers individually.'

7 Under Article 3 of Directive 97/67:

'1. Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

2. To this end, Member States shall take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users.

3. They shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum:

- one clearance,
- one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations.

Any exception or derogation granted by a national regulatory authority in accordance with this

paragraph must be communicated to the Commission and to all national regulatory authorities.

4. Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,
- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,
- services for registered items and insured items.

5. The national regulatory authorities may increase the weight limit of universal service coverage for postal packages to any weight not exceeding 20 kilograms and may lay down special arrangements for the door-to-door delivery of such packages.

Notwithstanding the weight limit of universal service coverage for postal packages established by a given Member State, Member States shall ensure that postal packages received from other Member States and weighing up to 20 kilograms are delivered within their territories.

6. The minimum and maximum dimensions for the postal items in question shall be those laid down in the Convention and the Agreement concerning Postal Parcels adopted by the Universal Postal Union.

7. The universal service as defined in this Article shall cover both national and cross-border services.'

8 Article 7(1) of Directive 97/67 provides:

'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.

...'

National legislation

9 The provisions intended to transpose Article 13A(1)(a) of the Sixth Directive are included in the Value Added Tax Act 1994, as amended by the Postal Services Act 2000 ('the Postal Services Act'), while the provisions seeking to transpose Directive 97/67 are included in the Postal Services Act.

10 The *London Gazette* of 28 March 2001 reported that the Secretary of State for Trade and Industry gave notice that Consignia plc (as Royal Mail was then named) had been designated, in accordance with the Postal Services Act, as a universal service provider providing a universal postal service in the United Kingdom. No such notification has been given by the Secretary of State in respect of any other person.

11 On 18 February 2005, the Postal Services Commission issued a decision in the exercise of

its statutory duties under the Postal Services Act that, from 1 January 2006, it would grant a licence to any suitable applicant to convey any letter of any weight. As a result, the postal market in the United Kingdom was fully liberalised from that date but without affecting the status and obligations of Royal Mail as the only designated universal service provider in the United Kingdom.

12 Royal Mail operates under a licence granted by the Postal Services Commission on 23 March 2001 under Part II of the Postal Services Act, that licence having most recently been amended on 25 May 2006. The regulatory framework of that licence is designed to ensure that a nationwide, comprehensive and affordable postal system is accessible by every natural and legal person. That licence contains the following obligations which apply only to Royal Mail: first, to provide the United Kingdom public with a universal postal service, including at least one delivery to every address every working day and one collection every day from every 'access point' within the United Kingdom, at affordable prices that are uniformly applied throughout the United Kingdom, and, secondly, to ensure that the United Kingdom public have ready access to that universal postal service through a sufficient number and density of access points.

13 On 20 January 2006, the Postal Services Commission granted a licence to TNT Post under Part II of the Postal Services Act, under which that company is authorised to convey any letter within the United Kingdom. That licence replaced an earlier licence issued on 23 December 2002.

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

14 According to the referring court, Royal Mail, as the sole universal postal service provider in the United Kingdom, provides a large range of postal services to any undertaking or individual wishing to use its services. Those postal services are provided by means of an integrated national network which currently services around 27 million addresses six days a week subject to a public interest regulatory regime which is unique to Royal Mail amongst all postal operators. Letters and other mail are collected by Royal Mail from various locations, namely approximately 113 000 pillar boxes, 14 200 post offices and 90 000 business premises. Royal Mail employs approximately 185 000 persons in the United Kingdom.

15 The postal services which Royal Mail is obliged to supply to the public under the terms of its licence account for the substantial majority both of the total volume of mail handled by that company and of the total revenues it earns from its postal operations. Taking into account Royal Mail's 'letterpost' business, around 90% of its activities, measured by reference to revenue, are subject to regulatory conditions and requirements that have been imposed only on Royal Mail and not on any other postal operator in the United Kingdom.

16 TNT Post, which is part of the TNT Group which operates in more than 200 countries and employs over 128 000 people, provides postal distribution services for pre-sorted and unsorted business mail. Its business is the collection, provision of mechanised and manual sorting services (for unsorted mail), processing and delivery by road to a Royal Mail regional depot of its customers' mail. Those services are known as 'upstream services'.

17 On 6 April 2004, TNT Post entered into an agreement with Royal Mail under which Royal Mail agreed to provide 'downstream services', that is, to deliver the mail that TNT Post had collected, sorted and delivered by road to one of Royal Mail's regional depots. That agreement was made in accordance with the conditions of the licence held by Royal Mail, which requires it to provide access to its postal facilities to any postal operator or user seeking such access and to negotiate in good faith with a view to agreeing the terms of such access. TNT Post does not currently provide any 'downstream' services itself.

18 The referring court also states that the principal market for business mail, which accounts for

85% of TNT Post's United Kingdom mail volumes, lies in the financial services sector. Since financial institutions are unable to recover all the input VAT they incur, it is in TNT Post's commercial interest to minimise the amount of VAT it has to charge its customers.

19 The Value Added Tax Act 1994, as amended by the Postal Services Act, provides that the conveyance by Royal Mail of postal packets, which includes letters, is exempt from VAT, whereas the services provided by TNT Post (which, that company contends, are the same as those provided by Royal Mail) are subject to VAT at the standard rate of 17.5%.

20 Since it considered that the resolution of the dispute before it required the interpretation of Community law, the Queen's Bench Division (Administrative Court) of the High Court of Justice of England and Wales decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) How is the expression "the public postal services" in Article 13A(1)(a) of the [Sixth Directive] (now Article 132(1)(a) of Directive 2006/112) to be interpreted?

(b) Is the interpretation of that expression affected by the fact that postal services in a Member State have been liberalised, there are no reserved services within the meaning of [Directive 97/67] and there is one designated universal service provider that has been notified to the Commission pursuant to that directive (such as Royal Mail in the United Kingdom)?

(c) In the circumstances of the present case (which are as set out in (b) above) does that expression include

(i) only the sole designated universal services provider (such as Royal Mail in the United Kingdom) or

(ii) also a private postal operator (such as TNT Post)?

2. In the circumstances of the present case, is Article 13A(1)(a) of the [Sixth Directive] (now Article 132(1)(a) of Directive 2006/112) to be interpreted as requiring or permitting a Member State to exempt all postal services provided by "the public postal services"?

3. If Member States are required or permitted to exempt some, but not all, of the services provided by "the public postal services", ... by reference to which criteria are those services to be identified?'

The application to have the oral procedure reopened

21 By document lodged at the Court Registry on 2 March 2009, TNT Post requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure. According to that company, the Advocate General's Opinion contains a number of misconceptions as to the facts of the case in the main proceedings and the operation of the United Kingdom postal market.

22 It is clear from the case-law that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-210/06 *Cartesio* [2008] ECR I-0000, paragraph 46).

23 As it is, the facts in the case in the main proceedings and the operation of the postal market

in the United Kingdom were described in detail by the referring court and were commented upon in the written and oral observations submitted to the Court. Accordingly, the Court considers itself to have all the information necessary to enable it to reply to the questions referred.

24 Moreover, it is not claimed that this case must be dealt with on the basis of an argument which has not been debated between the parties.

25 Consequently, the Advocate General having been heard, the request that the oral procedure be reopened must be rejected.

The questions referred

The first question

26 By its first question, which must be dealt with as a whole, the referring court asks the Court how the term 'public postal services' in Article 13A(1)(a) of the Sixth Directive is to be interpreted, in particular in the present case where the postal services in a Member State have been liberalised.

27 In this connection, it is important to note, first of all, that the syntax of the whole phrase 'public postal services' clearly shows that the words in fact refer to the actual organisations which engage in the supply of the services to be exempted. In order to be covered by the wording of the provision, the services must therefore be performed by a body which may be described as 'the public postal service' in the organic sense of that expression (see Case 107/84 *Commission v Germany* [1985] ECR 2655, paragraph 11).

28 That interpretation is founded on the actual wording of Article 13A(1)(a) of the Sixth Directive. Furthermore, there is nothing to suggest that that interpretation would have been affected by facts such as the liberalisation of the postal sector, which has taken place since the delivery of the judgment in *Commission v Germany*.

29 On the contrary, the fact that Article 132(1)(a) of Directive 2006/112 is drafted in terms precisely identical to those in Article 13A(1)(a) of the Sixth Directive shows that the exemption provided for in the latter provision has been maintained in the form in which it was originally enacted, notwithstanding the liberalisation of the postal sector.

30 It follows that, in contrast to what is claimed by TNT Post and the Finnish and Swedish Governments, the exemption laid down in Article 13A(1)(a) of the Sixth Directive cannot be interpreted so as to cover, in essence, supplies of postal services, such as the reserved services within the meaning of Article 7 of Directive 97/67, regardless of the status of the provider of those services.

31 Secondly, the terms used to specify an exemption such as that set out in Article 13A(1)(a) of the Sixth Directive are to be interpreted strictly, since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-445/05 *Haderer* [2007] ECR I-4841, paragraph 18 and the case-law cited).

32 Thus, as the title which Article 13A of the Sixth Directive carries, the exemptions provided

for in that Article are intended to encourage certain activities in the public interest.

33 That general objective takes the form, in the postal sector, of the more specific objective of offering postal services which meet the essential needs of the population at a reduced cost.

34 As Community law now stands, such an objective is the same, in essence, as that of Directive 97/67 to offer a universal postal service. Under Article 3(1) of that directive, such a service involves the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

35 Therefore, notwithstanding the fact that it cannot be used as a basis for the interpretation of Article 13A(1)(a) of the Sixth Directive, the legal basis of which differs from that of Directive 97/67, the latter directive nevertheless constitutes a useful point of reference for the purposes of interpreting the term 'public postal services' within the meaning of that provision.

36 It follows that public postal services within the meaning of Article 13A(1)(a) of the Sixth Directive must be regarded as operators, whether they are public or private (see, to that effect, *Commission v Germany*, paragraph 16), who undertake to supply postal services which meet the essential needs of the population and therefore, in practice, to provide all or part of the universal postal service in a Member State, as defined in Article 3 of Directive 97/67.

37 Such an interpretation is not contrary to the principle of fiscal neutrality, which precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT (see Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraph 46 and the case-law cited).

38 As the Advocate General observes in point 63 of her Opinion, the assessment of the comparability of the services supplied hinges not only on the comparison of individual services, but on the context in which those services are supplied.

39 As the facts in the main proceedings demonstrate, on account of the obligations described in paragraph 12 of this judgment, which are required under its licence and connected with its status as the universal service provider, an operator such as Royal Mail supplies postal services under a legal regime which is substantially different to that under which an operator such as TNT Post provides such services.

40 Consequently, the answer to the first question is that term 'public postal services' in Article 13A(1)(a) of the Sixth Directive must be interpreted to cover operators, whether they are public or private, who undertake to provide, in a Member State, all or part of the universal postal service, as defined in Article 3 of Directive 97/67.

The second and third questions

41 By its second and third questions, which it is appropriate to deal with together, the referring court essentially asks whether the exemption provided for in Article 13A(1)(a) of the Sixth Directive applies to all of the postal services provided by the public postal services or only part of those services. In the latter situation, it wishes to know the criteria enabling the exempted services to be identified.

42 It must be observed in this connection that, under Article 13A(1)(a) of the Sixth Directive, the supply of services by the public postal services and supply of goods incidental thereto are exempted from VAT. Only passenger transport and telecommunications services are expressly

excluded from the scope of that provision.

43 However, contrary to what is maintained by Royal Mail, the Greek and United Kingdom Governments and Ireland, it may not be inferred from that provision that all the supplies of services by the public postal services and supplies of goods incidental thereto which are not expressly excluded from the scope of that provision are exempted, regardless of their intrinsic nature.

44 It follows from the requirements referred to in paragraph 31 of this judgment that the exemption provided for in Article 13A(1)(a) must be both strictly interpreted and interpreted consistently with the objectives of that provision, that the supplies of services and of goods incidental thereto must be interpreted as being those that the public postal services carry out as such, that is, by virtue of their status as public postal services.

45 Such an interpretation is dictated, in particular, by the need to observe the principle of fiscal neutrality. The obligations on an operator such as Royal Mail, which – as is apparent from paragraph 39 of this judgment – distinguish the situation in which that operator supplies postal services from that in which an operator such as TNT provides such services, concern only the postal services supplied in its capacity as the universal service provider.

46 In the same way, it follows from the requirements set out in paragraph 44 of this judgment and, in particular, from the nature of the objective pursued by Article 13A(1)(a), which is to encourage an activity in the public interest, that the exemption is not to apply to specific services dissociable from the service of public interest, including services which meet special needs of economic operators (see, to that effect, Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 19).

47 The German Government and the Commission are therefore correct to submit that services supplied by the public postal services for which the terms have been individually negotiated cannot be regarded as exempted under Article 13A(1)(a) of the Sixth Directive. By their very nature, those services meet the special needs of the users concerned.

48 That interpretation is, moreover, confirmed by recital 15 in the preamble to Directive 97/67, from which it is apparent that the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of universal service provision.

49 Consequently, the answer to the second and third questions is that the exemption provided for in Article 13A(1)(a) of the Sixth Directive applies to the supply by the public postal services acting as such – that is, in their capacity as an operator who undertakes to provide all or part of the universal postal service in a Member State – of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

Costs

50 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 (Second Chamber) hereby rules:

1. The concept of ‘public postal services’ in Article 13A(1)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, must be interpreted to cover operators, whether they are public or private, who undertake to

provide, in a Member State, all or part of the universal postal service, as defined in Article 3 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.

2. The exemption provided for in Article 13A(1)(a) of Sixth Directive 77/388 applies to the supply by the public postal services acting as such – that is, in their capacity as an operator who undertakes to provide all or part of the universal postal service in a Member State – of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

[Signatures]

* Language of the case: English