

JUDGMENT OF THE COURT (Grand Chamber)

21 April 2015 (*)

(Failure of a Member State to fulfil obligations — Value added tax — Sixth Directive 77/388/EEC — Directive 2006/112/EC — Articles 132(1)(a) and 135(1)(h) — Exemptions — Public postal services — Postage stamps — Directive 97/67/CE)

In Case C-114/14,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 10 March 2014,

European Commission, represented by J. Enegren and L. Lozano Palacios, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by U. Persson and A. Falk, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz, J.-C. Bonichot (Rapporteur), S. Rodin and K. Jürimäe, Presidents of Chambers, A. Rosas, E. Juhász, A. Borg Barthet, J. Malenovský and E. Levits, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

gives the following

Judgment

1 By its action, the European Commission asks the Court to declare that, by failing to exempt from value added tax (VAT) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto, and the supply at face value of postage stamps valid for use for postal services within national territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 132(1)(a) and 135(1)(h) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

Legal context

Directive 2006/112

2 Title IX of Directive 2006/112, 'Exemptions', includes Chapter 2, 'Exemptions for certain activities in the public interest'. Article 132, which appears in that title, provides in paragraph 1(a):

'Member States shall exempt the following transactions:

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

3 Article 135 of Directive 2006/112, which appears in the next chapter, 'Exemptions for other activities', provides in paragraph 1(h):

'Member States shall exempt the following transactions:

...

(h) the supply at face value of postage stamps valid for use for postal services within their respective territory, fiscal stamps and other similar stamps.'

4 The provisions referred to in paragraphs 2 and 3 above are identical to those previously applicable of Article 13A(1)(a) and B(e) 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), which Directive 2006/112 repealed and replaced.

Directive 97/67/EC

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 1988 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, as stated in Article 1, common rules concerning inter alia the provision of a universal postal service within the European Community and the criteria defining the services which may be reserved for universal service providers.

6 Article 3(1) of Directive 97/67 reads as follows:

'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.'

7 Article 4 of Directive 97/67 provides:

'Each Member State shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps it has taken to fulfil this obligation and, in particular, the identity of its universal service provider(s). Each Member State shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them.'

Pre-litigation procedure and proceedings before the Court

8 On 10 April 2006 the Commission sent a letter of formal notice to the Kingdom of Sweden, complaining that it had failed to fulfil its obligations under Article 13A(1)(a) and B(e) of the Sixth

Directive 77/388 by failing to exempt from VAT the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto, and the supply at face value of postage stamps valid for use within national territory.

9 By letter of 7 June 2006, the Swedish authorities replied to that letter, contesting that they had failed to fulfil their obligations under the Sixth Directive 77/388.

10 By letter of 18 July 2007, the Commission, not satisfied with that reply, sent the Kingdom of Sweden a reasoned opinion calling on it to comply with its obligations within a period of two months from receipt of the opinion.

11 By letter of 17 September 2007, the Kingdom of Sweden replied to the reasoned opinion, arguing that the exemption for supplies by the public postal services, provided for by Directive 2006/112 in the same terms as by the Sixth Directive 77/388, was not applicable in the Swedish market because such services did not exist there.

12 Since it was not satisfied with the position taken by the Kingdom of Sweden, the Commission decided to bring the present action before the Court.

13 Pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, the Kingdom of Sweden requested the Court to sit as a Grand Chamber.

The action

First complaint: incorrect transposition of Article 132(1)(a) of Directive 2006/112

Arguments of the parties

14 The Commission submits that the Kingdom of Sweden should exempt from VAT the supplies of services, other than passenger transport and telecommunications services, and incidental supplies of goods which Posten AB has to supply in accordance with Directive 97/67.

15 It submits that supplies of services by a universal service provider in accordance with its obligations under Articles 3 to 6 of Directive 97/67 fall within the definition of 'the supply by the public postal services of services' within the meaning of Article 132(1)(a) of Directive 2006/112.

16 It observes in this respect that Posten AB, a private law company, was designated as a universal service provider in Sweden. In support of that assertion, the Commission relies on the dispute between Posten AB and the Swedish postal and telecommunications authorities concerning their decision to attach to the authorisation for Posten AB to carry on a postal activity conditions relating to its designation as a universal service provider. According to the Commission, it is clear from the judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) that the operations carried out by Posten AB may be distinguished on that basis from those of other operators in the Swedish market.

17 According to the Commission, the Kingdom of Sweden is required to implement the exemption laid down in Article 132(1)(a) of Directive 2006/112 even if it considers that it can better ensure fiscal neutrality by means other than the exemption. The Commission relies in this respect on the judgment in *Commission v Spain* (C-204/03, EU:C:2005:588, paragraph 28).

18 Moreover, the Commission infers from the judgment in *TNT Post UK* (C-357/07, EU:C:2009:248) that the VAT exemption in question does not infringe the principle of fiscal neutrality.

19 Finally, it submits that no distortion of competition, even if one did exist, could dispense the Kingdom of Sweden from its obligation to apply the exemption in Article 132(1)(a) of Directive 2006/112, which differs from other provisions of that directive by being unconditional. On the contrary, according to the Commission, it is precisely the existence of a situation in which all the Member States with one exception apply that exemption that may produce distortions of competition in the internal market.

20 The Kingdom of Sweden submits, contrariwise, that to exempt Posten AB from VAT on the basis of the exception for public postal services would be contrary to Directive 2006/112, the provisions of the FEU Treaty on competition, and the objectives of Directive 97/67.

21 It submits that in Sweden some 30 undertakings operate under identical financial conditions in a postal market that was liberalised long ago — even before the accession of the Kingdom of Sweden to the European Union — and no longer has a ‘public postal service’. In particular, Posten AB receives no compensation from the State for its universal service obligations, although this is permitted by the second sentence of Article 7(1) of Directive 97/67.

22 The Kingdom of Sweden argues further that the Swedish market in postal services differs from the British market examined in the judgment in *TNT Post UK* (C-357/07, EU:C:2009:248), in that, at the date of delivery of that judgment, numerous public postal services within the European Union were entrusted to public undertakings in a monopoly situation, whereas that is no longer the case since Article 7(1) of Directive 97/67 put an end to the possibility of granting exclusive or special rights in that sector.

23 In those circumstances, the Kingdom of Sweden submits that exempting Posten AB from VAT would amount to giving it an artificial competition/price advantage over its competitors which could go as far as the VAT rate applicable, namely 20%, which would reduce the pressure of competition on the postal market to the detriment of the end consumer. Moreover, such an exemption would increase the price of the outsourced services Posten AB makes use of, since it would no longer be able to deduct input VAT on those purchases, which could thus induce it to reorganise its activities with a view to performing more services itself internally.

24 The Kingdom of Sweden argues, moreover, that VAT has been charged on all postal services in Sweden since 1993 without that system being challenged — except by the banking/insurance sector, precisely because of the VAT exemption it enjoys, which prevents it from deducting input VAT on the postal services it uses.

25 It argues, finally, that the present case concerns principally the functioning of the postal market, and that the rules on exemption from VAT are not necessary for the best possible functioning of that market.

Findings of the Court

26 It should be observed, as a preliminary point, that the Kingdom of Sweden relies on Directive 97/67 as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3). However, Directive 2008/6 had not yet entered into force when the period prescribed in the reasoned opinion expired. The present action must therefore be examined on the basis of Directive 97/67 as amended by Directive 2002/39.

27 It is common ground that the Kingdom of Sweden considers that since it ended its historic operator's monopoly in 1993 there has no longer been a 'public postal service' within the meaning of Directive 2006/112 in its territory, and consequently no longer an obligation to exempt any postal service provider from VAT. The Kingdom of Sweden thus subjected to VAT supplies of services and goods incidental thereto by all postal service providers.

28 On this point, it should be recalled that the Court has previously held that the term 'public postal services' in Article 13A(1)(a) of the Sixth Directive 77/388, the wording of which is reproduced identically in Article 132(1)(a) of Directive 2006/112, 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' within the meaning of Directive 97/67 (see, to that effect, judgment in *TNT Post UK*, C?357/07, EU:C:2009:248, paragraph 40).

29 It is not disputed that, when the period prescribed by the reasoned opinion of 18 July 2007 expired, Posten AB had been designated a 'universal service provider' in Sweden within the meaning of Directive 97/67.

30 Furthermore, the Kingdom of Sweden's pleadings show that, as provided for by Article 4(2) of Directive 97/67, national legislation imposes specific obligations on Posten AB to ensure that it provides the universal postal service within the meaning of that directive throughout national territory.

31 It follows that, since Posten AB provides all or part of the 'universal postal service' within the meaning of Directive 97/67 in Sweden, it must be classified as a 'public postal service' within the meaning of Article 132(1)(a) of Directive 2006/112, and consequently that supplies of services, other than passenger transport and telecommunications services, and supplies of goods incidental thereto made by Posten AB as a universal service provider must be exempted from VAT.

32 That conclusion cannot be called in question by the Kingdom of Sweden's argument that the principle of neutrality precludes the interpretation of Directive 2006/112 put forward by the Commission, in so far as the situation of the Swedish postal market differs markedly from that examined by the Court in the judgment in *TNT Post UK* (C?357/07, EU:C:2009:248) in that the services of Posten AB are no different from those provided by other operators in the Swedish market.

33 It is apparent from paragraphs 37 to 39 of the judgment in *TNT Post UK* (C?357/07, EU:C:2009:248) that the difference between 'public postal services' and other operators depends not on the nature of the services provided but on the fact that the operators who provide part or all of the universal postal service are subject to a special legal regime with specific obligations. As stated in paragraph 30 above, Posten AB is indeed subject to such obligations.

34 Nor is the conclusion reached in paragraph 31 above called in question by the fact that the judgment in *TNT Post UK* (C?357/07, EU:C:2009:248) was delivered after the expiry of the period prescribed by the reasoned opinion of 18 July 2007 for bringing Swedish law into conformity.

35 Where an obligation derives from an interpretation of EU law by the Court, the Court has

clarified and defined the meaning and scope of the rule as it ought to have been understood and applied from the time of its entry into force, so that the Member States should, from that time, have interpreted and applied EU law as it follows from the Court's judgment, even if that was later. It is otherwise only if, for reasons of legal certainty, the Court has exceptionally restricted, as regards the past, the opportunity of relying on the law as thus interpreted with a view to reopening legal relationships (see judgment in *Denkavit Italiana*, 61/79, EU:C:1980:100, paragraphs 16 and 17), which is not the case with the judgment in *TNT Post UK* (C-357/07, EU:C:2009:248).

36 Consequently, the first complaint raised by the Commission in support of its action must be upheld.

Second complaint: incorrect transposition of Article 135(1)(h) of Directive 2006/112

Arguments of the parties

37 The Commission submits that the Kingdom of Sweden should exempt from VAT the supply at face value of postage stamps valid for use for postal services within national territory.

38 It argues that postage stamps are a means of payment for postal services and that the scope of the exemption laid down for them should in any event correspond to that of the exemption laid down for public postal services.

39 The Kingdom of Sweden adopts that argument of the Commission, but draws the conclusion, contrary to the Commission's conclusion, that since public postal services should not be exempted from VAT, the same applies to postage stamps.

Findings of the Court

40 It follows from the very wording of Article 135(1)(h) of Directive 2006/112 that the Member States must exempt from VAT the supply at face value of postage stamps valid for use for postal services within national territory.

41 First, it appears from the documents submitted to the Court that on the expiry of the period prescribed by the reasoned opinion of 18 July 2007 Swedish legislation did not provide for the exemption for postage stamps laid down by Article 135(1)(h) of Directive 2006/112.

42 Secondly, in support of its contention that this complaint should be rejected, the Kingdom of Sweden confines itself to submitting, in essence, that supplies at face value of postage stamps valid for use for postal services within national territory are not exempted from VAT as a consequence of the subjection to VAT of supplies of goods incidental to supplies by the public postal services of services other than telecommunications and passenger transport. However, it has been held in paragraphs 26 to 32 above that that subjection is contrary to the provisions of Article 132(1)(a) of Directive 2006/112.

43 In those circumstances, the second complaint must also be upheld.

44 The Commission's action is consequently well founded in its entirety.

45 It follows from all the above considerations that, by failing to exempt from VAT the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto, and the supply at face value of postage stamps valid for use for postal services within national territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 132(1)(a) and 135(1)(h) of Directive 2006/112.

Costs

46 Under Article 138 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Sweden has been unsuccessful, the Kingdom of Sweden must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by failing to exempt from value added tax the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto, and the supply at face value of postage stamps valid for use for postal services within national territory, the Kingdom of Sweden has failed to fulfil its obligations under Articles 132(1)(a) and 135(1)(h) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax;**
2. **Orders the Kingdom of Sweden to pay the costs.**

[Signatures]

* Language of the case: Swedish.