

Conclusions
OPINION OF ADVOCATE GENERAL
GEELHOED
delivered on 10 April 2003 (1)

Case C-169/02

Dansk Postordreforening
v
Skatteministeriet

(Reference for a preliminary ruling from the Østre Landsret (Denmark))

((VAT exemptions – Services provided by public postal services))

I ? Introduction

1. In this case the Østre Landsret (Eastern Regional Court) (Denmark) has submitted two questions concerning 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 (hereinafter Sixth Directive). (2)

2. More specifically, these questions concern Article 13A of the Sixth Directive, which provides for the exemption from VAT of certain activities in the public interest. They include the services provided by public postal services and the supply of goods incidental thereto. The Østre Landsret wants to know if the Sixth Directive prevents a Member State from levying VAT on the conveyance by the public postal services of COD letters and parcels to private individuals.

3. An important aspect of this case is that 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 (hereinafter Postal Directive) (3) contains rules concerning the provision of a universal postal service and the definition of the services which may be reserved for certain undertakings or services. The question now is what relevance the provisions of this Directive have to the interpretation of Article 13A of the Sixth Directive.

II ? Legislative background

A ? European law

4. The relevant provisions of Article 13A of the Directive under the heading Exemptions for certain activities in the public interest read as follows:

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 ...

5. Article 3 of Directive 97/67/EC reads as follows:

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.

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

6. Article 7 provides as follows:

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. ...

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.

7. Article 9 states:

1. For non-reserved services which are outside the scope of the universal service as defined in Article 3, Member States may introduce general authorisations to the extent necessary in order to guarantee compliance with the essential requirements.

2. For non-reserved services which are within the scope of the universal service as defined in Article 3, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to safeguard the universal service.

B ? National law

8. Chapter 2 of the Danish Law on postal services (4) lays down rules on the obligation to convey mail and the exclusive right. Article 2 of this Law reads as follows: The State is required to ensure nationwide conveyance of the following items of mail:

? Addressed letters

? Other addressed items of mail with a uniform printed content which are not wrapped, e.g. catalogues and brochures.

? Daily, weekly or monthly papers/magazines and periodicals.

? Addressed parcels.

? Printed matter in braille.

9. Article 3 of this Law reads as follows:

1. The State shall have an exclusive right to convey by post letters addressed to locations in Denmark, which is to be understood as meaning:

- ? Addressed items of mail, irrespective of their content, where they are placed in an envelope or similar wrapping.
- ? Addressed written communications, including postcards, with an individual content.
2. However, the exclusive right shall not cover the conveyance by post of addressed catalogues, brochures, papers/magazines or other items of mail with a uniform, printed content which are placed in transparent wrapping.
3. Furthermore, the State shall have an exclusive right to convey by post in the territory of Denmark addressed letters which are sent to countries abroad by senders in Denmark and from countries abroad to addressees in Denmark.
4. The Minister for Transport may lay down rules limiting or rescinding the exclusive right to convey by post in the territory of Denmark addressed letters sent to countries abroad by senders in Denmark.
5. The exclusive right to convey post addressed letters shall cover the collection, transportation and distribution thereof.
6. The Minister shall lay down rules concerning weight and price limits and the physical dimensions relating to the items of mail referred to subparagraphs 1 and 3.
7. Courier post shall not be covered by the exclusive right.
10. By the concession under Chapter 2 of the law the State's exclusive right and obligation to convey mail was transferred to Post Danmark.
11. This case concerns COD items of mail. According to the order for reference, this covers mail in respect of which the postal services not only carry the items of mail themselves for the sender but also collect, as a condition for delivering the letter or parcel to the recipient, the consideration for the content of the letter or parcel intended for the sender and arrange for that consideration to be transferred to the sender.
12. In a partial judgment given by the Østre Landsret on 1 June 2001 in the present case it was ruled that the conveyance of COD letters and parcels must be regarded as a combined service under the Danish Law on postal services. At the same time it was ruled that Post Danmark was not required to convey such letters and packages. The judgment also ruled that under Danish postal legislation Post Danmark did not have an exclusive right to deliver COD letters and parcels since the scope of the exclusive right had to be regarded as limited to services covered by the obligation to convey mail.
13. This brings me to Danish VAT law concerning services supplied by the postal services. By Law No 442 of 10 June 1997, amending inter alia the VAT Law, the heading and subparagraph 13 of Article 13(1) of the Danish VAT Law was given the following wording: The following goods and services shall be exempt from tax: ... The collection and distribution by Post Danmark of addressed letters, addressed packages and addressed daily, weekly and monthly newspapers/magazines. Furthermore, the exemption shall cover the conveyance by Post Danmark of addressed letters and parcels which are sent by registered post or with a declaration of value.
14. The notes on the draft law amending inter alia the VAT legislation include the following with respect to COD items of mail: By virtue of the amendments made by administrative action pursuant to the postal legislation, as of 1 July 1996 such items of mail are to be treated as combined items of mail which are not covered by the obligation to convey mail. However, the wording of the VAT Law does not afford a sufficient basis on which to subject the conveyance of COD letters and parcels to VAT in its entirety. As a result of this amended wording, conveyance of such items of mail will be taxable in its entirety, and at the same time full parallelism secured between the exemption from VAT and the obligation on Post Danmark to convey mail under Law No 89 of 8 February 1995 on postal operations.
15. Accordingly, as of 1 July 1996 VAT was levied on the entire value of the service which consists in the conveyance by Post Danmark of COD letters and parcels, whereas the conveyance of similar letters and parcels without COD was exempt from VAT.
16. As from 1 January 2002 the conveyance of parcels between undertakings ? as a specific

service ? was removed from the obligation to convey mail. Consequently, it was decided to regard this service as liable to VAT.

III ? Facts of the case and procedural background

17. In Denmark the public postal services are organised as an independent public undertaking under the name of Post Danmark. Post Danmark offers inter alia the conveyance of COD letters and parcels. It has around 1 100 public post offices across the entire country, some of which it operates itself and some of which it operates together with local retailers (post office shops etc.). In practice a considerable proportion of COD items of mail for private individuals are collected from the post office because the recipient is not at home when the item of mail is delivered.

18. Even though Post Danmark provides parcel services and delivers heavy letters (over 250 grams) in competition with other postal undertakings, it was for many years, and in practice continues to be, the only provider offering mass conveyance of COD items of mail to private households.

19. In the sector of parcels for delivery to individuals, Post Danmark offers a product designated private parcels, which are parcels handed in under a commercial contract with Post Danmark by commercial undertakings, including members of Dansk Postordreforening (Danish Mail Order Association), for delivery to private recipients. Furthermore, Post Danmark offers a post parcel product, which is a designation for ordinary parcels which are posted at post offices, that is to say they are typical private items of mail.

20. Under Danish law, Post Danmark is under an obligation to convey mail where a letter, a private parcel or a post parcel is not sent COD. Moreover, such an item of mail is exempt from VAT. On the other hand, where a letter, a private parcel or a post parcel is sent COD, there is no obligation to convey mail and VAT is levied on the combined service.

21. As the order for reference shows, the applicant in the main action is an association whose members include a large number of mail order companies in Denmark. The aim of the association is inter alia to safeguard its members' interests vis-à-vis Post Danmark, Tele Danmark, other joint partners, public authorities, organisations and the public. The association's members use inter alia COD mail when conveying goods that have been ordered to private consumers.

22. The main action was brought on 3 May 1999 and concerns the question whether, and, if so, to what extent, Article 13A(1)(a) of the Sixth VAT Directive precludes a Member State from levying VAT on the conveyance by the public postal service of COD letters and parcels to private individuals.

23. By order of 1 May 2002, registered at the Court of Justice on 6 May 2002, the Østre Landsret then requested a preliminary ruling on the following questions:

1. Is Article 13A(1)(a) of the Sixth VAT Directive (Council Directive 77/388/EEC) to be interpreted as meaning:

(i) that a Member State has the right to levy VAT on the conveyance by the public postal services of COD letters and parcels to private persons where the Member State has removed such items of mail from the exclusive right and obligation to convey mail under the Member State's national postal legislation, or

(ii) is a Member State required to levy VAT on such items of mail?

2. If neither Question 1(i) nor Question 1(ii) can be answered unequivocally in the affirmative, what criteria should be used to establish whether a Member State has a right, under the circumstances set out in Question 1(i), to levy VAT on the conveyance of COD letters and parcels to private individuals or is it required not to levy VAT on such items of mail?

24. In this case written comments have been submitted to the Court by the applicant and the defendant in the main action and by the Commission and the Italian Government. There has been no hearing.

IV ? A closer examination of the relevant Community legislation

A ? Contents of the Sixth Directive and especially Article 13A(1)(a) thereof

25. The basic rule laid down by the Sixth Directive is that VAT is levied on any service effected by a taxable person for consideration (Article 2). Title X, of which Article 13 forms part, provides

above all for exemptions from VAT for certain categories of activities. One such exemption is a derogation from the basic rule laid down in Article 2 of the Sixth Directive. A derogation of this nature may be deemed consistent with Community law only if it is explicitly permitted pursuant to the provisions of that Directive.

26. Article 13A(1)(a) permits exemption from VAT for the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. The article is worded in very broad terms, and the Directive does not elaborate further on the terms public postal services and supply of services within the meaning of that article.

27. The Court therefore has to decide what services supplied by the public postal services are exempted from VAT pursuant to Article 13A(1)(a). The wide range of case-law on the Sixth Directive, and especially Article 13A, reveals that, despite the detailed nature of the Directive, the scope of the exceptions is not self-evident. The case-law of the Court provides a guide for determining the content and purpose of the terms used in Article 13A(1)(a) of the Sixth Directive.

28. I would begin by pointing out that the exemptions pursuant to Article 13 of the Sixth Directive apply to economic activities geared to certain objectives. These activities are not, however, always defined in purely material or functional terms. Most of the provisions ? including the exception referred to in Article 13A(1)(a) ? also indicate who may undertake the exempted activities.

29. The terms used to specify the exemptions envisaged by Article 13 must be interpreted strictly. The case-law gives four reasons for this. First, Article 13 does not provide exemption for every activity performed in the public interest, but only for those which are listed and described in great detail. (5) Second, a restrictive interpretation is necessary because the exemptions constitute exceptions to the general principle that VAT is levied on all services supplied for consideration by a taxable person. (6) Third, the provisions must be interpreted restrictively to promote equality of fiscal treatment. This counteracts distortion of competition. (7) Fourth, the principle of fiscal neutrality should be borne in mind.

30. With this principle the Community legislature seeks to ensure the completely neutral fiscal treatment of all economic activities, whatever their aim or outcome, provided that they are in themselves subject to VAT. The judgment in *Gregg* is of interest in this context. (8) In this judgment the Court gives a broad interpretation of activities undertaken by establishments or organisations. It bases its judgment inter alia on the principle of fiscal neutrality. Where the levying of VAT is concerned, economic operators carrying on the same activities must not be treated differently on the basis of their legal form.

31. The two principles, equality of fiscal treatment and fiscal neutrality, are, moreover, similar concepts, but they are used in different contexts. The first is used in an international context, while the second indicates a domestic matter.

32. It is settled law that the exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of value added tax introduced by the Sixth Directive and whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another. (9)

33. The judgment in Case 107/84 *Commission v Germany* gives a definition of postal services. It follows from this judgment that Article 13A(1)(a) of the Sixth Directive is applicable only to public postal services, by which the Court understands a body governed by public law or a licensed undertaking to which a Member State has assigned postal activities. Other commercial undertakings are excluded from the levying of VAT, even if their activities pursue the same objective. (10)

34. I would point out that this judgment preceded the adoption of the Postal Directive and the related changes to conditions in the postal sector. The substance of the term public postal service could not therefore be assessed by the Court in the light of the provisions of that Directive. I will revert to this aspect in my assessment.

35. The Member States differ significantly in the way in which they have implemented Article 13A(1)(a) of the Sixth Directive. In Germany, for example, the exemption applies to items of mail

up to 2 000 grams, including COD items. In Austria, universal services up to 2 kg and parcels up to 20 kg are exempt from VAT. These services are provided by Österreichische Post Aktiengesellschaft. Under Austrian law, COD items of mail form part of the universal service and are exempt from VAT. In Belgium and France the services supplied by the public postal services are exempt from VAT; this includes COD items of mail. In Finland and Sweden, on the other hand, all postal services are subject to VAT.

B ? Contents of the Postal Directive

36. The Postal Directive includes provisions concerning the minimum scale of the universal service and the maximum scale of the reserved sector, conditions governing the provision of non-reserved services and access to the postal network, and provisions concerning tariff principles, transparency of accounts, the quality of service provision and the harmonisation of technical standards. These provisions, which primarily establish principles and set limits, create a Community framework to which the Member States must adapt their legislation.

37. The most important objectives of the Postal Directive are to improve the quality of European postal services and to create a single market for postal services. The most important premisses are the gradual and controlled opening of the market to competition and a guarantee of a universal postal service that meets minimum requirements throughout the European Union.

38. From the 11th and 12th recitals in the preamble to the Directive it follows that the universal postal service calls for a minimum range of services of specified quality to be provided for all users. Even people living in remote areas must be able to send and receive mail at least five days a week.

39. Member States may reserve certain services for the universal service provider(s), if necessary for the maintenance of the universal service. These reserved services may consist of exclusive or special rights. Exclusive rights are rights granted by a Member State which reserve the provision of postal services to one undertaking through any legislative, regulatory or administrative instrument and reserve to it the right to provide a postal service, or to undertake an activity, within a given geographical area. Special rights are rights granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area, may inter alia limit to two or more the number of such undertakings authorised to provide a service. (11)

40. Article 7 of the Postal Directive imposes a number of restrictions on the services which may be reserved by the Member States. Only services falling within a given price and weight category may be reserved. Document exchange may not be reserved in any circumstances. (12)

41. To explain this, it should be emphasised that universal services and reserved services need not be the same. Only a small category of universal services may be reserved for one or more providers by means of exclusive or special rights. If a service may not be reserved, but forms part of the universal service, a Member State may grant individual authorisations to an undertaking. In this way specific rights are granted to an undertaking, and the activities are subject to specific obligations. However, the undertaking does not in this way gain a market position that distinguishes it from other undertakings; no restriction may be imposed on the number of undertakings that may receive an authorisation.

42. Where a service may not be reserved and does not form part of the universal service, the Member State may lay down general rules to guarantee compliance with essential requirements. Essential requirements are general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons include the confidentiality of correspondence and the security of the network as regards the transport of dangerous goods. Through these rules the Directive provides for partial harmonisation.

43. This partial harmonisation gives the Member States a limited power to take measures that may have the effect of distorting competition. Member States may make a distinction between providers of postal services by granting exclusive or special rights to one or more providers. As certain services may be reserved, this will inevitably result in restrictions on the provision of such services by other undertakings established in the Member State concerned and by undertakings

established in other Member States.

44. The Member States are, moreover, free to take or introduce measures which are more liberal than those for which the Postal Directive provides. Such measures should be compatible with the EC Treaty.

V ? Comments of the parties

45. The following are the comments of the parties of interest in this context.

46. In its comments the Skatteministeriet states that the heading of Article 13A(1) must be considered to determine what services are exempt from VAT. The Member States are therefore entitled to exercise discretion as to whether the services supplied by the national postal services are in the public interest. Services passing this test are exempt from VAT under Article 13A(1)(a) of the Sixth Directive. Universal services supplied by the national postal services are in the public interest, while services supplied by the national postal services on a voluntary basis and thus, in principle, in free competition with other existing or potential undertakings cannot, according to the Skatteministeriet, be regarded as covered by the VAT exemption.

47. In this context the Skatteministeriet emphasises that, if the national postal services enjoyed VAT exemption in respect of services supplied in free competition with other actual or potential providers of equivalent services, competition would be distorted contrary to the principle in Article 4(5) of the Sixth Directive that public authorities are to be considered taxable persons where the activities or transactions engaged in would, if they were not subject to VAT, lead to significant distortions of competition.

48. In addition, Article 13A(1)(a) of the Sixth Directive must be interpreted in the light of the significant liberalisation which has taken place in the postal services sector since the Sixth Directive was adopted. The objective has never been to exempt services supplied by the national postal services in free competition with normal commercial undertakings, such as courier and parcel services. The provision must be regarded as having been introduced with regard specifically to the obligatory postal services in the general interest of the citizens of the Member States.

49. In short, the Skatteministeriet concludes that only universal services are exempt under Article 13A(1)(a) of the Sixth Directive. Services supplied in free competition with normal commercial undertakings, such as the conveyance of COD letters and parcels, are not exempt.

50. The Commission agrees with the Skatteministeriet. COD items of mail cannot be exempted from VAT. But the Commission arrives at this conclusion in a different way.

51. As a number of terms are not defined in the Sixth Directive, other provisions must be considered for their interpretation. (13) The Commission uses the Postal Directive for a more detailed interpretation of these terms.

52. As the Postal Directive prescribes a minimum range of postal services (universal services) to be offered by the Member States to all users, the Commission concludes that these services are supplied in the public interest. It points out that Member States are entitled to reserve certain services. This is not an obligation. Where a postal service is not reserved to one provider, but is exempt from VAT, the result is fiscal discrimination between different service providers. The principle of fiscal neutrality is threatened where a postal service is not reserved, but certain service providers none the less enjoy different fiscal treatment. The Commission therefore believes that a service must be exempt only where it is of a reserved nature. In this way the principle of fiscal neutrality is respected.

53. As the Member States are free to take or introduce measures which are more liberal than those for which the Postal Directive provides, the range of the exemption may differ from one Member State to another. The Commission does not have any problem with this, however, since it is a possibility for which the Directive explicitly allows.

54. The Commission concludes that Article 13A(1)(a) of the Sixth Directive must be interpreted as follows. A Member State is required to exempt the postal service from VAT where the services are reserved. As the conveyance of COD letters and parcels in Denmark is not reserved by the Member State, it may not be exempted from VAT.

55. Dansk Postordreforening disagrees with the Skatteministeriet and the Commission. It argues that the heading of Article 13A, Exemptions for certain activities in the public interest, has no bearing on the interpretation of Article 13A(1). After all, the heading and the text of the provision can only be construed as meaning that the legislature regards the services of the postal service as being in the public interest. The services offered by the postal service cannot therefore be divided into those which are in the public interest and those which are not. The terms public interest and services supplied by public postal services in Article 13A of the Sixth Directive are concepts of Community law, and the individual Member States are not free arbitrarily to restrict these terms.

56. Nor does Dansk Postordreforening agree with the Skatteministeriet's view that Member States are entitled to decide whether the services supplied by the national postal service are in the public interest. According to Dansk Postordreforening, Member States may take measures only to prevent evasion, avoidance and abuse.

57. Dansk Postordreforening also takes the view that it is inconsistent with the provisions of the Sixth Directive for a distinction to be made between universal services and services supplied on a voluntary basis. It can be argued that the provisions are not directed at all postal services, only at the conventional postal services. However, such an interpretation ignores the clear definition given in the provision, which allows of an exception only in the case of passenger transport and telecommunications services.

58. Dansk Postordreforening refers to a further two specific reasons for not interpreting Article 13A(1)(a) of the Sixth Directive restrictively:

? Article 13A(2) excludes certain services and supplies of goods from exemptions. It does not, however, refer to Article 13A(1)(a). From this Dansk Postordreforening infers a contrario that there are no reasons for interpreting Article 13A(1)(a) restrictively.

? The aim of Article 13A(1)(a) of the Sixth Directive is to improve the operation of the postal service and to make the mailing of items cheaper. Levying VAT on the conveyance of COD letters and parcels would be inconsistent with this aim. There is therefore no basis for a restrictive interpretation of the provision that enables VAT to be levied on some items of mail.

59. Nor, according to Dansk Postordreforening, can the goal of avoiding the distortion of competition result in its being permissible under the Sixth Directive for VAT to be levied on the services in question in respect of items of mail sent to private individuals. The Community legislature has allowed the goal of a better functioning market for postal services to take precedence over the goal of preventing the distortion of competition. The fact that competition in the postal services market has steadily increased since the Sixth Directive entered into force cannot in itself be seen as a reason for the Court to interpret the provision otherwise. It is for the Council and Parliament to decide whether the Sixth Directive should be amended as a result of the changed circumstances in the market.

60. Like Dansk Postordreforening, the Italian Government takes the view that COD items of mail should be exempt from VAT. These services should, however, be exempt from VAT only in respect of the amount that corresponds to the cost price of the public postal service. If a provider governed by private law also offers these services, VAT should be levied only on the amount that exceeds the cost price of the public postal service. This interpretation is consistent with the aim of the Sixth Directive.

VI ? Assessment

A ? Introduction

61. Article 13A(1)(a) of the Sixth Directive is one of the exceptions to the basic rule that VAT should be levied on any service effected for consideration by a taxable person. Article 13A(1)(a) requires all the Member States to grant exemptions for the services supplied by public postal services. (14) Where an activity falls within the scope of an exception, the Member States must permit the exception.

62. Article 13A(2), which authorises Member States to restrict certain exemptions, has no bearing on this case since it does not refer to Article 13A(1)(a) of the Sixth Directive. The list in Article 13A(2) is of a restrictive nature.

63. All that therefore needs to be considered is the wording of Article 13A(1)(a) itself. The heading of Article 13A does not, in my view, have any significance in itself. The heading of an article does not form part of the legislative part of a provision. Like the title of the whole piece of legislation or a part of it, the title (heading) of an article describes the subject-matter of what follows. A title is explanatory in nature. None the less, the legislature's intention can be deduced from the title of a provision. To this extent it may play a part in the Court's assessment. This is also how I interpret the term public interest in the title of Article 13A. The term does not therefore impose a direct restriction, but it does determine the interpretation of the exemptions referred to in Article 13. (15) The only significance to be attributed to the heading in the present case is that, where a service provided by a public postal service is concerned, there is a public interest.

64. Having decided that the heading as such does not have any significance, I come to the substance of the article itself. Article 13A(1)(a) of the Sixth Directive sets out two criteria, the supply of services and public postal services. The first term is very broad and covers all services supplied by the public postal service. It is therefore restricted by the second criterion, public postal services.

65. It is evident from the case-law relating to the Sixth Directive that the terms used to specify the exemptions envisaged by Article 13 are to be interpreted strictly. There are four reasons for this. First, Article 13 does not provide exemption for every activity performed in the public interest, but only for those which are listed and described in great detail. (16) Second, a restrictive interpretation is necessary because the exemptions constitute exceptions to the general principle that VAT is levied on all services supplied for consideration by a taxable person. (17) Third, the provisions must be interpreted restrictively to promote equality of fiscal treatment. This counteracts distortion of competition. (18) Fourth, the principle of fiscal neutrality should be borne in mind. (19)

B ? Reserved services

66. The 1985 judgment in *Commission v Germany*, which gave a definition of the term public postal services, forms, to my mind, the basis for the substance of this term, but this does not yet answer the questions submitted by the national court. (20) The term public postal service, after all, must also be considered in the light of the 1997 Postal Directive. This Directive entered into force later than the Sixth Directive, it triggered the opening up of the postal market, and it imposed on the Member States minimum harmonised standards for the provision of universal services. Since then the postal sector has undergone major changes and has been partly liberalised.

67. The Postal Directive requires the Member States to ensure a universal service so that every user is offered service provision of a high quality. Member States are authorised to reserve certain services to one or more undertakings. They have this authority for the benefit of the provision of the universal service.

68. The Member States enjoy wide discretionary powers in this context. They are free to determine not only the scale of the services which are reserved ? within the limits set by the Directive ? but also to whom the services are reserved, a public service or a commercial undertaking. Furthermore, the postal services may be reserved to more than one service or undertaking.

69. The substance of the term public service (service public) can be deduced from the judgment in *France, Italy and United Kingdom v Commission*. According to this judgment, a public service is any undertaking over which the public authorities may exercise directly or indirectly a dominant influence on the basis of ownership, of financial participation or of the appropriate rules. (21) In the context of the postal service, the judgment concerned the traditional (State) postal undertakings, regardless of whether they are governed by public or private law.

70. However, since that judgment the nature of public service provision ? in the postal as well as other sectors ? has changed radically. It is no longer always undertakings of the State itself or undertakings in which the State participates that ensure public service provision. Private undertakings with entirely commercial objectives may also ensure such service provision. Where a public service is concerned, the question is no longer what influence the State has on the undertaking itself, but what influence it has on the activities of the undertaking. In other words, in

the case of a public service the State guarantees that a service is provided, but it does not necessarily provide the service itself or with the aid of an undertaking related to it.

71. In this connection I would cite Article 86(1) EC. The term public service is not restricted to a public undertaking within the meaning of that provision, but also extends to undertakings to which the State has granted special or exclusive rights. These rights are needed for the performance of the special public task entrusted to such undertakings.

72. This brings me back to the Postal Directive. As I have said, services forming part of the universal service may also be reserved to undertakings with entirely commercial objectives. Such undertakings then not only gain a right to provide the service but are also obliged to deliver and collect the mail in accordance with the Directive. The public thus have a claim against them to have the service provided.

73. The question now is whether such commercial undertakings are then to be seen as public postal services within the meaning of the Sixth Directive. On the basis of the foregoing the answer can only be in the affirmative. Such undertakings are, after all, entrusted with a certain task under public law. Their (possibly shared) exclusive right in respect of these services is directly linked to the public task they are required to perform. To whom the performance of the task is assigned is, moreover, irrelevant. I would refer in this context to the principle of fiscal neutrality, by virtue of which undertakings carrying on the same activities must not be treated differently as far as the levying of VAT is concerned. (22) As a secondary argument, I would add that the Member States are free to entrust both a public service and a commercial undertaking with the performance of all or part of the universal service. There is, then, no question of unequal fiscal treatment of either party.

74. A different view would, moreover, be inconsistent with the goal and purpose of the Postal Directive and of the exemption from VAT. After all, the provision of the universal service, and especially of a reserved service, must be subject to as few obstacles as possible. An exemption would be deprived of any relevance if the conveyance of items of mail in a Member State was no longer undertaken by a public undertaking within the meaning of the judgment in *France, Italy and United Kingdom v Commission*. (23) And one of the objectives of the Postal Directive happens to be the liberalisation of the postal sector. Reserved services too should be entrusted to commercial undertakings as far as possible. It goes without saying that disadvantageous fiscal treatment of commercial undertakings with respect to public services does not promote liberalisation.

75. The purpose of the exemption for which Article 13A(1)(a) provides is to ensure more favourable treatment of the said activities in the public interest. It would be inappropriate to levy VAT on these services. This would act as an obstacle. An undertaking which provides reserved services takes the place of the classical (State) postal service as it existed before the Postal Directive entered into force. As a result of the Postal Directive and the related liberalisation of the postal sector the term public postal service in the Sixth Directive gains a different meaning.

76. To summarise, an undertaking to which a postal service is reserved in accordance with the Postal Directive must be regarded as a public postal service within the meaning of Article 13A(1)(a) of the Sixth Directive, at least as regards the provision of services which are reserved. Neither the legal form nor the objective of the undertaking is relevant in this context.

77. This means that more providers may benefit from VAT exemption, specifically in cases where special rights have been granted by a Member State to more providers. Although this conflicts with the line taken in the judgment in *Commission v Germany*, which ruled that Article 13A(1)(a) of the Sixth Directive is applicable only to a body governed by public law or a licensed undertaking to which a Member State has assigned postal activities, (24) the judgment was, as I have said, delivered before the adoption of the Postal Directive, as a result of which the Court's interpretation of the term postal service cannot be overridden by new developments in the postal sector.

78. The view that reserved services are exempt from VAT has also given rise to differences between Member States in the area of VAT exemption. These differences are, however, the inevitable consequence of the fact that the Postal Directive gives the Member States the option of reserving certain services, but otherwise leaves it to them to decide which services within the

given limits qualify for this.

C ? Non-reserved services

79. This brings me to services which, though not reserved, do form part of the universal service. Member States must guarantee that such services too are available at an affordable price, as is evident from Article 3 of the Postal Directive. However, in contrast to reserved services, the provision of non-reserved services is not ensured through their assignment exclusively to one or more undertakings. It is left to market operators to perform this task under normal conditions of competition. One consequence of the Postal Directive is that this part of the postal sector has been liberalised. Member States may issue only individual licences in which certain rights are granted and specific obligations are imposed on the undertaking. As these services are not reserved by means of rights, new undertakings are also able to enter this market. New undertakings offer additional services, such as the more rapid conveyance of the mail. These services are not therefore public in nature, but are commercial activities in which there can be competition on the basis of price, quality and greater diversity within services.

80. Although certain public conditions may be attached to licences, the undertakings do not perform a public task. They are not therefore public services within the meaning of the Sixth Directive.

81. The last category of services comprises services which cannot be reserved and are not universal services. The services provided in this category are commercial activities undertaken in free competition.

82. Once a public postal service also provides services other than reserved services, the question that logically arises is whether these services can also be exempted from VAT. The Sixth Directive says that the services provided by the public postal services are exempt. I take the view that an undertaking is in the nature of a public postal service only in respect of the services which it provides as part of its public task. This public task emerges from the exclusive or special rights granted to it. In short, only in the provision of reserved services does the undertaking act as a public postal service. As for the other services provided, it must be regarded as a normal market operator competing under equal conditions with other market operators. It would be wrong if they, unlike their competitors, were exempted from VAT. I would also point out, unnecessarily perhaps, that it is not uncommon for postal undertakings also to provide services unconnected with the delivery and collection of items of mail, such as the sale of office supplies and internet packages. Where such services are concerned, there is absolutely no question of VAT exemption.

83. Unfair competition would also occur if these services were exempted from VAT. This would be inconsistent with the Postal Directive and the Sixth Directive. The very objective of the Postal Directive, after all, is to liberalise the part of the postal market which is not reserved. In case-law it has been ruled that the Sixth Directive must be interpreted as meaning that the principle of fiscal neutrality may not be infringed, so that completely neutral fiscal treatment of all economic activities is ensured. Economic operators carrying on the same activities must not be treated differently as far as the levying of VAT is concerned on the basis of their legal form.

84. What does this all mean for the main action? Post Danmark is a public postal service. Under Danish law a number of services are reserved to Post Danmark; however, the conveyance of COD letters and parcels is not one of these services. Under the legislation the reserved services are exempt from VAT, which complies with the Postal Directive and the Sixth Directive. As the conveyance of COD items of mail is not reserved, it is not exempt from VAT.

VII ? Conclusion

85. In view of the above I propose that the Court should answer the questions submitted by the Østre Landsret as follows: A Member State is required to levy VAT on services which are not reserved pursuant to Article 7 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. The term public postal services as referred to 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 as meaning that it also includes undertakings with a commercial objective provided that services are reserved to such undertakings pursuant to Article 7 of Directive 97/67/EC.

1 – Original language: Dutch.

2 – OJ 1977 L 145, p. 1.

3 – OJ 1997 L 15, p. 14.

4 – Law No 89 of 8 February 1995.

5 – Judgment in Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraphs 17 and 18.

6 – Judgment in Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraphs 30 to 43.

7 – See my Opinion in Case C-144/00 *Hoffmann* [2003] ECR I-2921.

8 – Judgment in Case C-216/97 *Gregg* [1999] ECR I-4947.

9 – See, in particular, the judgments in Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 11, Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraph 15, and Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23.

10 – Judgment in Case 107/84 *Commission v Germany* [1985] ECR 2655, paragraph 17.

11 – Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ 1998 C 39, pp. 2 to 18.

12 – Document exchange means the provision of means, including the supply of ad hoc premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service.

13 – Judgment in *Card Protection Plan*, cited in footnote 9, paragraph 18. In this judgment the Court ruled that there is no reason for the interpretation of the term insurance to differ according to whether it appears in the insurance directives or in the Sixth Directive.

14 – See the judgment in Case 107/84 *Commission v Germany*, cited in footnote 10, paragraph 17.

15 – See my Opinion of 14 November 2002, cited in footnote 7.

16 – Judgment in *Institute of the Motor Industry*, cited in footnote 5, paragraphs 17 and 18.

17 – Judgment in Case C-287/00, cited in footnote 6, paragraphs 30 to 43.

18 – See my Opinion in the *Hoffmann* case, cited in footnote 7.

19 – See the judgment in *Gregg*, cited in footnote 8.

20 – Judgment in Case 107/84 *Commission v Germany*, cited in footnote 10, paragraph 17.

21 – Judgment in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, paragraph 25.

22 – Judgment in *Gregg*, cited in footnote 8.

23 – Cited in footnote 20.

24 – Judgment in Case 107/84 *Commission v Germany*, cited in footnote 10, paragraph 17.