

# Crossed Wires in Luxembourg

## Hutchison 3G & the competition test in VAT

In Case C-369/04 *Hutchison 3G UK Ltd & Others v CEC* and Case C-284/04 *T-Mobile & Others v Austria*, judgments of 26 June 2007, the ECJ held that Member States' auctions of 3G licences do not constitute an economic activity and so fall outside the scope of the Sixth Directive. In finding that claims by successful bidders for recovery of allegedly-paid VAT have failed at the first hurdle, the ECJ declined to offer any observations on the other questions referred. Issues such as when treatment of a public authority as a non-taxable person will lead to 'significant distortions of competition' therefore remain clouded with uncertainty.

The judgments are nevertheless notable for the marked divergence in reasoning between Advocate-General Kokott and the ECJ, a divergence which sheds light in particular on the potential scope for crossover between VAT and competition law. In this respect the *Hutchison 3G* case falls within a succession of references, including *AITC*, in which judgment was recently delivered, and *Isle of Wight*, currently pending before the ECJ, which offer some insight into the practical application of a competition test in the sphere of VAT. This is an issue with which the courts are increasingly having to grapple, not only in relation to the application of the Sixth Directive to public authorities but also more generally, in relation to the application of the principle of fiscal neutrality.

### The background to the *Hutchison 3G* reference

In Spring 2000 the UK conducted an auction of five licence packages for the use of certain frequency bands to provide mobile communications, known as UMTS or third-generation mobile communications (hence 3G). Five telecommunications organisations (*Hutchison 3G*, *mmO<sub>2</sub>*, *Orange 3G*,

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*T-Mobile* and *Vodafone*) each successfully bid for one licensing package. The UK received revenue from the auctioning of the licences totalling approximately £22.5 billion. No reference to VAT was made during the auction procedure.

The five successful telecommunications organisations subsequently claimed a refund of VAT in the sum of £3.348 billion, on the grounds that the award of the licences was a transaction subject to VAT, that the licence fees therefore included VAT and that they were entitled to the claimed sum as input tax. HMRC considered, however, that the auctioning of the licences was not a taxable activity within the meaning of the Sixth VAT Directive.

According to Article 4(1) and (2) of the Sixth Directive only transactions that a taxable person carries out in the course of an economic activity are subject to tax. According to Article 4(5) the State and its bodies are not, in principle, to be considered taxable persons where they exercise public authority. However, they shall be considered taxable persons when treatment as non-taxable persons would lead to significant distortions of competition. It is the interpretation of these provisions in the context of the auctioning of the 3G licences that formed the cornerstone of the proceedings. The five telecommunications organisations brought an appeal to the VAT & Duties Tribunal, which made a reference to the ECJ.

In a reference for a preliminary ruling made in a parallel case, the Regional Civil Court, Vienna asked similar questions on how to assess the auctioning of UMTS licences in Austria. By one of the referred questions the Court sought to ascertain whether an activity such as the issuing

of the licences by auction constitutes an 'economic activity' within the meaning of Article 4(1) and (2).

### The divergence between the ECJ and the Advocate-General

The ECJ's judgment effectively caused the bidders' claims to fall at the first hurdle by finding that the auctions did not constitute economic activity, thereby falling outside the scope of VAT altogether. The ECJ reiterated the well-settled proposition that the scope of the term 'economic activities' is very wide and that the term is objective in character, in the sense that the activity is considered *per se* and without regard to its purpose or results (see, *inter alia*, Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 47 and the case law cited). The question was whether the issuing of the licences was to be regarded as the 'exploitation of ... property' within the meaning of Article 4(2). Under Directive 97/13, the Wireless Telegraphy Act (WTA) 1949 and the Wireless Telegraphy Act (WTA) 1998, the issuing of the licences in question fell exclusively within the competence of the Member State concerned. The issuing of the licences constituted a necessary precondition for the access of economic operators to the mobile telecommunications market. That activity could not constitute participation in that market by the competent national authority. Only the operators, who are the holders of the rights granted, operate in the relevant market by exploiting the property in question for the purpose of obtaining income therefrom on a continuing basis. Therefore, in granting such an authorisation, the competent

