

The end of the line for the mobile telecoms operators and their VAT refund claims?

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

**By Valentina Sloane
26 June 2007**

The ECJ has held that a Member State's auction of 3G licences does not constitute an economic activity and so falls 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 shrouded in uncertainty. There is, however, an interesting gleam of light in the short judgment. In departing from the Opinion of Advocate General Kokott, the ECJ has indicated that the door is open for the cross-fertilisation of certain concepts in VAT and competition law.

Background

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 ("3 G"). The Radiocommunications Agency, an agency of the Department of Trade and Industry, conducted the auction on behalf of the Secretary of State for Trade and Industry. Five telecommunications organisations (Hutchison 3G, mmO₂, Orange 3G, T-Mobile and Vodafone) each successfully bid for one licensing package. The Agency received revenue from the auctioning of the licences totalling approximately GBP 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 GBP 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 his economic activity are subject to tax. According to Article 4(5) of the Directive 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

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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 those questions, the national courts 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) of the Sixth Directive.

The judgment of the ECJ

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). But 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) of the Sixth Directive.

Under Directive 97/13, the WTA 1949 and the 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 on 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 national authority was not participating in the exploitation of property; it was exclusively carrying out the activity of controlling and regulating the use of the electromagnetic spectrum which had been expressly delegated to it.

The ECJ's analysis is markedly divergent from that of Advocate General Kokott, who considered that the auctioning of the licences did constitute an economic activity. Of particular interest is the difference of approach towards importing principles from the sphere of competition law. The Advocate General dismissed as irrelevant the ECJ's case law that there is no economic activity for the purposes of the Treaty rules on competition where the powers of a public authority are exercised. As far as Advocate General Kokott was concerned, competition law and the Sixth VAT Directive were based on differing concepts of economic activity. In contrast, the ECJ specifically referred to Case C-343/95 *Diego Cali & Figli*, a case on abuse of a dominant position, in relation to its finding that the fact that the issuing of the licences gave rise to a payment could not affect the legal status of the activity.

The ECJ declined to offer any observations on the other questions submitted by the national courts, which related in particular to the requirement that a public authority be treated as a taxable person where to treat it as a non-taxable person "would lead to significant distortions of competition". What is meant by "would lead"? When is a distortion insignificant? What is the relevance, if any, of the principle of fiscal neutrality to the test? The answers proposed by Advocate General Kokott will remain the only pronouncement from Luxembourg on the subject but the focus now turns to the pending reference made by Rimer J in *Commissioners for HMRC v Isle of Wight Council & Others* [2007] EWHC 219 (Ch) for much-needed clarification from the ECJ of this issue.

Christopher Vajda QC and George Peretz acted for the UK in both references. Paul Lasok QC acted for the five UK mobile telecoms operators.

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