

Article on the Royal Mail/Whistl UK case

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Raymond Hill examines the difficulties arising from granting exemptions to the public sector for services that can be provided by both public and private sectors.

The decision of the Administrative Court of England and Wales on 23rd October in the dispute between Royal Mail and Whistl (formerly TNT Post UK) demonstrates the tension between granting exemption from VAT in order to achieve particular public policy goals and the difficulty of ensuring that competition is not significantly distorted as a result, which would equally be contrary to the public interest.

The issue in *Royal Mail/Whistl* was the width of the exemption for the supply of services “by the public postal services”, contained in Article 132(1)(a) of the Principal VAT Directive. The European Court of Justice (CJEU) had previously held in the *TNT Post UK* case (Case C-357/07; ECLI:EU:C:2009:248) that the “public postal services” which benefit from the exemption are public or private operators “who undertake to supply postal services which meet the essential needs of the population and therefore ... provide all or part of the universal postal service in a Member State”. On that basis, TNT Post could not itself claim the benefit of the postal services exemption as it was not a universal services provider.

However, the CJEU went on to decide that the exemption did not apply to all postal services provided by a universal service provider, but only those which it supplied in its role as the universal service provider.

The question for the Administrative Court was how to apply the CJEU’s judgment in *TNT Post UK* to the services provided by Royal Mail under the liberalised regime for postal services in the United Kingdom. Under that regime, the Royal Mail has been designated as the universal service provider, which is responsible for guaranteeing a range of postal services to all users across the United Kingdom at affordable prices. The services covered by the universal service obligation, such as stamped and franked mail, are exempt from VAT. Other services, such as business mail and advertising material, fall outside of the universal service obligation and are standard rated.

The dispute in the *Royal Mail/Whistl* case related to a third type of mail. As a condition of Royal Mail’s designation as the UK universal service provider, the UK regulator for postal and telecoms services (Ofcom) has required Royal Mail to give commercial postal operators access to its postal network. Under the relevant access arrangements, private operators such as Whistl collect mail in bulk from businesses, sort it and transport it using their own network, but then hand it over to the Royal Mail for final delivery to the addressees. Such “access mail” forms a very

substantial proportion of UK mail volumes – no less than 44% of the market.

What is important is that access mail does not form part of the Royal Mail's universal service obligation. Nevertheless, the UK has included access mail within the exemption. Whistl argued that this was inconsistent with the CJEU decision in *TNT Post UK*, because Royal Mail did not provide access services to Whistl in its capacity as the universal service provider. However, the Administrative Court held that the UK had correctly included access services within the exemption – the obligation on Royal Mail to grant access to its delivery network was only imposed on Royal Mail because it was the universal service provider. Therefore, in providing access services, Royal Mail was not acting as an ordinary commercial postal operator.

What the *Royal Mail/Whistl* judgment shows is the difficulty in establishing the limits of exemptions, whether by reference to the economic effects of widening or narrowing the exemption – or the public interest sought to be furthered by granting the exemption. The purpose of the exemption for postal services is to avoid imposing VAT on postal services whose supply at a reasonable price is in the public interest. The effect of bringing access services provided by Royal Mail within the exemption benefits Whistl's customers to the extent that Whistl uses Royal Mail to deliver mail which Whistl has collected. Whistl's customers therefore benefit from exemption on the delivery leg of the service. Exempting access services also benefits postal customers more generally, including those who use Royal Mail to provide the whole of the collection and delivery service, because the universal services and the access services share the same Royal Mail delivery network. Therefore, extending the VAT exemption to access services reduces the overall cost of supplying the universal services.

But the inclusion of access service within the exemption also has the effect of dissuading Whistl from competing with Royal Mail by establishing its own delivery network – since Whistl would have to charge VAT for delivery services, whilst Royal Mail does not. The effect is to dissuade Whistl from entering the delivery market and offering new delivery services at lower cost. The High Court's decision achieves the narrow objective of the exemption of protecting the universal postal service, but paradoxically it may also serve to inhibit competition in the postal market, which was after all the whole point of requiring Royal Mail to offer access services in the first place. It will be interesting to see whether the *Royal Mail/Whistl* case ends up back in Luxembourg and, if so, which aspect of the public interest prevails.

Raymond Hill specialises in VAT and direct tax, as well as the pensions aspects of employment law. He has been instructed in 56 cases before the CJEU in Luxembourg.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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