The second article in our new Viewpoint series 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 October 23, 2014 in the dispute between Royal Mail and Whistl (formerly TNT Post UK) demonstrates the tension between granting an 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 be equally 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 Court of Justice of the European Union (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:

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, the supply of which 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 services 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.

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