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Case No: CO/5302/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2012

Before :

MR JUSTICE KENNETH PARKER

Between :

**THE QUEEN on the application of TNT POST UK
LIMITED**

Claimant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Defendant

-and-

ROYAL MAIL GROUP LIMITED

**Interested
Party**

Mrs P Hamilton (instructed by **Charles Russell LLP**) for the **Claimant**
Miss Nicola Shaw QC and Mr Michael Jones (instructed by **HM Revenue and Customs**) for
the **Defendant**

Mr Javan Herberg QC and Miss Emily Neill (instructed by **Slaughter and May**) for the
Interested Party

Hearing dates: 30 and 31 October 2012

Approved Judgment

Mr Justice Kenneth Parker :

Introduction

1. This is a renewed application for permission to apply for judicial review. I had refused permission on the papers both on the grounds of delay and of lack of merit of the claim. The issue raised by the claim is narrow, namely, whether the exemption from Value Added Tax (“VAT”) conferred by United Kingdom primary legislation in respect of the supply of regulated “access services” by Royal Mail Group Limited, a designated provider of universal postal services, is consistent with EU law. The regulatory and commercial background, however, is somewhat complex and fluid, and needs to be set out in some detail. The resolution of the issue in dispute turns upon the correct interpretation of the judgment of the European Court of Justice in *R (on the application of TNT Post UK Ltd) v Revenue and Customs Commissioners* (Case C-357/07) [2009] STC 1438 (“*TNT*”).
2. The Claimant is TNT Post UK Ltd. (“TNT”), part of the TNT Group which operates in more than 200 countries and employs over 120,000 employees. TNT provides postal distribution services for pre-sorted and unsorted business mail. Its business is the collection, provision of mechanised and manual sorting services (for unsorted mail), processing and delivery by road to a Royal Mail regional depot of its customers’ mail. These services are known as “upstream services”. The Defendants to the claim are the Commissioners for Revenue and Customs (“the Commissioners”), who maintain that the challenged UK exemption from VAT is compatible with EU law. The interested Party is Royal Mail Group Limited (“Royal Mail”). Royal Mail is the sole universal postal service provider in the UK. Royal Mail’s services are provided by means of an integrated national network which services about 29 million addresses six days a week. Letters and other mail are collected by Royal Mail from various locations, namely, about 115,000 pillar boxes, 11,500 post offices and 90,000 business premises. The “access services”, which lie at the heart of this claim, mean access by other postal operators or users of postal services to Royal Mail’s postal network for the final delivery by Royal Mail, over the last mile or so, from a Royal Mail depot to the ultimate recipient of the mail, sometimes called the “downstream services”.
3. I invited the parties to agree that this application should be treated as a “rolled up” hearing, so that, if I granted permission, I could proceed to decide the claim. However, not all parties acceded to that proposal and, given that prejudice might otherwise arise, I felt that I could not adopt that suggested procedure. In the event I have to decide only whether the Claimant’s claim is properly arguable and may proceed to a substantive hearing.

The Relevant Legislative Framework

4. Article 132(1)(a) of Council Directive 2006/112 EC (“the VAT Directive”) exempts from VAT:

“The supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto.”

5. The UK gives effect, or purports to give effect, to the foregoing exemption through the provisions of Group 3 (Postal Services) of Schedule 9 to the Value Added Tax Act 1994. The language and scope of Group 3 has been amended a number of times. However, it is in my view sufficient for determining the present application to set out the terms of the current exemption resulting from section 22(2) Finance (No 3) Act 2010 which took effect in relation to supplies made on or after 31 January 2011 and was subsequently amended by the Postal Services Act 2011 (Consequential Modifications and Amendments) Order 2011 (S1 2011/2085), which took effect on 1 October 2011:

“1. The supply of public postal services by a universal service provider.

2. The supply of goods by a universal service provider which is incidental to the supply of public postal services by that provider.

NOTES:

(1) ...

(2) Subject to the following Notes, “public postal services”, in relation to a universal service provider, means any postal services which the provider is required to provide in the discharge of [a specified condition].

(3) Public postal services include postal services which a universal service provider provides to allow a person access to the provider’s [postal network (within the meaning of section 38 of the Postal Services Act 2011) and which are required to be provided by a specified condition].

(4) Services are not “public postal services” if –

(a) the price is not controlled by or under [a specified condition], or

(b) any of the other terms on which the services are provided are freely negotiated.

(5) But Note (4) does not apply if [a specified condition] requires the universal service provider to make the services available to persons generally –

(a) where the price is not controlled by or under [the condition], at the same price, or

(b) where terms are freely negotiated as mentioned in Note (4)(b), on those terms.

[(6) In this Group “specified condition” means a designated USP condition, a USP access condition or a transitory condition

under paragraph 5 of Schedule 9 to the Postal Services Act 2011 which is imposed only on a universal service provider.]

(7) Any expression which is used in this Group and in Part 3 of the Postal Services Act 2011 has the same meaning in this Group as in that part.”

6. The Notes to what is now Group 3 (Postal Services) are intelligible only by reference to the Postal Services Act 2011 (“the Act”). Under section 29 of the Act OFCOM must carry out their functions in relation to postal services in a way that they consider will secure the provision of a universal postal service. Under section 30 OFCOM must by order (a “universal postal service order”) set out a description of the services that they consider should be provided in the United Kingdom as a universal postal service and the standards with which those services are to comply. A universal postal service must, as a minimum, include each of the services set out in section 31 (as read with sections 32 and 33) of the Act. OFCOM has made on 26 March 2012 a universal postal service order: see the Postal Services (Universal Postal Service) Order 2012 S1 2012 No. 936, which came into force on 1 April 2012 (“the Order”).
7. By section 35 of the Act OFCOM may designate one or more postal operators as “universal service providers”. Royal Mail has been uniquely so designated. By section 36 of the Act OFCOM may impose a designated USP (universal service provider) condition on a universal service provider. By a statutory notification dated 27 March 2012 (“the notification”) OFCOM has imposed, with effect from 1 April 2012, designated USP conditions on Royal Mail as universal service provider. The conditions, which are set out in Schedule 1 to the notification, are detailed and comprehensive.
8. It is common ground in this application that the specific services with which I am concerned do not, on strict analysis, fall within the description of services set out in the relevant Order; and, consequently, none of the designated USP conditions that are set out in Schedule 1 to the notification and that are imposed on Royal Mail by the notification relate to those specific services. As a plain matter of statutory interpretation, therefore, the services with which I am concerned are not, strictly speaking, within the definition of universal postal services.
9. However, the specific services do fall within the regulatory regime. By section 38 of the Act OFCOM may impose a USP access condition on a universal service provider. Such a condition requires the provider to give access to its postal network (that is, the systems and all the resources used by the provider for the purpose of complying with its universal service obligations) to other postal operators or users of postal services. It is convenient at this point to set out section 38 of the Act in full:

“38 USP access conditions

- (1) OFCOM may impose a USP access condition on a universal service provider.
- (2) A USP access condition is a condition requiring the provider to do either or both of the following—

- (a) to give access to its postal network to other postal operators or users of postal services, and
 - (b) to maintain a separation for accounting purposes between such different matters relating to access (including proposed or potential access) to its postal network as OFCOM may direct.
- (3) The provider's "postal network" means the systems and all the resources used by the provider for the purpose of complying with its universal service obligations (and, accordingly, includes arrangements made with others for the provision of any service).
- (4) OFCOM may not impose a USP access condition unless it appears to them that the condition is appropriate for each of the following purposes—
- (a) promoting efficiency,
 - (b) promoting effective competition, and
 - (c) conferring significant benefits on the users of postal services.
- (5) In addition, OFCOM may not impose any price controls on a universal service provider in a USP access condition unless it appears to them that the provider concerned—
- (a) might otherwise fix and maintain some or all of its prices at an excessively high level with adverse consequences for users of postal services, or
 - (b) might otherwise impose a price squeeze with adverse consequences for users of postal services.
- (6) In imposing price controls in a USP access condition in connection with the giving of access to a universal service provider's postal network or to part of that network, OFCOM must have regard to such of the costs incurred in the provision of that network, or part of that network, as OFCOM consider appropriate.
- (7) In imposing price controls in a USP access condition OFCOM may—
- (a) have regard to the prices at which services are available in comparable competitive markets, and
 - (b) determine what they consider to represent efficiency by using cost accounting methods.

(8) In deciding what obligations to impose in a USP access condition in a particular case, OFCOM must (in addition to taking into account anything relevant for the purpose of performing their duty under section 29) take into account, in particular, the following factors—

(a) the technical and economic viability, having regard to the state of market development, of installing and using facilities that would make the proposed access unnecessary,

(b) the feasibility of giving the proposed access,

(c) the investment made by the universal service provider concerned in relation to the matters in respect of which access is proposed,

(d) the need to secure effective competition in the long term, and

(e) any rights to intellectual property that are relevant to the proposal.

(9) For the purposes of this section references to giving a person access to a provider's postal network include giving a person an entitlement to use, be provided with or become a party to any services, facilities or arrangements comprised in the postal network.

(10) In Schedule 3—

(a) Part 1 makes provision about the kind of matters that may be included in a USP access condition, and

(b) Part 2 makes provision about the resolution of access disputes by OFCOM.”

10. By a statutory notification dated 27 March 2012 OFCOM has imposed, with effect from 1 April 2012, USP access conditions on Royal Mail. The conditions, which are contained in a Schedule to the notification, are detailed and comprehensive. They include a price control, namely control to prevent “price squeeze”. There was considerable reference in the evidence, and some discussion at the hearing, of the nature, object and effect of the price control. For future reference it may be helpful to explain the nature of the issue. Geradin, Layne-Farrer and Petit in EU Competition Law and Economics (at 4.304) well describe “margin squeeze” as:

“**4.304** ... a situation in which a vertically integrated dominant firm uses its control over an input supplied to downstream rivals to prevent them from making a profit on a downstream market in which the dominant firm is also active. Margin squeeze thus amounts to a “constructive” refusal to supply. The dominant firm could in theory engage in margin squeeze in

a number of different ways. It could, for instance, raise the input price to levels at which rivals could no longer sustain a profit downstream. Alternatively, it could engage in below-cost selling in the downstream market, while maintaining a profit overall through the sale of the upstream input. Finally, the dominant firm could raise the price of the upstream input and lower the price of the downstream retail product to create a margin between them at which a rival could not be profitable.”

11. In the present context, as I understand it, the price control is intended to secure a sufficient margin between the price at which Royal Mail provides the relevant access services to other enterprises (such as TNT) and the prices at which Royal Mail provides certain final services to customers, to enable such enterprises to compete effectively with Royal Mail in the supply of such final services. TNT argued in its evidence that such price control should not be taken into account because it adheres by reason of Royal Mail’s historic (and continuing) dominant market position, and not by virtue of its regulated status as universal service provider. That argument, in my view, is not supported by the legislative framework outlined above, and furthermore Geradin *et al*, after analysis of EU jurisprudence on price squeeze, make (at 4.353) what appears to me the valid point that EU competition law and national regulatory laws (intended, *inter alia*, to maintain and improve universal service in the regulated sector) have different objectives.
12. In any event, the foregoing exegesis of the legislative framework explains why the services with which I am concerned in this application are “public postal services [supplied] by a universal service provider” within Group 3 and are thus exempted from VAT.
13. The exemption in Group 3 must, of course, not extend further than what is allowed by Article 132(1)(a) of the VAT Directive (see paragraph 4 above). The ambit of that Article has been authoritatively determined by the Court of Justice in *TNT*, in a reference on a previous claim for judicial review brought by the present applicant.
14. The first question on that reference was the correct interpretation of the term “public postal services”. The Court of Justice answered as follows:

“30. It follows that, in contrast to what is claimed by TNT Post and the Finnish and Swedish governments, the exemption laid down in art 13A(1)(a) of the Sixth Directive cannot be interpreted so as to cover, in essence, supplies of postal services, such as the reserved services within the meaning of art 7 of Directive 97/67, regardless of the status of the provider of those services.

31. Secondly, the terms used to specify an exemption such as that set out in art 13A(1)(a) of the Sixth Directive are to be interpreted strictly, since it constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the

requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in art 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, *Haderer v Finanzamt Wilmersdorf* (Case C-445/05) [2008] STC 2171, [2007] ECR I-4841, para 18 and the case law cited).

32. Thus, as the title which art 13A of the Sixth Directive carries, the exemptions provided for in that article are intended to encourage certain activities in the public interest.

33. That general objective takes the form, in the postal sector, of the more specific objective of offering postal services which meet the essential needs of the population at a reduced cost.

34. As Community law now stands, such an objective is the same, in essence, as that of Directive 97/67 to offer a universal postal service. Under art 3(1) of that directive, such a service involves the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.

35. Therefore, notwithstanding the fact that it cannot be used as a basis for the interpretation of art 13A(1)(a) of the Sixth Directive, the legal basis of which differs from that of Directive 97/67, the latter directive nevertheless constitutes a useful point of reference for the purposes of interpreting the term 'public postal services' within the meaning of that provision.

36. It follows that public postal services within the meaning of art 13A(1)(a) of the Sixth Directive must be regarded as operators, whether they are public or private (see, to that effect, *Commission v Germany*, para 16), who undertake to supply postal services which meet the essential needs of the population and therefore, in practice, to provide all or part of the universal postal service in a member state, as defined in art 3 of Directive 97/67.

37. Such an interpretation is not contrary to the principle of fiscal neutrality, which precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT (see *JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Comrs* (Case C-363/05) [2008] STC 1180, [2007] ECR I-5517, para 46 and the case law cited).

38. As the Advocate General observes in para 63 of her opinion, the assessment of the comparability of the services supplied hinges not only on the comparison of individual

services, but on the context in which those services are supplied.

39. As the facts in the main proceedings demonstrate, on account of the obligations described in para 12 of this judgment, which are required under its licence and connected with its status as the universal service provider, an operator such as Royal Mail supplies postal services under a legal regime which is substantially different to that under which an operator such as TNT Post provides such services.

40. Consequently, the answer to the first question is that term 'public postal services' in art 13A(1)(a) of the Sixth Directive must be interpreted to cover operators, whether they are public or private, who undertake to provide, in a member state, all or part of the universal postal service, as defined in art 3 of Directive 97/67."

15. The second question was whether the exemption applied to all of the postal services provided by the public postal services, or only part of those services, and what the correct criterion should be. The Court of Justice answered, as follows:

"43. However, contrary to what is maintained by Royal Mail, the Greek and United Kingdom Governments and Ireland, it may not be inferred from that provision that all the supplies of services by the public postal services and supplies of goods incidental thereto which are not expressly excluded from the scope of that provision are exempted, regardless of their intrinsic nature.

44. It follows from the requirements referred to in para 31 of this judgment that the exemption provided for in art 13A(1)(a) must be both strictly interpreted and interpreted consistently with the objectives of that provision, that the supplies of services and of goods incidental thereto must be interpreted as being those that the public postal services carry out as such, that is, by virtue of their status as public postal services.

45. Such an interpretation is dictated, in particular, by the need to observe the principle of fiscal neutrality. The obligations on an operator such as Royal Mail, which—as is apparent from para 39 of this judgment—distinguish the situation in which that operator supplies postal services from that in which an operator such as TNT provides such services, concern only the postal services supplied in its capacity as the universal service provider.

46. In the same way, it follows from the requirements set out in para 44 of this judgment and, in particular, from the nature of the objective pursued by art 13A(1)(a), which is to encourage an activity in the public interest, that the exemption is not to

apply to specific services dissociable from the service of public interest, including services which meet special needs of economic operators (see, to that effect, *Criminal proceedings against Corbeau* (Case C-320/91) [1993] ECR I-2533, para 19).

47. The German government and the Commission are therefore correct to submit that services supplied by the public postal services for which the terms have been individually negotiated cannot be regarded as exempted under art 13A(1)(a) of the Sixth Directive. By their very nature, those services meet the special needs of the users concerned.

48. That interpretation is, moreover, confirmed by recital 15 in the preamble to Directive 97/67, from which it is apparent that the option to negotiate contracts with customers individually does not correspond, in principle, with the concept of universal service provision.

49. Consequently, the answer to the second and third questions is that the exemption provided for in art 13A(1)(a) of the Sixth Directive applies to the supply by the public postal services acting as such—that is, in their capacity as an operator who undertakes to provide all or part of the universal postal service in a member state—of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.”

Submissions of the Parties

16. On behalf of TNT Mrs Penny Hamilton makes a very short and straightforward submission. It is common ground that the relevant “access services” are not within the description of universal postal services (see paragraph 8 above). According to the authoritative ruling of the Court of Justice, the exemption in the VAT Directive is confined to those services which public postal services “carry out as such, that is, by virtue of their status as public postal services”. Mrs Hamilton contends that the Court’s formulation is simply another way of referring to the services which fall strictly within the description of universal postal services. Access services are not part of universal postal services and are excluded by the Court’s formulation. She seeks to elicit support for this proposition from the Opinion of the Advocate General in *TNT*, in particular paragraphs 72-78 and 89, which she maintains the Court’s formulation is in effect echoing:

“72. In order to take account of the latter requirements, the exemption must be applied only to the services provided by a public postal service, which it also provides *as such*. As was evident from the answer to the first question, the exemption is intended to benefit the services of the public postal network which are guaranteed in the public interest, and in that regard

the approach adopted under the Postal Directive must be taken into account.

73. It is true that, in principle, a uniform interpretation of the concepts of the Sixth Directive is necessary. However, since the Postal Directive does not fully harmonise the universal service, there may be differences from member state to member state in the definition of the services which are part of the universal service and of their components, which also affect the exemption from VAT of the postal services.

74. In *Commission v Germany*, the court has already pointed out that the Sixth Directive has avoided influencing the manner in which the member states organise their postal systems, since art 13A(1)(a) covers in the same way both state postal service undertakings and those organised under private law. It accords with the principle of subsidiarity for member states to specify the postal services which must be guaranteed in the public interest in the light of their own individual geographical, social and economic characteristics.

75. It should however be noted that the member states have a duty to grant the exemption where the requirements of art 13A(1)(a) are satisfied. That duty is matched by a corresponding right of the individual. In applying the VAT exemption, member states must therefore adhere to the approach which they have adopted in the context of postal regulation. Were they to be free to define the public interest requirements for the purposes of the VAT exemption arbitrarily otherwise than by reference to the definition of the universal postal service, the right to the granting of the exemption would be called into question.

76. A universal service does not exist merely when it is provided by means of the infrastructure of a universal service provider. It must also be made available in accordance with the standardised terms and tariffs in force for the general public. Only then can it be regarded as a service which a public postal service as such provides and which benefits the public interest in a particular way.

77. As the German government correctly points out, with reference to recital 15 in the preamble to the Postal Directive, universal service providers are free to negotiate contracts with customers individually. Such services are not provided by a provider acting as a *public* postal service, since the service on those terms is not available to every user in the same way, but only to users with particular purchasing power.

78. Moreover, with regard to those services, which are provided in addition to the universal service and are not subject to the

obligations applicable to it, the universal service provider finds itself in the same position as any other provider of postal services. Consequently, both the principle of fiscal neutrality and the prohibition of distortions of competition preclude exemption.

...

89. The answer to the second and third questions must therefore be that only those services of a public postal service which that service also provides as such, that is, the universal services provided in the public interest, are exempt from VAT in accordance with art 13A(1)(a) of the Sixth Directive. By contrast, those services which are provided on individually negotiated terms and are not subject to the requirements of the universal service are not exempt.”

17. She also submits that there is no relevant public interest in exempting from VAT supplies of access services which, *ex hypothesi*, are not consumed by customers of universal postal services (see paragraph 41 of the Opinion of the Advocate General). Furthermore, the exemption of access services creates significant and unjustifiable distortion of competition, and is inconsistent with the well recognised principle in the present context of fiscal neutrality. As to competitive distortion, I had some difficulty at the hearing in pinpointing exactly how that was said to arise and how significant it might be. As far as I could understand, the focus of the alleged distortion was the position of certain large customers, especially large financial institutions (who themselves supply services that are exempt from VAT), who wish to arrange for the sorting and delivery of their own mail to their own customers, rather than to provide (as TNT and other similar operators provide) postal services to other enterprises. Such large customers can benefit, owing to the volume of mail involved, from Royal Mail’s access services. If such a customer chose to acquire from Royal Mail “end to end” services (that is the “upstream service” of sorting etc. together with the “downstream service” of final mile delivery), my understanding from the evidence is that such an “end to end” service is now standard rated for VAT purposes, and no question of competitive distortion would arise. However, such a customer could alternatively carry out its own “upstream activities” of sorting etc. and acquire only Royal Mail’s access services of final mile delivery. In that event, the customer would incur no VAT on the access service, and would thus incur no VAT in respect of the whole postal operation. If TNT offered to supply such a customer with the downstream element of final mile delivery (assuming that TNT had the facilities and resources to do so even on a limited geographical basis), TNT, not being a universal provider, would have to charge VAT on the supply of such services, VAT that would be irrecoverable by the customer if it supplied exempt financial services. TNT could alternatively seek to compete in this market by providing “upstream services” of sorting etc. to such a customer and then procure Royal Mail, as TNT’s agent, to provide the final mile delivery. Such an arrangement would apparently avoid VAT on the final mile delivery, but the customer would pay irrecoverable VAT on the “upstream service”. This competitive alternative, therefore, might not be attractive to a customer who was able to carry out relatively efficiently and cost effectively its own

upstream activities, and could acquire Royal Mail's VAT exempt access services for final mile delivery.

18. Whatever the correct analysis, the competitive effect of the VAT exemption has been noted, for example, by Richard Hooper CBE, who carried out an independent review of Royal Mail's services on behalf of the Department for Business, Education and Regulatory Reform (as it then was):

“for the remainder of the market – principally financial services, charities and businesses who are unable to reclaim VAT – Royal Mail's VAT exemption does provide the company with an advantage over its competitors, particularly competitors setting up their own delivery networks.”
(paragraph 207)

19. The Commissioners and Royal Mail made substantially similar submissions in response to the claim, which can be summarised as follows.
20. First, the Court of Justice did not say in terms that the VAT exemption was restricted only to those services falling expressly within the description of universal postal services. The Court could have done so, and all potential ambiguity would have been removed. However, the Court purposively used a somewhat wider formulation, which was unsurprising given that it had held that the Postal Services Directive was no more than a useful point of reference for determining which entity constituted a supplier of public postal services.
21. Secondly, the relevant test, flowing from paragraph 39 of the Judgment, in respect of any particular services was whether the services were supplied by the universal service provider in its capacity as such, that is, under the legal regime which applied especially and uniquely to the provider of universal postal services.
22. In that context the Commissioners and Royal Mail relied upon the recent Joined Cases C-259/10 and C-260/10 *Rank Group Plc v HMRC* [2012] STC 23 (“Rank Group”). These cases concerned a different exemption, namely, that applying to gambling transactions. So far as that exemption was concerned, the Court had constantly held that it was the nature of the transactions alone that was determinative; and the status of the operator or the legal regime under which it carried out the transactions were irrelevant. In *Rank Group* the Court contrasted the position under certain other exemptions where the status of the operator was critical, as follows:

“That outcome is not called into question by the fact that, in certain exceptional cases, the Court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supply of goods or services at issue such as ... whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs.....” (referring, with other cases, to Case C-357/07 *TNT Post UK*) (at paragraph 50)

23. Thirdly, the Commissioners and Royal Mail stress that the provision of access services derives directly from Royal Mail's special and unique status as the provider of the universal postal service in the UK and from the maintenance by Royal Mail of the infrastructure that is necessary for the discharge of Royal Mail's obligations as provider of the universal postal service. The current legislative and regulatory regime makes the position quite clear. Section 38 of the Act requires Royal Mail, and Royal Mail alone, to provide access services. The extent of the postal network to which Royal Mail is required to give access is defined specifically by reference to –

“the systems and all the resources used by the provider for the purpose of complying with its universal service obligations...”
(see section 38(3) of the Act)

The supply of access services cannot be treated as “dissociable” (in the language of the Court in *TNT*) from the service of public interest.

24. Fourthly, although the Commissioners and Royal Mail do not rely on the fact alone that access services are regulated, they do submit that the extent to which the services are presently regulated (including price control) demonstrates the close connection between the access services and the services of universal postal supply. The principal reason for strict and precise regulation is that those who are entitled to receive access to the infrastructure of the universal service provider must be able to do so on terms that are fair, competitive and non-discriminatory.
25. Finally, the Commissioners and Royal Mail submit that the provision of access services, and the terms upon which such services must be made available to customers, have a powerful public interest or public policy rationale. In order to require Royal Mail to give access to its infrastructure as a universal service provider, OFCOM must be satisfied that such a requirement is appropriate for “conferring significant benefit on the users of postal services” (see section 38(4)(c) of the Act). They say that it is self evident that access does operate in the public interest: it enables economic operators, such as TNT, to gain access, on fair and reasonable terms, to Royal Mail's infrastructure as a universal service provider. That access promotes competition in the supply of postal services, bringing the kind of benefit to consumers, such as lower prices and improved quality of service, that increased competition may ordinarily be expected to produce.

Discussion

26. When I first considered the papers in this case and reflected on the arguments of the parties, I was convinced that the Commissioners and Royal Mail were indisputably correct, and that the claim was not in reality arguable. I tried to frame my conclusion succinctly, by saying that the VAT exemption had not been limited to the supply of universal postal services but extended to –

“ services that, but for the universal obligation, the operator would not be supplying on the terms and conditions which specifically and uniquely apply to it by reasons of its capacity as a universal postal service.”

27. However, I have now had the benefit of extensive and, if I may say so, impressive oral argument (from all parties), and, with further reflection, I do not now believe that the matter is as clear cut as I had initially concluded. I shall state my reasons briefly.
28. First, there does appear to me to be some ambiguity in the language used by the Court in stating the ratio of the judgment. There is considerable force in the submission of the Commissioners and Royal Mail (see paragraphs 20-22 above), but I do not believe that I could properly rule out as unarguable the counter contention that, on reading the judgment as a whole (and taking account of the Advocate General's Opinion), the Court meant to limit the VAT exemption to a provider of universal postal services, in respect of only those services supplied by such a provider that fell within the description of universal postal services.
29. If TNT's claim cannot fail at the threshold by reason of a putative clear formulation of the legal test by the Court, the question then arises whether it should fail as unarguable by reason of the apparent policy of the VAT exemption interpreted in the light of recognised principles of EU VAT law. Each side appeals to the underlying rationale of the exemption and to recognised principles, especially fiscal neutrality and avoidance of competitive distortion.
30. Again, I do not believe that I could properly rule out as unarguable TNT's contention that VAT exemptions must be strictly and narrowly interpreted, and that in the present context the public interest focus is on direct and immediate consumers of universal postal services. Those who enjoy access services are not direct and immediate consumers of universal postal services. The direct and immediate beneficiaries of access services are economic operators such as TNT, who wish to gain access to Royal Mail's infrastructure so that they can provide postal services to their own commercial customers. The beneficiaries also include large scale consumers of postal services (such as banks and other financial institutions), who can gain access to the final mile delivery of the universal service provider on terms that are not generally available to the public as consumers of universal postal services. I readily accept that the requirement of access (at least to intermediate enterprises such as TNT) promotes competition and is likely to benefit customers of postal services in a broad sense, but arguably that benefit to the public interest may not be sufficient in the present context.
31. It also seems to me right to take into account, on the question of arguability, TNT's submissions regarding fiscal neutrality and competition. It seems to me at least arguable that extending the VAT exemption to access services may have an undesirable effect on competition in the supply of postal services. It has arguably at least the potential to discourage operators such as TNT from seeking to establish their own final mile delivery facilities, not with a view to competing as a universal service provider, but as a means of attracting the custom of large-scale users of postal services, especially financial institutions. Even in the absence of any ambition to establish such services, those competing in the relevant market for such custom may arguably be at a disadvantage to Royal Mail (see paragraph 17 above).
32. There may of course be counter arguments. Imposing VAT on the supply of access services would tend to raise the price of such services (the incidence of the tax being determined by the relevant elasticities of supply and demand), to the potential detriment of consumers of postal services more generally. Furthermore, smaller enterprises competing in TNT's market may see advantages in the present position:

they may not have the scale of operation to justify establishing their own final mile delivery services, but might believe that they can presently compete effectively by acquiring such services, exempt from VAT, and on an entirely level playing field, from Royal Mail. If VAT were imposed on access services, they might perceive themselves at a disadvantage in seeking to compete with an integrated end-to-end service provided by larger operators such as TNT whose scale of operation might justify investment in final mile delivery facilities.

33. It is unnecessary for present purposes for me further to explore those arguments regarding fiscal neutrality and competition. It is sufficient to say that I find TNT's position to be arguable.

Delay

34. In my order refusing permission I also held that TNT's claim was out of time and I saw no good reason for extending time.
35. It does seem to me that there has been delay in this case. The Finance (No 3) Act 2010 received Royal Assent on 16 December 2010. TNT was well versed in this particular subject matter, and the interests of legal certainty pressed for any claim to be made promptly. TNT did seek to challenge The Finance (No 3) Act 2010 on 16 March 2011 (that is, at the very end of the three month time limit applicable in all cases), but in a manner that was not appropriate. It was plain that The Finance (No 3) Act 2010 needed to be challenged by a fresh claim, but TNT simply sought to amend the original claim. On 13 May 2011 I held that the application to amend was unacceptable. A new claim was then issued on 8 June 2011.
36. In these circumstances the claim was not issued in time. On the other hand the Commissioners and Royal Mail knew in March 2011 that a claim would be forthcoming, and the delay to 8 June 2011, although regrettable, was not an inordinately lengthy one.
37. The dimension that has changed since my order refusing permission is my conclusion that the claim is arguable. The claim raises a point of principle and of great practical importance in respect of the proper scope of the EU VAT exemption and of its correct implementation in UK law. Even if TNT's claim were excluded on grounds of delay, the Act would arguably remain vulnerable to challenge by others in the position of TNT, especially by a new entrant to the UK market from another Member State, and even to enforcement action by the European Commission. In my judgment, there is a compelling public interest that this claim, if arguable, should be allowed to proceed.

Conclusion

38. I, therefore, grant permission. I would invite the parties carefully to consider this judgment with a view to exploring the best way forward. At the moment I am inclined to think that a further reference to the Court of Justice may be desirable. On the last occasion the Court was not specifically addressing access services. Such services, although not universal postal services, have important characteristics, explained in this judgment, which differentiate them from the kind of "dissociable" commercial services that were the focus in *TNT*. Given the arguable ambiguity in the judgment, legal certainty might in the longer term be achieved only by eliciting the

view of the Court on this specific issue. In this context it should be borne in mind that, although I did not have particulars of market arrangements elsewhere, the relevant issue may well arise in other Member States as postal services become increasingly liberalised and new entrants need access to the final delivery facilities of the universal service provider. A further reference, although regrettable in terms of delay, cost and immediate (but, perhaps, illusory) certainty, would allow any interested Member State and the Commission to state its position and would achieve longer term certainty.