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Case No: HC-2015-000702

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 28/03/2022

Before :

MR JUSTICE ADAM JOHNSON

Between :

**CLAIMANTS IN THE ROYAL MAIL GROUP
LITIGATION
- and -
ROYAL MAIL GROUP LIMITED**

Claimants

Defendant

Laurent Sykes QC, Michael Firth and George McDonald (instructed by **Mishcon de
Reya LLP**) for the **Claimants**
Javan Herberg QC and Emily Neill (instructed by **Macfarlanes LLP**) for the
Defendant

Hearing dates: 11, 12, 13, 14, 15 and 18 October 2021

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10.30am on Monday 28 March 2022.

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Mr Justice Adam Johnson:

Introduction

1. Shorn of all unnecessary complexities, this case involves the Court resolving two questions, directed to be determined as preliminary issues by Order of Mann J.

(1) EU VAT Exemption

2. The first question is whether, during what I will call “*the Relevant Period*” (see below at [12]), certain postal services offered by the Defendant – “*the Sample Services*” – were exempt from VAT as a matter of EU law.
3. That question depends on identifying the proper scope of the exemption from VAT contained in Article 132(1)(a) of the Principal VAT Directive (Council Directive 2006/112/EC), which is as follows:

“(1) Member States shall exempt the following transactions:

(a) the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto.”

4. I will refer to this as the “*EU VAT Exemption*”.
5. It is accepted here that the Defendant, Royal Mail Group Limited (“*Royal Mail*”) is “*the public postal services*” within the meaning of that phrase in the EU VAT Exemption. That was established by the decision of the CJEU in 2009 in The Queen, on the application of TNT Post UK Ltd v HMRC Case (C-357/07) ECR I-3025 (“*TNT Post*”).
6. That being so, on the face of it, the scope of the EU VAT Exemption is very broad. It covers the supply by Royal Mail of “*services ... and the supply of goods incidental thereto*”, as long as such services are not passenger transport and telecommunications services.
7. It was also held in TNT Post, however, that the EU VAT Exemption is not to be read in such an open-ended way. It has to be read down. Thus, not every service offered by Royal Mail is exempt. Guidance was given in TNT Post but there is disagreement in this case about how that guidance is to be interpreted. The essential difference between the parties is as follows.
8. Royal Mail argues that the CJEU in TNT Post established a test that focuses on the *capacity* in which services are provided. That is because, at [49] of its judgment, the CJEU expressed the conclusion that the EU VAT Exemption applies to any supply made by “*the public postal services acting as such*”. Thus, argues Royal Mail, any service supplied by it in its capacity as the *public postal services* is an exempt service. And all the Sample Services qualify for exemption under this test, since Royal Mail as the *public postal services* was subject to a specific regulatory regime, and the regulatory conditions which applied to it required it to provide the Sample Services on terms which were (amongst other things) regulated as to price. It follows that the Sample Services were provided by it as the public postal services *acting as such*.

9. Subject to some points of detail, there is no real dispute about the regulatory regime applicable to Royal Mail during the Relevant Period. The Claimants accept that Royal Mail was subject to certain regulatory obligations which obliged it to provide the Sample Services on terms which were regulated as to price. The Claimants say that is not determinative, however, because the relevant test does not focus only on the capacity in which the provider of the services provides them. It also looks at the character of the services themselves. In order to qualify for exemption, the services must be part of what Directive 97/67 EC (“the *Postal Services Directive*”) calls in Article 3 the “*universal service*”.
10. Moreover, the Claimants say this is a narrow concept, reflecting what they describe as the *traditional* or *basic* postal service. Relying on a line of decisions of the CJEU starting with Case C-320/91 Corbeau [1993] ECR I-2533 (“*Corbeau*”), they say it is well established that services which are “*dissociable from the service of public interest*”, including “*services which meet the special needs of economic operators*”, are all *outside* the universal service. They say, in short, that all the Sample Services have features or characteristics which mean they are *dissociable*, largely because they are designed to serve the specific needs of the business community. They are therefore not essential in the required sense, and not part of the *basic* or *traditional* postal service.
11. Royal Mail do not accept the basic structure of the Claimants’ argument, which they say misconstrues the test in TNT Post; but they also say that if they are wrong about that, the Claimants’ approach to identifying the scope of the universal service under Article 3 of the Postal Services Directive is too narrow. In particular, they argue it is simply incorrect to think that business services cannot be part of the universal service. Overall, they say that if it is a necessary part of the inquiry, the Sample Services *were* in fact all part of the Article 3 universal service, properly construed.
12. As to the duration of the Relevant Period (mentioned above at [2]), as I understood it, the parties were effectively agreed that this was to be the period from February 2009 onwards. At any rate, the Claimants’ Skeleton for trial, in dealing with this first issue, addressed only this period of time.
13. Those are the essential battle-lines between the parties in relation to the first question.

(2) Emanation of the State

14. The second question is whether Royal Mail was an “*emanation of the State*”, in the EU law sense. That again is essentially a question of interpretation or, perhaps more accurately, characterisation. In the event, there was a large measure of agreement between the parties on this issue, in particular because Royal Mail did not contest the idea that it was an emanation of the State at all points from 2001 (when it was incorporated as Consignia plc), to October 2013 (when it was privatised). I will explain further below starting at [238].
15. It seems to me the Relevant Period is the same as for the first question. Although the Claimants made submissions on time periods prior to February 2009 in dealing with the second question, nothing really turns on this because the position between the parties was agreed for all periods prior to 2013.

The Relevance of the Questions

16. These two questions are relevant to the Claimants for the following reasons.
17. The Claimants are all businesses or other users of what might loosely be described as business-oriented postal services. The action is a group claim constituted by means of a Group Litigation Order made by Chief Master Marsh on 25 July 2016. Three Claimants have been appointed as Lead Claimants – Harrier LLC (“*Harrier*”), H Tempest Limited (“*Tempest*”), and Leicester City Council (“*Leicester*”).
18. The Claimants were all users of postal services provided by Royal Mail during the Relevant Period. Their core allegation is that, although they were treated as exempt from VAT under the applicable domestic legislation, such services were not, in fact, permitted to be exempted from VAT as a matter of EU law. Thus, the Claimants argue, when they made payment for those services, the amounts they paid over must in law be treated as having *included* VAT, although that was not what was thought at the time. The Claimants then say that, having paid VAT in that way, they are entitled to claim it back.
19. The Claimants have sought various forms of relief designed to give practical effect to their claims. Their entitlement to such relief has also been the subject of contention, and has resulted in a decision of Mann J ([2020] EWHC 97 (Ch)), and a decision of the Court of Appeal ([2021] EWCA Civ. 1173). In separate but related litigation, Zipvit Ltd v. Commissioners for Her Majesty’s Revenue and Customs, what seems likely to be a more fundamental issue has now been resolved by the CJEU, namely whether any VAT is in fact due or paid at all in a case where both the supplier and the recipient of the supply assumed the supply was VAT exempt, and where in consequence the supplier’s invoice did not refer to VAT, although the parties’ contract provided for the recipient to bear the cost of it if it was due. (In its Judgment dated 13 January 2022 the CJEU said no: see Case C-156/20, para. 41.)
20. Thus, other important questions are also in the mix which may have a material effect on the viability of the Claimants’ claims. Nonetheless, in the interests of overall efficiency, the parties wish the present issues to be resolved as well.
21. The present issues are relevant to the Claimants overall position because:
 - i) In order to have any claim at all, they must show that the services they received were required to be subject to VAT under EU law and were not exempt. Thus, the scope of the EU VAT Exemption is critical.
 - ii) If Royal Mail was, during the relevant time, properly an *emanation of the State*, then the Claimants will be entitled to rely on EU law as having direct effect against Royal Mail, and thus claim damages (on a Francovich basis), and an injunction.

The Sample Services

22. The Sample Services are as follows:
 - i) Freepost/Response Services.

- ii) Packetpost.
 - iii) Walksort.
 - iv) Standard Tariff Letter (also referred to as “*Postage Paid Impression*” or “*PPI*”).
 - v) Franking.
 - vi) Door-to-Door.
23. Helpfully, and following directions given at the Pre-Trial Review, the parties were able to agree the key characteristics of each of the Sample Services. The agreed characteristics are set out in Annex 1 to this Judgment (“*Agreed Facts in Relation to the Sample Services*”). I will here however set out a brief description of each of the Sample Services, to give a flavour of their essential nature.
24. Freepost/Response Services: “*Freepost*” is the name given by Royal Mail to a type of Response Service. The basic idea of a Response Service is that the *recipient* of a communication, not the sender, pays the relevant postage. Freepost operates as follows. It is available to users holding a licence. A user which is (for example) a business might use Freepost to enclose within its outgoing mail to customers envelopes pre-printed with its address and licence number. The service then enables such customers to reply to the business without them incurring any charges themselves. Instead, the business is charged: Royal Mail delivers the responses and levies a charge to the licence holder based on the number of responses received.
25. Packetpost: Packetpost is an account service for senders of multiple items which are larger than a letter but smaller than a parcel. Pricing is based either on the average weight of a posting (the daily rate service) or a flat rate (where a customer’s weight and volume posting profile is assessed over a period of time), based on published rate cards. The average weight of postings, where relevant, is policed through regular sampling. The idea is to save on the administration costs involved in checking individual postal items. Some work has to be carried out by the user of the service - for example, separating out items by format into different containers for collection, and weighing consignments. Royal Mail collects Packetpost items from customers. It is an example of a *bulk mail* service.
26. Walksort: Walksort is a service where the user performs a high level of sortation before sending the mailing for delivery. Users are required to sort their outgoing mail down to the level of the individual UK postal walk. Users pay lower prices, reflecting the contribution made by them to the sorting process. Royal Mail collects the relevant bundles or bags, or they need to be delivered to an agreed location arranged in advance. Like Packetpost, Walksort is a bulk mail service.
27. Standard Tariff Letter or PPI: This essentially involves using an account as a way of paying for postage. To open an account, customers must incur a minimum of £5,000 in postage invoiced through the account in each 12 month period. Instead of a stamp, the user includes a *Postage Paid Impression* or *PPI* on the corner of the envelope. Items must be separately presented according to class, rate of postage, service type and format. Postings may only be undertaken from a point agreed to in writing by Royal Mail in advance.

28. Franking: The franking service is governed by schemes made by Royal Mail. A user of the franking service must obtain authorisation/a licence to use franking equipment. Franking machines must be hired or purchased from an authorised manufacturer. All postage payable on franked letters must be prepaid, via credit on the franking machine. Letters are marked (rather than a postage stamp being affixed). Franked items are priced according to a rate card, and are priced lower than stamps.
29. Door-to-Door: Door-to-Door enables the user to send out unaddressed mail which Royal Mail delivers to entire Postcode Sectors. The customer buys access to a Postcode Sector and every address in that sector receives the same item. There is no stamp or other means of postage (such as PPI or franking) identifiable on the items. This service is designed to enable business or other high-volume mailers to deliver business items such as catalogues and leaflets.

VAT Treatment of the Sample Services

30. I will need to say more about the detail below, but in summary the present issues arise because (broadly speaking) the Sample Services were all treated as VAT exempt under UK domestic law until 1 April 2012. (Some qualifications are necessary to this broad statement, but I will not complicate matters at this stage by seeking to explain what they are.)
31. The Claimants' position is that this tax treatment under domestic law was out of step with what EU law required, having regard to the proper scope of the EU VAT Exemption. In fact, say the Claimants, the EU VAT Exemption did *not* permit the Sample Services to be treated as exempt from VAT; and consequently they were not so exempt, and VAT was therefore chargeable on them, even though no one appreciated that at the time.
32. In the present action, the Claimants invite me to agree with the first of these propositions, i.e. that the EU VAT Exemption did *not* permit the Sample Services to be treated as exempt from VAT.

The Legal and Regulatory Framework

33. To make sense of what follows, I need to say something more about the relevant legal and regulatory framework.
34. This is a complex topic, because it involves consideration of points from a number of different sources. Moreover, in order to deal adequately with the Relevant Period, it is necessary to go back in history a little and explain the regulatory framework as it developed. As will be shown, one is presented with a patchwork of rules and principles which overlap and intersect, sometimes imperfectly. The relevant sources are: (1) EU law on postal services (principally, the Postal Services Directive); (2) domestic law on postal services (the Postal Services Acts 2000 and 2011); (3) the domestic regulatory framework for the provision of postal services (i.e., regulatory decisions made first by Postcomm and then by Ofcom, including the licensing and regulatory framework imposed on Royal Mail); (4) EU VAT law (the VAT Directive); and (5) domestic VAT law (the VAT Act 1994 and in particular Schedule 9 Group 3 to that Act specifying the scope of the VAT exemption under domestic law in relation to postal services).

35. This rather messy framework presents a risk, as one descends into the detail, of losing sight of the wood for the trees. Accordingly, I will try in this section to set out a simple overview. I will elaborate as necessary in stating my conclusions below.

Postal Services Directive

36. The Postal Services Directive was introduced in December 1997. It has been amended in certain (immaterial) respects since, and is now available in a consolidated version.
37. The Directive introduced the idea of the *universal postal service* formally into EU law. The key Article for present purposes is Article 3(1), which contains the obligation on Member States to maintain a universal service. Art. 3(1) requires Member States to ensure that:

“ ... users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users ”.

38. By Art. 2, “*user*” is defined to mean “*any natural or legal person benefitting from postal service provision as a sender or an addressee*”, and “*universal service provider*” is defined to mean “*the public or postal service provider providing a universal postal service or parts thereof within a Member State ...*”.
39. Arts 3(3) and 3(4) then set out certain *minimum* requirements for the universal service (e.g., daily clearance and delivery on each working day). Art. 3(5) establishes a weight limit for items within the universal service of 20 kilograms. Art. 5 then stipulates that each Member State shall take steps to ensure that the universal service provision meets certain requirements, including (for example) ensuring that it is made available without any form of discrimination and is not interrupted save in exceptional circumstances.

Postal Services Act 2000

40. Turning to domestic law, section 1(1) of the Postal Services Act 2000 established the Postal Services Commission (“*Postcomm*”). The 2000 Act imposed a number of obligations on Postcomm, including (section 3) an obligation to ensure the provision of “*a universal postal service*”:

“(1) The Commission shall exercise its functions in the manner which it considers is best calculated to ensure the provision of a universal postal service.

(2) The Commission may, in particular, impose as a condition of a licence under Part II a requirement that the licence holder provides a universal postal service or part of such a service.

(3) Where the Commission has imposed such a condition, it may include in the licence such conditions and other provisions as it considers appropriate in relation to the provision of such a service (including conditions and other provisions about activities which do not require a licence under Part II). ”

41. Section 4(1) (headed “*Provision of a universal postal service: meaning*”) set out certain minimum requirements for the provision of a UK version of the *universal postal service*, including (1) at least one delivery of postal packets every working day, and (2) at least one collection of relevant postal packets every working day.
42. Section 5 was headed “*Other duties of the Commission in the consumer interest*”, and provided as follows at subsection 5(1):

“(1) Subject to section 3, the Commission shall exercise its functions in the manner which it considers is best calculated to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators.”
43. Section 6 restricted the provision of postal services without a licence. Section 11(1) provided Postcomm with a power to grant licences for the conveyance of letters, and by section 13 it was empowered to include conditions in such licences.
44. More generally, by section 44(1), Postcomm was required, in so far as it considered it practicable to do so with a view to facilitating the exercise of its functions, to keep under review the provision of postal services (in the UK and elsewhere) and collect information about those services.
45. The new regulatory framework established by the 2000 Act came into force on 26 March 2001. A few days before that, on 23 March 2001, Consignia plc (as Royal Mail was then known) was granted a Licence by Postcomm (“*the Licence*”), which then came into effect on 26 March 2001.

Consultations by Postcomm: 2001-2005

46. Under the Licence as originally granted in 2001, Royal Mail was appointed as provider of the UK’s *universal postal service*, but at the time there was some uncertainty as to precisely what this would comprise. Postcomm wanted time to consult and form an assessment. In a “*Decision document*” published in April 2001, Postcomm said as follows (describing Condition 1 to the Licence, which dealt with “*Interpretation and construction*”):

“ ... We received representations that the licence should specify the precise scope of the universal postal service which Consignia is required to provide. We have concluded that it is neither necessary nor desirable to do this in the licence at this stage.

The main reason for this conclusion is that there are issues about the extent and coverage of the universal postal service which we wish to see debated in the wider context of the consultation document in the introduction of competition ... and we do not wish to prejudice that consultation. The licence itself (condition 19) requires Consignia to continue to provide all the postal services that it provided on 1 January 2001, which means that the universal service as it has been provided hitherto will continue under the terms of the licence.”

47. By June 2004, Postcomm had carried out a year-long review “*to find out what people expect from the universal service*”. It published a Decision document entitled “*The UK’s universal postal service*”. Three specific points are worth noting:

i) There had been consultation as to whether the UK’s universal service should address the needs of business users specifically. Postcomm stated its “*assessment and conclusion*” on this topic as follows (at para 2.9):

“Postcomm notes the overall view of consultees that the universal service should satisfy the social and commercial needs of users and is not there simply to support social users of mail. The needs of businesses and social users and the ways in which they use postal services are highly interdependent and difficult to distinguish ...

Postcomm concludes that the universal service in the UK should provide a range of postal services that meet a variety of customer needs – commercial as well as social”.

ii) Among the elements of the proposed universal service, Postcomm identified (para. S.9), “*Priority and non-priority mail services*”. It is common ground that this description included franking, one of the Sample Services in this action.

iii) A particular controversy surrounded the question of bulk mail services. Royal Mail had a number of bulk mail products in existence at the time, and although Postcomm concluded that the UK’s universal service *should* include “*a bulk service for large mailers*”, it did not feel able to determine which of Royal Mail’s products this should cover. It deferred making a decision pending further review, and in the meantime determined (para. 3.15) that: “*... all of Royal Mail’s current bulk mail products will continue to be provided on a universal service basis.*”

48. Thus, what one sees in 2004 are some early decisions being taken about what might eventually form the UK’s universal service. But at the same time, there was ongoing uncertainty about what it would in fact comprise, and also – running alongside that – a concern about the effect on users of services which had been available historically perhaps disappearing.

49. The answer from Postcomm is summarised in paras S.6 and S.7 of the 2004 Decision, where it explained that mechanisms were available to it to ensure the continued provision of such services on specified terms in the public interest, if that was considered necessary. The Decision said:

“S.6 Royal Mail’s licence provides an important tool for Postcomm to manage the transition to a competitive market. It provides a mechanism whereby, in response to the views and needs of users, and as competition in the postal market develops, certain services may move over time from full universal status (and requirements), to being provided on an obligatory (but non-universal) basis, and finally to being provided simply in response

to demand in a competitive market. A related issue is whether a service is within the 'scope' of the universal service. Services which fall within the 'scope' of the universal service are defined by the Act as services which are 'substantially similar' to universal services. The decision about whether a service is a universal service rather than just within the scope of the universal service does not affect whether it is subject to price and service quality regulation. The current price control will continue to apply to all currently controlled products until March 2006. Postcomm is currently undertaking a review of the price and service quality controls that apply to Royal Mail to determine what arrangements should apply from April 2006. Postcomm will only remove products from price and service quality regulation if it is content that competition for the product is sufficiently developed to protect customers' interests.

S.7 Changes will only happen gradually. This is because even if a service ceases to be a universal service, the current price and service quality controls on Royal Mail will continue to apply with Postcomm proposing new arrangements from April 2006 ...”.

50. The controversy over which Royal Mail bulk mail products should be included in the UK universal service was resolved a by further Postcomm Decision (“*The Universal Service for Bulk Mailers*”) in June 2005. The final determination was that Royal Mail should be required to provide two bulk mail products as part of the UK’s universal service, namely Mailsort 1400 (first and second class), and Cleanmail (first and second class). Consequently, Packetpost and Walksort – two of the Sample Services in this action - were *not* categorised as part of the UK universal service by Postcomm. They did, however, remain mandated and subject to price and service quality controls under the terms of the Licence (as I will explain shortly), “*to ensure that postal users’ interests are protected*” (Decision at para. S.10).

51. Para. 3.40 of the Decision stated:

“Therefore, Postcomm’s decision is as follows:

- *A generic obligation to provide a universal service for bulk mail users should be included in Royal Mail’s licence.*
- *A specific obligation to provide the bulk mail element of the universal service through Mailsort 1400 (0-2kg, first and second class) and Cleanmail (0-100g, first and second class) should also be included. Subject to the generic obligation above, all other bulk mail products fall within the scope of the universal service but are not themselves universal service products”.*

The Licence

52. By the start of the Relevant Period in February 2009, the key provisions of Royal Mail’s Licence were as follows:
- i) Condition 2 referred expressly to the concept of a “*universal postal service in the United Kingdom*”. Paragraph 1 required the Licensee (Royal Mail) to “*provide a universal postal service within the United Kingdom subject to the following paragraphs of this Condition.*” It is common ground that, among the services required to be provided pursuant to Condition 2 of the Licence were “*First Class Metered*” and “*Second Class Metered*”, which are both *franking* services and so Sample Services.
 - ii) Two other Conditions are also relevant, namely Condition 4 and Condition 21. It is convenient to deal first with Condition 21.
 - iii) To begin with, Condition 21 para. 1 imposed on Royal Mail an obligation to continue to provide certain identified services, including a group of services referred to as “*Controlled Services.*” Again, it is common ground that among such Controlled Services were all the Sample Services apart from Door-to-Door, namely *franking*, *Freepost/Response Services*, *Packetpost*, *Walksort* and *PPI*. Condition 21 para. 2 then went on to impose limitations on the non-price terms of the services covered by the Condition. Condition 21 paras 5-16 then imposed certain price controls. It is unnecessary to set out the detail here. The basic mechanism involved the imposition of price controls by reference to certain “*Tariff Baskets.*” The important point is that each of the Sample Services apart from Door-to-Door fell within one or other of the relevant price control baskets.
 - iv) Condition 4 imposed certain quality standards on Royal Mail in relation to a sub-set of the Controlled Services, but again, among them were all the Sample Services (with the exception of Door-to-Door). Again, it is not necessary to record the detail in the body of this Judgment. By way of example, the obligations imposed by Condition 4 included an obligation not to make any change to the services covered (para. 4), an obligation to monitor performance (para. 6), and an obligation to maintain a compensation scheme for users of services affected by a failure to meet the required quality standards (paras 11-15).
53. More detail about the obligations imposed by Conditions 2, 4 and 21 is set out in Annex 2 to this Judgment. Annex 2 is largely based on a document prepared by Royal Mail. I did not understand it to be controversial, and in any event it is a very useful summary which I gratefully adopt.
54. The upshot, as will be apparent, is that by this stage at the start of the Relevant Period, *franking* fell within the Condition 2 *universal service* and was also regulated under Conditions 4 and 21. All the other Sample Services – with the exception of Door-to-Door – were mandated and price controlled under Conditions 4 and 21 by virtue of their being *Controlled Services*.

The VAT Directive, the VAT Act 1994 and the original Group 3

55. That then was the regulatory position as regards the provision of postal services in February 2009, at the start of the Relevant Period.
56. As to the VAT position, I have already mentioned above (see at [3]) the key provision in the EU's Principal VAT Directive. At the time, which was before the decision of the CJEU in TNT Post, the broad language of this provision had given rise to the view all services provided by Royal Mail as the public postal services were entitled to exemption under the EU VAT Exemption.
57. This view was reflected in the domestic VAT legislation.
58. Section 31(1) of the VAT Act 1994 provides that "*A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9.*"
59. Postal services are dealt with in Group 3 of Schedule 9, and the original version of Group 3 (I need not set it out in detail) in effect exempted *all* services provided by Royal Mail. The result was that all the present Sample Services were treated as exempt, even though they were categorised under the Licence in different ways, *viz.*:
 - i) Franking, which was mandated under Condition 2 as part of the "*universal postal service in the United Kingdom*" and was also regulated under Conditions 4 and 21.
 - ii) Freepost/Response Services, Packetpost, Walksort and PPI, which were all mandated and subject to price and quality controls as *Controlled Services* under Conditions 4 and 21.
 - iii) Door-to-Door, which was not regulated in the same way under Conditions 4 and 21.

TNT Post

60. I will need to say more about TNT Post below, but it is useful at this point to recall that the decision in that case rejected the UK's expansive interpretation of the EU VAT Exemption in favour of an interpretation with a narrower scope. Thus, as already noted ([7] above), the CJEU determined that not *all* services provided by Royal Mail as the public postal services were exempt as a matter of EU law, but only some. One can see how the UK Government interpreted the effect on TNT Post in defining the scope of EU VAT Exemption, by considering the way the decision was transposed into domestic law in an amended version of Schedule 9, Group 3.

The Amended Group 3

61. Group 3 of Schedule 9 to the VATA was amended by section 22(2) of the Finance (No 3) Act 2010 ("*the Amended Group 3*") with effect from 31 January 2011.
62. The Amended Group 3 exempted the following at a headline level:

“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”.

63. More detail was then provided by the accompanying Notes, as follows (my emphasis added):

“(1) ‘Universal service provider’ means a person who provides a universal postal service, or part of such a service, in the United Kingdom.

(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 licence duty.

(3) Public postal services include postal services which a universal service provider provides to allow a person access to the provider's postal facilities, where such services are provided pursuant to a licence duty.

(4) Services are not ‘public postal services’ if—

(a) the price is not controlled by or under a licence, 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 licence duty requires the universal service provider to make the services available to persons generally—

(a) where the price is not controlled by or under the licence, at the same price, or

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

(6) In this Group—

‘licence’ means a licence under Part 2 of the Postal Services Act 2000;

‘licence duty’ means a duty imposed as a condition of a licence;

‘postal facilities’, in relation to a universal service provider, means the resources and systems deployed by the provider, for

the purpose of discharging any licence duty to provide a universal postal service or part of such a service;

‘postal services’ and ‘universal postal service’ have the same meaning as in the Postal Services Act 2000”.

64. Expressed in simple terms, what the Notes say is that services rendered by Royal Mail as the public postal services will be exempt:
- i) if they are services which the provider is *required* to provide in the discharge of a licence duty, but
 - ii) even then, they will not be exempt if they are not price controlled or if they are otherwise provided on terms which are freely negotiated.
65. In this case, Royal Mail effectively adopts this same view of the scope of the EU VAT Exemption: the domestic legislation reflects a view of the EU VAT Exemption which focuses on the capacity in which postal services are provided. In other words, the qualifying criterion is whether services are provided by the “*public postal services acting as such*”, and the Amended Group 3 provides guidance on when that criterion is fulfilled.
66. This corrected view of the scope of the EU VAT Exemption had no impact on the domestic law VAT treatment of any of the Sample Services, save for Door-to-Door. The other Sample Services remained within the scope of the Amended Group 3, because all were required to be provided and were subject to price controls – either as part of the universal service under Condition 2, and/or as Controlled Services under Conditions 4 and 21.
67. Door-to-Door was different. It was not mandated and price controlled in the same way, and so fell to be treated differently in light of TNT Post and the Amended Group 3. After implementation of the Amended Group 3 in January 2011, Door-to-Door became subject to VAT as a matter of domestic law. In the context of the present action, Royal Mail has now accepted that, consistent with its own case on the scope of the EU VAT Exemption, the domestic law treatment of Door-to-Door during the Relevant Period prior to that was inconsistent with what EU law required: Door-to-Door was treated under domestic law as VAT exempt, but did not on proper analysis fall within the scope of the EU VAT Exemption because it was not mandated or price controlled like the other Sample Services, and so was not provided by the public postal services *acting as such*. It is for this reason that the parties are now in agreement about the Door-to-Door service, at least as far as its tax treatment as a matter of EU law is concerned, although they are in disagreement as to the reasons for that overall conclusion. The practical consequences of the parties’ agreement (if any) are beyond the scope of this Judgment.

Postcomm Decision August 2011

68. Postcomm transferred its regulatory responsibilities to Ofcom in late 2011, but before doing so carried out a further consultation and in August 2011 published a final Decision.

69. One determination made in the Decision was to remove bulk products altogether from the universal service. This meant that Mailsort 1400 (first and second class) and Cleanmail, which in 2005 had been determined to fall within the UK universal service, were now determined to fall outside it.
70. A related proposal was the introduction of a definition of “*single piece*”, for the purpose of defining the First and Second class services that should be part of the UK universal postal service (see para. S.3). The definition arrived at excluded services involving any added value or premium attributes or volume discounts. Thus, “*single piece*” was defined as follows (see at S.15):

“... the priority and non-priority service of conveying postal packets, with no value added services or premium attributes, at a price which is not subject to any discounts related to requirements regarding volume of mail per mailing, or presentation of mail, and regardless of payment channel used.”

71. Postcomm had no doubt that “*the current stamp and meter First and Second class products which Royal Mail is obliged to provide under its universal service obligation are single piece products*” (see again S.15). Metered mail is a reference to franking, one of the Sample Services.
72. An issue also arose, however, as to one of the other Sample Services, namely PPI, and whether Royal Mail’s PPI offering might qualify as “*single piece*”, and therefore part of the domestic universal service. It is common ground that, although a *Controlled Service*, PPI was not part of the UK’s universal service prior to 2011. Postcomm in its Decision affirmed as much, and also said that the PPI offering, in its then current form, would not qualify as a *single piece* product within the intended new definition. That was because the standard tariff terms for PPI included provision for volume discounts and (see S.11) potentially had “*some important differences with the stamp and meter channels, such that they may not simply be described as another payment channel for single piece products.*” These differences included more generous compensation arrangements for loss and delay than existed in connection with stamped and franked mail.
73. During the consultation, however, Royal Mail indicated that if the single piece definition were introduced, it would bring in what was described as a “*PPI single piece variant*”, which then would qualify as part of the UK’s universal service having regard to the new definition. This:

“... would have no volume related discounts and would have similar features to those of the single piece products paid for by stamps and meter, so that it would be clear that PPI single piece items are simply paid for by a different payment channel.”

Licence: 2011 Amendments

74. These decisions were carried through in an amended version of Royal Mail’s Licence. In terms of the Sample Services, the upshot was that:

- i) Metered mail (i.e., franking) and PPI were now both included as part of the UK universal service covered by Condition 2, “*insofar as the Licensee provides such a service which conforms to the definition of single piece.*” That is the definition set out above at [70].
 - ii) Otherwise, the Sample Services (including franking and PPI, but excluding Door-to-Door) continued to be mandated and subject to price and quality control standards under Conditions 4 and 21.
75. Given the scope of the VAT exemption recognised in Amended Group 3, these changes had no impact on the domestic VAT treatment of any of the Sample Services: they all (with the exception of Door-to-Door) remained VAT exempt.

Postal Services Act 2011 - Ofcom

76. Shortly after this, the Postal Services Act 2011 came into effect. The basic change was a structural one: there was a move away from a system of postal provision based on licensing in favour of a system based on general authorisation. The background was a shift in approach at EU level, but that is immaterial for present purposes.
77. Under the 2011 Act a new regulator, Ofcom, was established. Provision was made (ss 29-34) for a “*universal postal service*”. Sections 35-39 then dealt with the appointment and obligations of “*Universal service providers.*” Under section 35, Ofcom was empowered to designate a postal operator as a universal service provider. By section 36, Ofcom was then empowered to impose regulatory conditions on any such universal service provider.
78. There was initially to be a period of transition. Under the transitional provisions set out in Schedule 9 of the Act, Ofcom was required to determine the regulatory conditions under the new authorisation regime which were to apply with effect from 1 October 2011, but by Schedule 9, paragraph 4(1) and 4(2), the “*initial conditions*” that Ofcom put in place had to have substantially the same effect as the licence conditions which applied immediately before 1 October 2011. These “*Transitional Conditions*” applied between 1 October 2011 and 31 March 2012.
79. Royal Mail was provisionally designated as the universal services provider under the Act, and as required, Ofcom imposed Transitional Conditions on Royal Mail which (so far as relevant for present purposes) mirrored the approach under the Licence. Thus:
- i) Designated Universal Service Provider Condition 1 (“*DUSP Condition 1*”) in substance mirrored Condition 2 of the Licence, and incorporated the Postcomm definition of “*single-piece*” mentioned above.
 - ii) The provisions of Licence Condition 4 were mirrored in DUSP Condition 5 and CP1.1, 1.3 – 1.25. (Rather than referring to “*Controlled Services*” (as in the Licence), the Transitional Conditions instead referred to “*DUSP scheduled services*”).
 - iii) Condition 21 was mirrored in Condition T4.

80. The upshot is that, during the Transitional Period, the basic scheme of the Licence as it stood before then was continued. The effect as regards the Sample Services was as follows:
- i) Metered mail (franking) and PPI (if single piece) remained part of the UK universal service under DUSP 1 (the equivalent of old Condition 2).
 - ii) Otherwise, all Sample Services (including franking and PPI but excluding Door-to-Door) remained mandated and subject to price and quality controls under (*inter alia*) DUSP 5 and Condition T4 (the equivalents of old Condition 4 and Condition 21).

The Current Group 3

81. The Notes to Group 3 were updated by the Postal Services (Consequential Modifications and Amendments) Order SI 2011/2085 with effect from 1 October 2011 (“*the Current Group 3*”) to reflect the coming into effect of the Postal Services Act 2011 and the regulatory regime under Ofcom.
82. The relevant changes were terminological only, and the VAT treatment of the Sample Services did not change.

Ofcom’s March 2012 Decision

83. In March 2012, Ofcom published its own Decision (“*the March 2012 Decision*”), entitled “*Securing the Universal Postal Service: Decision on the new regulatory framework.*”
84. The 2012 Decision came after a further period of consultation, and brought in some rather more fundamental changes. The backdrop included Royal Mail’s “*immediate financial position*” being weak (para. 1.8), with its most recent financial results showing “*a loss of over £100m on revenues of about £7 billion and a significantly worse cash position as it invests in modernisation*” (*ibid.*) As a result, the “*sustainability of the universal service has come under severe pressure*” (*ibid.*)
85. The response, in summary, was to grant Royal Mail increased pricing flexibility (see para. 1.24):
- “ *... in these circumstances, we consider there are real benefits to be gained from giving Royal Mail additional pricing flexibility. Royal Mail will be able to adapt readily to the changing market circumstances. In our view Royal Mail is necessarily better positioned than the regulator to take commercial decisions that are in its interests.*”
86. At the same time, recognising that removing price controls would come with “*serious risks*”, the new structure was to include “*an effective monitoring regime that would allow us to recognise potential problems at an early juncture*” (para. 1.32)

The UPS Order

87. In consequence of the 2012 Decision, Ofcom made the Postal Services (Universal Postal Service) Order 2012 (“*the UPS Order*”).
88. The UPS Order prescribed the content and standard of the universal service obligation in the UK. As to the content of the universal service obligation, certain minimum requirements prescribed by section 31 of the Act were reflected in the UPS order, together with some additional end-to-end services at affordable prices, including *single piece* priority (i.e. first class) and standard (i.e. second class) services which “*are capable of purchase by postage stamp and by meter and may be capable of purchase by other reasonable methods” (UPS Order, Schedule 1, para 2(b) and para 3(b) – my emphasis added). The reference to “*purchase by other reasonable methods*” in my judgment includes PPI.*
89. Royal Mail as the designated universal service provider was made subject to a designated universal service provider condition (“*DUSPI*”), requiring it to discharge the universal service obligation. DUSP 1.6 incorporated a revised and simplified definition of “*single-piece*” which excluded only services which were subject to volume discount arrangements (c.f. the Postcomm definition above at [70]), as follows:
- “‘Single piece service’ means a postal service for the conveyance of an individual postal packet to the addressee, for which the price per postal packet is not subject to any discounts related to —*
- (a) the number of postal packets sent in connection with the person who paid for the service;*
- (b) the positioning or formatting of text on the postal packet;*
- (c) the use of markings which facilitate the use of machines to sort postal packets;*
- (d) presortation into geographical areas for delivery; or*
- (e) the purchase of any other conveyance of the same or any other postal packet”.*
90. The effect in terms of the Sample Services was as follows:
- i) metered mail (i.e. franking) and PPI, if single piece, remained part of the UK’s universal service; however
 - ii) the following Sample Services, which had been mandated and price controlled in all periods prior to 1 April 2012, ceased to be subject to any controls from that date onwards, namely -
 - a) Freepost/Response Services;
 - b) Packetpost;

- c) Walksort;
- d) PPI if not single piece; and
- e) Franking if not single piece.

91. As to the VAT consequences under the Current Group 3:

- i) Metered mail (franking) and PPI (if single piece) continued to be VAT exempt.
- ii) Otherwise, the Sample Services, which ceased to be subject to any relevant regulatory controls, ceased also to be VAT exempt, and Royal Mail began to charge VAT on the provision of those services.

Summary

92. The domestic licensing and regulatory position is summarised in the Table below:

Service	Feb 2009 to March 2011 Licences	August 2011 Licence	Transitional Regime	1 April 2012 onwards
Franking	Condition 2 Condition 4 Condition 21	Condition 2 (if single piece) Condition 4 Condition 21	Condition 2 equivalent (if single piece) Condition 4 equivalent Condition 21 Equivalent	Single piece franking DUSP 1.6.1(a) and (b)
Freepost/Response Services	Condition 4 Condition 21	Condition 4 Condition 21	Condition 4 equivalent Condition 21 Equivalent	Not regulated
Packetpost	Condition 4 Condition 21	Condition 4 Condition 21	Condition 4 equivalent Condition 21 Equivalent	Not regulated
Walksort	Condition 4 Condition 21	Condition 4 Condition 21	Condition 4 equivalent Condition 21 Equivalent	Not regulated
PPI	Condition 4 Condition 21	Condition 2 (if single piece) Condition 4 Condition 21	Condition 2 equivalent (if single piece) Condition 4 equivalent Condition 21 equivalent	Single piece PPI DUSP 1.6.1(a) and (b)

The EU VAT Exemption: the Parties' Cases in Detail

93. Before drawing the threads together and stating my conclusions, it is useful to return to, and to expand upon, the key points underlying the parties' respective cases, in light of the regulatory and statutory background as now set out above.
94. Royal Mail's basic approach is anchored in its particular status as the (admitted) *public postal services*. It accepts – as it must, in light of the decision in TNT Post – that not everything it does (or did during the Relevant Period) was exempt having regard to the terms of the EU VAT Exemption. But it says that the things it was *required* to do by *reason of its status*, on terms moreover which were *regulated as to price*, were exempt. Those things included provision of the Sample Services, which were mandated and price regulated under Condition 2 of the Licence (or its later equivalent), and/or Conditions 4 and 21 (or their later equivalents). As one can see, the nub of this is the submission that what are exempt are services rendered by Royal Mail as part of a mandated public service mission, rather than services offered voluntarily as a commercial or business endeavour.
95. The Claimants take a very different view. They argue that on a correct interpretation of the decision in TNT Post, only postal services falling within the Article 3 *universal service* qualify for exemption under the terms of the EU VAT Exemption.
96. Moreover, the Claimants argue that the Article 3 universal postal service is very narrowly circumscribed and includes only the *basic* or *traditional* postal service. They say that in a number of decisions, including TNT Post, EU case law has recognised material limitations on the scope of the universal postal service, and in particular has drawn a distinction between the universal service (which is intended only to meet the “*essential needs of the population at reduced cost*” -see TNT Post at para. [33]), and other services which “*dissociable from the service of public interest*”, including services which meet the particular needs of the business community.
97. In making this submission, the Claimants rely in particular on the early decision in Corbeau in which the idea of services “*dissociable from the service of public interest*” was first ventilated, and on a line of authorities since then which have made use of that same concept. The authorities are:
- i) Case C-368/15 Ilves Jakelu Oy (“*Ilves Jakelu*”).
 - ii) Joined Cases C-259/16 and C-260/16 Confetra (“*Confetra*”).
 - iii) Joined Cases C-203/18 and C-374/18 Deutsche Post AG and Klaus Leymann v Land Nordrhein-Westfalen and UPS Deutschland Inc & Co OHG and others v Deutsche Post AG (“*Deutsche Post*”), in which the reasoning in Corbeau was used to support the conclusion that where what the Court described as “*basic services*” were accompanied by separate “*add-on services*”, the combined result was that the postal items in question were not to be regarded as being delivered within the scope of the *universal service*.
98. Against that background, the Claimants say that each of the Sample Services bore characteristics which took them outside the Article 3 definition. During the trial, Mr Sykes QC grouped these characteristics under 4 headings, as follows:

(A) Characteristics directed at the particular needs of business.

(B) Characteristics which involved the provision of “*additional features*”, beyond those associated with the basic or traditional postal service. These might be features offered as an intrinsic part of the Sample Service in question but which provided *added value* (for example, the volume price discounts available with Response Services/Freepost and Walksort), or alternatively might be “*add-ons*” in the strict sense (i.e., bolt-on options which could be added on to any of the Sample Services).

(C) The relevant service provision being offered under licence or on other discretionary terms and so not on the basis that there is a general *right* to access the service.

(D) The relevant service not being offered at a uniform tariff but instead (for example) on a sliding cost scale with volume discounts, which means that it was targeted at businesses and therefore was not realistically available to *all users* (as required by Art. 3(1)).

99. At my invitation, during the trial, the Claimants supplemented the Statement of Agreed Facts in relation to the Sample Services, so as to identify the particular agreed features of the Sample Services said to give rise to these characteristics. They did so by marking up the Statement of Agreed Facts according to the lettering system ((A) to (D)) identified above, taking each of the agreed features of the Sample Services and allocating a letter or letters to them, as appropriate. I replicate that system of notation in Annex 1 to this Judgment.

100. The Claimants also rely on the treatment of the Sample Services within the framework of the *domestic* licensing and regulatory regime, under both the Postal Services Act 2000 and the Postal Services Act 2011. Thus, they argue as follows (I leave aside Door-to-Door, since nothing turns on that: see [67] above):

i) *Freepost/Response Services, Walksort and Packetpost*: Under both the various iterations of the Postcomm Licence, and under the Ofcom Transitional Regime, none of Freepost/Response Services, Walksort or Packetpost were ever designated as part of the Condition 2 (or equivalent) *UK universal service*. They were only ever Condition 4 and Condition 21 (or equivalent) *Controlled Services*. Moreover as to Walksort and Packetpost, which were forms of bulk mail service, Postcomm must be taken to have considered their potential status as products within the universal service in 2005 and to have deemed them unsuitable, because their decision in 2005 was only to include Mailsort 1400 and Cleanmail within the UK universal service (see [50] above).

ii) *PPI*: Likewise, PPI was not included in the UK universal service until August 2011. Until then it was only a *Controlled Service* under Conditions 4 and 21. After that, although PPI also fell within Condition 2 (the universal service), that was only in relation to single piece PPI. The PPI in issue in this case is not limited to single-piece, however, because in at least some instances it included value added or premium characteristics which took it outside the single piece definition (whether the original Postcomm definition or the later Ofcom

definition). These were (1) a collection service (referred to as “*Business Collections*”) which was free for customers spending over £15,000 per year, (2) the availability of volume discounts, and (3) enhanced compensation arrangements. The upshot is that such non-single piece PPI was never part of the UK universal service, and consistently with that, fell outside the EU Article 3 definition as well.

- iii) *Franking*: Before August 2011, although franking (generally) *was* included within the UK universal service (since franking was covered by Condition 2 as well as Conditions 4 and 21), that does not automatically mean it was within the EU Article 3 definition, and in fact it was not, because it had characteristics (principally, the facility for using the Business Collections option referred to above) which meant it was really a business service and therefore dissociable from the service of general interest. From August 2011, although *single piece* franking was indisputably part of the UK universal service, franking when accompanied by the Business Collections option was not single piece because Business Collections was an added value or premium attribute which took any franking to which it applied outside the Postcomm definition of *single piece* (see at [70] above). Thus, during this period, franking (at least when accompanied by the Business Collections option) was outside *both* the UK universal service *and* the EU Article 3 universal service. Although when the simplified Ofcom single piece definition (see [89] above) then came into effect, franking accompanied by Business Collections *did* qualify as single piece and therefore as part of the domestic UK universal service (because the Ofcom definition depended only on the existence of a volume discount, and no such discount was applicable to franking), it still remained *outside* the EU Article 3 definition: that is because it was essentially a business-oriented service and thus dissociable from the service of general interest.
- iv) Finally, the Claimants say that the overall regulatory trend since TNT Post in 2009, which included not only Postcomm’s August 2011 decision to exclude *all* forms of bulk mail from the UK’s universal service, but also the more fundamental changes in April 2012 which involved the majority of the Sample Services losing their VAT exempt status under domestic law, is consistent with the domestic law position slowly being brought into conformity with EU law. That must involve an implied recognition that the pre-April 2012 domestic tax treatment of the Sample Services was out of step with the requirements of EU law.

101. Before moving on, I should note one final point of disagreement. I have referred above at [98] to the Claimants’ reliance both on features offered as an intrinsic part of the Sample Services which provided *added value*, and also on what might be called “*add-ons*” in the strict sense (i.e., bolt-on options which could be added on to any Sample Service). I have also mentioned the Business Collections service (at [100(ii)] and [100(iii)] above). There was disagreement between the parties about whether Business Collections, and two other features, referred to as “*Timed Delivery*” and “*Early Collect*”, were in fact intrinsic features of certain of the Sample Services, or add-ons in the true sense. This is a matter of detail but of some importance, and I will need to come back to it later (see below at [230]).

The EU VAT Exemption: Discussion & Conclusions

(1) The Main Contentions of Law

102. As the parties were agreed during trial, the issues between them are essentially questions of law. It therefore seems to me that the best way of proceeding is to examine the main contentions of law which separate them. Having done so, I should then be able to state my main conclusions and then to address any remaining points of detail.
103. The main contentions of law are effectively as follows:
- i) There is first the Claimants' contention, based on the assumption that the scope of the EU VAT Exemption is coterminous with the Art. 3 *universal service*, that the scope of the universal service is very narrowly circumscribed, and in particular excludes, as *dissociable services*, all business-oriented services or other services involving any added value component (relying on the line of authorities starting with Corbeau in 1993, and ending with Deutsche Post in 2019).
 - ii) There is then Royal Mail's contention that, on proper analysis, the test for the proper scope of the EU VAT Exemption identified in TNT Post ("*public postal services acting as such*") does not depend on whether individual services are within the Art. 3 *universal service*. It depends instead on whether, in providing the service, Royal Mail is acting in its capacity as the public postal services; and if in that capacity, it is required to provide a service in the public interest, then that service falls within the EU VAT Exemption. Analysing this contention involves examining the TNT Post decision itself, plus the later decision of the English Court in R (on the Application of Whistl UK) v. HMRC & Anor [2014] EWHC 3480 (Admin) ("*Whistl*") in which it was applied, and the later (2019) decision of the CJEU in Michael Winterhoff v Finanzamt Ulm and Jochen Eisenbeis v Bundeszentralamt für Steuern (Joined Cases C-4/18 and C-5/18) [2019] ECLI:EU:C:2019:860 ("*Winterhoff*"), which was another EU case (like TNT Post) dealing specifically with the scope of the EU VAT Exemption as it applies to postal services.
104. There is some overlap between these issues, but I propose to analyse them individually in that order, starting with the Claimants' point at [103(i)].

(2) Corbeau and the meaning of "dissociable services"

Corbeau

105. It is convenient to start with the Corbeau decision itself. This was an early case in 1993. This was *before* the Postal Services Directive. The decision was thus not concerned with defining the scope of the *universal service*, which at the time did not exist.
106. Instead, it was a decision on the competition provisions in Arts 85, 86 and 90 of the Treaty of Rome. Mr Corbeau was a businessman in Liège whose business provided, within the City of Liège and the surrounding areas, a special postal service which consisted of collecting mail from the address of the sender and delivering it by noon the following day (or in some cases, collecting mail and then posting it on behalf of the

sender). By Belgian law, however, the Régie des Postes had been granted an exclusive right to collect, carry and distribute throughout the Kingdom all correspondence of whatever nature. The Régie des Postes sought to enforce its exclusive right and brought a complaint against Mr Corbeau. The legal question was whether the Belgian monopoly was compatible with Community law.

107. The case was fought out against the backdrop of an ongoing debate about how the provision of postal services should be regulated at the EU level. A Green Paper had been published in 1992 (Green Paper on the single market in postal services – COM (91) 476 final, of 11 June 1992). It is clear from the Opinion of Advocate General Tesouro that one issue ventilated in the Green Paper was the treatment of what he called the “*rapid delivery service*” (see paras 18-22 of his Opinion), a concept which had been:

“ ... steadily developing, particularly in recent years, to deal with the requirements of special categories of users (above all undertakings and the professions). ”

108. At paragraph 22, the Advocate General sounded a note of caution about trying to prescribe the content of the rapid delivery service. That was to be resolved as part of the ongoing debate about the regulation of postal services across the EU:

“It must first be stated that the definition of rapid delivery service as compared with the basic service must be worked out at Community level and on the basis of criteria which are as clear and uniform as possible.”

109. At the same time, however, he was content to adopt the following, taken from the Green Paper, as a working definition (Opinion at para. 18):

“In what way can an express item be easily distinguished from a letter? Its dimension, weight and contents may be the same. Even the speed of delivery may be similar. The essential difference lies in the value (whatever form it takes) added by express service providers and perceived by customers. The most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay.”

110. What is also very clear is that by the “*rapid delivery service*”, the Advocate General meant a private law arrangement entered into on commercial terms. He said so expressly, at para. 18:

“It should also be stated that that service is performed by virtue of contractual relations under private law and is therefore subject to a legal system differing from that applied to the services provided by the postal administration. Finally, as regards tariffs, two aspects must be stressed. In the first place, in the absence of a scheme laid down by the public authorities, it is clear that tariffs will be laid down freely by the relevant undertakings on the basis of their costs and other market conditions (which means that in certain cases, though rarely, the

tariffs may correspond to or even be less than the tariffs applied in a given country for the corresponding basic postal service).

In the second place, however, there is nothing to prevent the public authorities from adopting rules on tariffs allowing rapid delivery services only above a certain threshold. Such rules would make it possible to safeguard the basic postal services financial equilibrium but without harming the rapid delivery service”

111. Mr Corbeau’s defence in the Belgian proceedings was that his service was a “*rapid delivery service*” (“*courrier accéléré*”), and that it was unlawful under the Treaty of Rome for the public authorities in Belgium to confer on the Régie des Postes a monopoly position which prevented him from offering it.
112. The policy question this gave rise to was how to encourage a market for the *rapid delivery service* among commercial operators, while recognising that at the same time, it might in some instances be necessary for public providers of postal services (like the Régie des Postes) to have an exclusive right in that same area, if that was required as a way of subsidising other (non-profitable) activities such bodies were mandated to carry out as part of their public function.
113. At paragraph 19, the Court struck the balance in the following way. It concluded that the exclusion of competition would *not* be justified:

“... as regards specific services dissociable from the service of general interest which meet the needs of economic operators and which call for certain additional services not offered by the traditional postal service such as collection from the senders’ address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, insofar as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general interest performed by the holder of the exclusive right.”

114. From the context, it seems to me entirely clear that what the Court had in mind, in talking of “*specific services dissociable from the service of general interest*”, were services along the lines of the *rapid delivery service*, provided on commercial terms as part of a private law arrangement. What the Court effectively said was that a public postal operator should have no monopoly right over the private law area of the *rapid delivery service*, unless that was necessary in order to safeguard the “*service of general interest*” it was mandated to provide.
115. This is important, because it gives proper definition to the concept of “*specific services dissociable from the service of general interest which meet the needs of economic operators*”, which is such a critical part of the Claimants’ case. On this key point, I have concluded that I agree with Royal Mail’s position, that key to the concept of “*dissociable services*”, if one traces it back to its origin in Corbeau, is the idea that they are private law, commercial arrangements whose terms are essentially a function of

market demand and market conditions, rather than a function of legislative or regulatory intervention. That supports the view that the Sample Services, whose existence and pricing terms plainly *were* a function of legislative and regulatory intervention, are not *dissociable services* in the relevant sense.

116. This interpretation of Corbeau, it seems to me, is entirely consistent with the terms of the (later) Postal Services Directive, and with the Court’s subsequent decisions in Ilves, Jakelu, Confetra and Deutsche Post.

Postal Services Directive

117. As noted, this was first introduced in 1997, after the decision in Corbeau. In terms of the present line of analysis, two points are notable.

118. First, Recital 18 deals with what in Corbeau had been referred to as the rapid delivery service. The terminology in the Directive is different – it talks of *express mail services* (as did the Green Paper: see above at [109]) - but the idea is the same. Recital 18 seeks to explain the difference between express mail and universal postal services (the universal service being the new concept introduced by Art. 3 of the Directive):

“Whereas, in view of the fact that the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay”

119. This is consistent with the reading of Corbeau above. The idea that the extra *value* of the express mail service is reflected in the extra *price* customers are prepared to pay suggests a correlation between the *demand* for a service and a price arrived at as a function of costs and market conditions. For customers to be willing to *pay* extra there must be someone freely able to *charge* extra. That is obviously not the case if the service is regulated as to price.

120. The second, related point concerns the argument that business related services fall outside the universal service. However, as Mr Herberg QC submitted for Royal Mail, that is inconsistent with the express terms of Article 12 of the Postal Services Directive.

121. Article 12 deals with tariffs. The introductory words of Article 12 are as follows (my emphasis added):

“Member States shall take steps to ensure that the tariffs for each of the services forming part of the universal service comply with the following principles”.

122. Five points are then set out, including the principles that “*prices shall be affordable*”, that “*prices shall be cost-oriented and give incentives for an efficient universal service provision*”, and that “*tariffs shall be transparent and non-discriminatory*”. There is then the following in the final indent:

“... whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions”.

123. I agree with Mr Herberg QC that Article 12 assumes that business-oriented services *can* fall within the universal service. It is quite express in doing so. Its purpose is to set tariff guidelines for services *“forming part of the universal service.”* Among the services then described, as to which tariff guidelines are given, are services offered to *businesses*. I find it impossible to read Article 12 in any other way.
124. The other cases relied on by the Claimants, Ilves Jakelu, Confetra and Deutsche Post, add little to this analysis and subtract nothing from it. It is clear in context that what they are each concerned with are express mail services within the meaning of Art. 18 of the Directive, i.e. commercial arrangements entered into on a private contract basis. They are not concerned with services which, like the Sample Services, a universal service provider is required to provide as part of its public service mission, on price terms which are heavily regulated.

Ilves Jakelu

125. In Ilves Jakelu, a supplier (Ilves Jakelu) had been licensed by the Finnish authorities to provide *“postal services locally in certain municipalities”* (Judgment at para. 22). Ilves Jakelu argued that since it was a commercial operator and not a provider of the *universal service* in Finland, its operations were not within the scope of the Postal Services Directive at all, and so it could not be made subject to any licence obligations by the Finnish authorities.
126. A key issue referred to the ECJ was whether the services provided by Ilves Jakelu fell within the scope of the Art.3 universal service. More specifically, the question was whether the distribution of items of customers with whom a contract had been concluded was within or without the universal service, *“where the postal undertaking agrees with its customers on the conditions governing delivery and charges them an individually agreed fee”*.
127. On this point, the Court gave the following guidance as to the parameters of the universal service (effectively, a restatement of the Art. 3 test):

“... an activity ... does not fall within the scope of the universal service if it does not involve the permanent provision of a postal service of specified quality at all points in the territory at affordable prices for all users”

128. That was not directly an answer to the question posed: ultimately, the CJEU said that was a matter for the domestic court in Finland to resolve. Nonetheless, it identified a number of matters of potential relevance, including (at para. 22) the fact that “ ... *the amount due for the postal services offered by that company [Ilves Jakelu] is negotiated separately and settled upon receipt of an invoice*” (para. 23).
129. It was in that context that, at paragraph 24, the Court then went on to refer to Corbeau:
- “In that regard, it must be recalled that express postal services are distinguished from the universal service through the added value which they bring to the customers, for which the customers agree to pay more. These are specific services dissociable from the service of general interest which meet the special needs of economic operators and which call for certain additional services not offered by the traditional postal service (see, to that effect, judgment of 19 May 1993, Corbeau, C-320/91, EU:C:1993:198, paragraph 19).”*
130. The overall conclusion was that, even if it was not a provider of the *universal service*, an operator like Ilves Jakelu was still a provider of “*postal services*” within the Postal Services Directive, and so could be made subject to general authorisation requirements by the Finnish authorities.
131. I see nothing in Ilves Jakelu which detracts from the analysis already set out above. In fact, it reinforces it. On the key point, it says no more than that services provided on individually negotiated terms will fall outside the scope of the universal service. That is entirely consistent with my reading of Corbeau. Beyond that, Ilves Jakelu is of no real relevance because (1) is not concerned with the scope of the EU VAT Exemption (it is not a VAT case), and (2) is not concerned with services made available on regulated terms by a body fulfilling a public service mission.

Confetra

132. The next case, Confetra, raised effectively the same point.
133. Confetra was a reference from the Italian courts. One group of applicants operated in the mail courier sector (see at paragraph 17). They argued that they provided “*express mail services*”, and that such services “*should fall outside the scope of Directive 97/67 because of the added value they provide.*”
134. That submission was rejected. The Court’s reasoning was that although there was certainly a difference between “*express mail services*” and the universal service, which was recognised in Recital 18 to the Postal Services Directive and had been reflected in Ilves Jakelu, it did not follow that express mail services fell outside the scope of the Postal Services altogether. In fact, Ilves Jakelu had reached the opposite conclusion.
135. Again, it was in the context of discussing *express mail services* that the Court referenced the language in Corbeau, as later relied on in Ilves Jakelu. It said at para. 38:
- “ ... it is the Court’s established case law that what distinguishes express mail services from the universal service is the added value which they bring to customers, for which the customers*

agree to pay more. These are specific services, dissociable from the service of general interest, which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service (see, to that effect, the judgment of 15 June 2017, Ilves Jakelu, Case C-368/15, EU:C:2017:462, paragraph 24 and the case-law cited)."

136. Again, this recitation of the mantra which originated in Corbeau is saying no more than that express mail services – private law arrangements entered into on essentially commercial terms – are distinguishable from the public mission of the *universal service*. It does not say that that public mission can never be concerned with the needs of economic operators.

Deutsche Post

137. The final case to mention in this context is Deutsche Post. This again references the formulation originally derived from Corbeau. In Germany, Deutsche Post was designated under domestic law as “*provider of the universal postal service*”. In German litigation, the question arose whether Deutsche Post drivers were required to comply with an EU road transport Regulation (Regulation No. 561/2006). This contained obligations concerning (for example) limits on driving time and compulsory rest periods, but importantly there were permitted exceptions, and one included the delivery of items as part of the *universal service*.
138. A number of questions were referred to the CJEU. One was whether the exception under the road transport Regulation applied only when relevant vehicles were being used *exclusively* for the purpose of delivering items as part of the *universal service*. The Court answered this question in the affirmative (see at paragraph 60).
139. A further question (“*the fourth question*”) was then concerned with what the referring Court had called “*add-on services*”. The problem here was what to do in a case where a postal vehicle carried items “*forming part of the universal service*”, but which were accompanied by an offer of:

“ ... *add-on services such as:*

- *collection (without a time slot);*
- *collection (with a time slot);*
- *minimum age check;*
- *cash on delivery;*
- *postage payment by recipient up to 31.5 kilograms;*
- *redirection service;*
- *instructions in the event of non-delivery;*
- *preferred daily delivery;*

- *preferred delivery time ...* “.

140. Did the provision of such *add-on services* mean that relevant items would then *not* be part of the universal service (within the Postal Services Directive), so that drivers delivering them would *not* be operating *exclusively* in delivering items as *part* of the universal service (within the road transport Regulation)? The CJEU again answered these questions affirmatively, and thus the driving time exception did not apply where such composite items were being transported.

141. In the present context what is interesting is the underlying reasoning, because the Court drew a close analogy between the composite items and *express mail services*. At paragraph 67 it said that “*such services*” (meaning “*basic services accompanied by add-on services*”):

“ ... *which are more akin to express mail services, cannot be considered to be covered by the ‘universal service’ within the meaning of Article 3(1) of Directive 97/67*”.

142. That reflected the advice of the Advocate General, at para. 125 of his Opinion:

“*In light of those considerations, there is no doubt, in my view, that the basic services accompanied by the add-on services listed in the fourth question referred ... are likely to provide added value to customers, who are thus willing to pay a higher price to benefit from those services. Consequently, it must be concluded that those services must be classified as ‘express mail services’ and therefore do not come under the universal service.*”

143. It was in this context that the Court made reference to Confetra, and indirectly to Ilves Jakelu and Corbeau as its predecessors. After referring at para. 64 to Recital 18 to the Postal Services Directive, the Court said the following at para. 65:

“*In that regard, the Court has recently ruled that delivery of an item with added value, that is an item with an add-on service, must be distinguished from the universal service as a basic service. What distinguishes express mail services from the universal postal service is the added value which they bring to customers, for which the customers agree to pay more. These are specific services, dissociable from the service of general interest, which meet the special needs of economic operators and call for certain additional services not offered by the traditional postal service (judgment of 31 May 2018, Confetra and Others, C-259/16 and C-260/16, EU:C:2018:370, paragraph 38 and the case-law cited).*”

144. As we have seen above, in Confetra the services in question were *express mail services* provided by private commercial operators. The Court in Deutsche Post treated the add-ons in that case in the same way. Certainly, there is nothing in the report to suggest that they were mandated and price-controlled in the manner of the Sample Services in the present case.

145. Thus, as I see it, the reasoning in Deutsche Post is that when a service provided by a postal services operator as part of its public service mission is combined with another service which in substance is an *express mail service* – essentially a commercial offering – then the composite offering is to be regarded as “*more akin to*” an express mail service. The consequence in Deutsche Post was that the composite items were not within the scope of the Art. 3 universal service, and drivers transporting them were *not* engaged exclusively in delivering items as *part* of the universal service, and so the exception under the road transport Regulation did not apply.
146. Looking at Deutsche Post in this way, it seems to me to provide no real support for the propositions which underpin the Claimants’ case. These include the broad proposition that business-oriented services can never form part of the universal service, but also the more specific point that the list of add-ons mentioned above at [139] is a helpful checklist of the sorts of added value items which are necessarily *dissociable services*. I do not think the reasoning in Deutsche Post can be stretched that far. One can illustrate the point easily. Among the add-ons in Deutsche Post was a “*redirection service*”, but as Royal Mail pointed out in their submissions, Article 11a of the Postal Services Directive expressly contemplates that if the national conditions require it, Member States can incorporate within their universal service a “*re-direction service and return to sender service*.” The result in Deutsche Post therefore cannot be explained on the basis that the *add-ons* were items prohibited from being within the universal service. It can only be explained on the basis that on the facts they were not, because under the local conditions in Germany they were offered on a commercial basis effectively as *express mail* items.

(3) Interpreting TNT Post: “the public postal services acting as such”

TNT Post

147. Sandwiched between the early decision in Corbeau (1993), and the later decisions in Ilves Jakelu Oy (2017), Confetra (2018) and Deutsche Post (2019), is the critical ruling in TNT Post (in 2009). The issue in that case arose in the following way.
148. Among Royal Mail’s licence obligations, as universal service provider in the United Kingdom, was a requirement to make its postal facilities available to other postal operators. This was known as the provision of *access services*.
149. One such postal operator was TNT Post. TNT Post was a commercial operator, whose business involved collecting and sorting mail from its customers (often banks), and then delivering it by road to a Royal Mail regional depot. This was referred to as an *upstream service*, and the service provided by Royal Mail (having received the relevant postal packets from TNT Post) was referred to as a *downstream service*. The issue was that the service provided by Royal Mail was treated as exempt from VAT under the then current version of Group 9 (see above at [59]), whereas TNT Post was required to charge VAT at 17.5% on the upstream services it provided to its customers. In a dispute about the lawfulness of this tax treatment, the Administrative Court referred three questions to the CJEU.
150. The first question was as to how the phrase “*public postal services*” in the text of the EU VAT Exemption should be construed in the context of a liberalised market, in which

there were a number of operators providing postal services, and no longer any monopoly or reserved areas. The answer given (Judgment at para. 36) was that:

“ ... the public postal services ... must be regarded as operators, whether they are public or private ... 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 Article 3 of Directive 97/67”.

151. That meant that in the UK, only Royal Mail was to be regarded as *the public postal services*. One of TNT’s submissions was that the services it provided were effectively the same as those provided by Royal Mail, and so it also qualified as *“the public postal services”*, but the Court’s approach was to say it was not simply a matter of comparing the services rendered: a proper exercise of comparison required one also to look at the context in which the services were provided (paragraph 38). As to this, Royal Mail provided its services *“under a legal regime which is substantially different to that under which an operator such as TNT Post provides such services”* (paragraph 39). That is to say, Royal Mail was subject to a regulatory regime which required it to perform a public interest mission. It was not a purely a commercial operator, like TNT Post.
152. The second question was whether *all* services rendered by Royal Mail were exempt, and then the third question required the Court, in case it held that only *some* services were exempt, to specify the criteria to be applied in determining which were and which were not.
153. The issue arose because of the apparently limitless scope of the EU VAT Exemption, looked at in isolation (*“ ... the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto”*).
154. This prompted a sharp division of views. Royal Mail and the UK and Greek Governments argued that all supplies made by Royal Mail were exempt, *“regardless of their intrinsic nature”*. The Commission and the German Government took the opposite view (see the Opinion of Advocate General Kokott at paragraph 68): they said that the exemption should apply *“ ... only to those services of the universal service which count directly as part of the universal service provision”*. In the view of the Commission this meant that *“the conveyance of certain bulk postings ... should not be exempted”*. The German Government drew the line differently, and said that *“services which are provided according to freely negotiated terms and tariffs”* should not be exempted.
155. The way these battlelines were drawn is highly relevant to the issues in the present case. Not only was TNT Post directly concerned with the scope of the EU VAT Exemption, but the Commission’s argument directly engaged the question whether that Exemption covered business-oriented services, because bulk mail services are likely to be of particular interest to business users. It will be remembered that in 2004, Postcomm had determined that bulk mail services should be included within the UK’s universal service (above at [47]), and in 2005 had mandated the provision of Mailsort 1400 and Cleanmail under Condition 2 of Royal Mail’s licence, although other bulk mail products (like Packetpost and Walksort) also remained *“within the scope of the universal*

service” (see above at [51]). Against that background, in July 2007, the EU Commission had commenced infraction proceedings against the UK Government alleging that the blanket exemption from VAT it accorded to Royal Mail was contrary to EU law, and in its Reasoned Opinion supporting those proceedings had referred specifically to what it said was the controversy about the supply of bulk mail services (Reasoned Opinion at para. 20).

156. The Opinion of Advocate General Kokott is important. Her starting point was to say that the blanket approach supported by the UK Government, the Greek Government and Royal Mail was not supportable: that was because if every service provided by the public postal services were exempt, that would lead to undesirable and indeed absurd results, such as the sale of stationery or giftware in post offices being VAT exempt (paragraph 71).
157. Looking at the opposing arguments from the German Government and the Commission, the particular point made by the German Government was dealt with straightforwardly: at paragraph 77, the Advocate General agreed with the submission that services provided on individually negotiated terms 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*” (emphasis in original).
158. The point made by the Commission was more problematic. To begin with, the Advocate General noted that the phrase “*bulk mail services*” was not a technical or defined term (paragraph 82). It might be susceptible to different interpretations (paragraph 83). But, “[h]owever the term may be understood the exemption plainly cannot apply where such items are carried at individually negotiated prices” (paragraph 84). At paragraph 85 she then said the following, which is highly relevant in this case in light of the Claimants’ basic submissions:

“85. Even in so far as a generally applicable postal tariff is applied, such services are without doubt not typical services which form part of the immediate necessities of life for private customers. However, in principle it is also in the public interest to provide commercial customers with a postal network.

86. Private individuals also benefit from that indirectly, however. They have an interest in business mail being sent to them at reasonable prices, even when they live in remote regions of the Member State. If the sender of business mail were not entitled to deduct input VAT, like, for example, a bank, the VAT levied on the postage would ultimately affect the price charged to its customer by the sender for its services.”

159. At paragraph 87, the Advocate General then drew attention to the problem of identifying clearly when something became a bulk posting, as opposed to a set of individual postings. As she put it, “*... as from what quantity of posted items should it be regarded as a non-exempt bulk posting?*” Should it start as low as say “*50 invoices, which a small or medium sized enterprise sends out every day, or only as high as thousands of invoices, which a large public utility sends out?*”

160. She then identified a possible distinction between bulk mail services involving individual communications covered by general tariffs, and “*direct mail*.” Unlike bulk mail the Postal Services Directive did recognise *direct mail* as a special category. This was defined in Article 2(8) of the Directive, and comprised essentially marketing or advertising materials, sent to many recipients in identical form save for their names and addresses. Even then, though, the AG declined to express a definitive view on direct mail, and instead would only go as far as saying (at paragraph 88):

“This could be excluded from the exemption despite the application of a universal postal tariff, since, in the case of these items, the commercial interest in advertising for the sender’s products or services predominates.”

161. She went on:

“In the end, however, it is for Member States to decide how, in this case, they weight private and public interests. The interests of the undertakings competing with the universal service provider in obtaining access on equal terms to this lucrative market segment must also be taken into account in this context.”

162. At paragraph 89 of her Opinion, the Advocate General then formulated her answer to the second and third questions referred as follows (my emphasis added):

“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 Article 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.”

163. This reasoning is interesting and instructive. In it, the Advocate General recognised expressly the acute difficulties of definition which in practice can arise in seeking to identify the *universal service*. All the same, in answering the second and third questions, her formulation appeared to adopt the basic thrust of the Commission’s argument, and to draw the perimeter of the EU VAT Exemption by reference to the Art. 3 universal service.

164. What is most interesting about this, as Mr Herberg QC pointed out, is that the CJEU appeared to draw the perimeter differently.

165. Like the Advocate General, the Court answered questions two and three together. At paragraph 44 of its Judgment, the Court accepted that the EU VAT Exemption had to be construed strictly, but at the same time had to be construed in a manner consistent with its object or purpose. As the Court had earlier said at para. 33, the purpose of the EU VAT Exemption in relation to postal services was to encourage the “*offering postal services which meet the essential needs of the population at reduced cost*”, and this was effectively (para. 34) the same as the objective of the Postal Services Directive. The EU VAT Exemption also had to be construed in a manner consistent with the principle

of fiscal neutrality – i.e., the principle that economic operators carrying out the same transactions should be treated in the same way in relation to VAT.

166. At the end of para. 44, the Court said that it followed from those requirements (my emphasis added):

“ ... 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.”

167. The emphasis here is on status, and status alone.

168. The Court then explained how this interpretation was consistent with the requirements it had identified.

169. Dealing first with fiscal neutrality, at paragraph 45 the Court said:

“Such an interpretation [i.e., that set out at paragraph 44] is dictated, in particular, by the principle of fiscal neutrality. The obligations on an operator such as Royal Mail, which – as is apparent from paragraph 39 of this judgment – distinguish the situation in which that operator supplies postal services from that in which an operator such as TNT provides postal services, concern only the postal services supplied in its capacity as the universal service provider.”

170. Again, what is important here is the emphasis on Royal Mail’s capacity or status. That is a function of the particular legal regime under which it was operating. As the Court had already determined, that was substantially different to the regime under which TNT Post operated (see above at [150]). It was this difference in status which justified a different VAT treatment and meant that the principle of fiscal neutrality was not contravened: Royal Mail and TNT Post were not carrying out the same transactions under the same or comparable conditions; they were operating under fundamentally different conditions.

171. Dealing then with the issue of consistency with the intended purpose of the EU VAT Exemption, the Court at paragraph 46 said as follows:

“In the same way, it follows from the requirements set out in paragraph 44 of this judgment and, in particular from the nature of the objective pursued by Article 13A(1)(a), which is to encourage 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 the special needs of economic operators (see, to that effect, Case C-320/91, Corbeau [1993] ECR-I-2533, paragraph 19).”

172. This is familiar language. As shown in the analysis of Corbeau above, it is really concerned with private law, commercial arrangements whose pricing is driven by the operation of market forces. What the Court is saying is that the EU VAT Exemption is not to apply to services carried out on that basis. The point is a natural extension of the point about fiscal neutrality made in the immediately preceding paragraph, because

again it is focused on the capacity in which the supplier is acting: as the mandated provider of a public service rather than as commercial operator.

173. In my view, moreover, this reading is confirmed by what immediately follows. That is endorsement by the Court of the German Government’s submission that services supplied on terms which have been individually negotiated do not fall within the EU VAT Exemption (para. 47).
174. The Court said nothing expressly about the Commission’s argument that bulk mail services fell outside the EU VAT Exemption.
175. The position overall was then summarised as follows at paragraph 49, the bulk of which was then repeated in the dispositive part of the Judgment at paragraph 2 (my emphasis):

“Consequently, the answer to the second and third questions is that the exemption provided for in Article 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.”

176. Mr Herberg QC is plainly right that the Court’s formulation differs from that of the Advocate General (see above at [162]). It does not draw the perimeter of the EU VAT Exemption by reference to the content of the Art 3 universal service, and instead the touchstone is the *capacity* in which the supplier is acting.

Whistl

177. This was a point of significance for Kenneth Parker J in Whistl, a decision of the English Court in 2014. Whistl UK Limited was in fact the same company as TNT Post, the party to the CJEU reference, which had undergone a name change and rebranding in the meantime. For convenience, Kenneth Parker J in his judgment continued to refer to it as TNT Post, and I will do the same.
178. By the time the matter came back before the English Court a number of changes at the domestic law level had taken place.
- i) The new, Amended Group 3 had been introduced with effect from January 2011. As noted above (see [61]), this reflected what was considered to be the effect of TNT Post by exempting services provided by Royal Mail which were both mandated and subject to price controls, including Controlled Services which fell outside the scope of the Condition 2 universal service (or its later equivalents). On 16 June 2011, after the Amended Group 3 came into effect, the European Commission announced that the infringement proceedings it had commenced in April 2006 (above at [155]) were to be closed.
 - ii) Ofcom had taken over postal services regulation from Postcomm in late 2011, and after the Transitional Period (1 October 2011 to 31 March 2012), the UPS

Order had come into effect, which had resulted in the majority of the present Sample Services ceasing to be mandated and price controlled. They had therefore lost their VAT exempt status under the Current Group 3.

179. It was against this background that the Court had to deal with a number of issues in Whistl. The two particular points relevant for present purposes were as follows:

- i) The first concerned the provision by Royal Mail of *access services* (mentioned above at [148]). Access services had *not* been designated as part of the UK's universal service by Ofcom under DUSP1. However, unlike the majority of the Sample Services in this case, which had ceased to be mandated and price controlled as a result of the UPS Order, access services *were* still mandated and price controlled, and so continued to fall within the exemption in the Current Group 3. TNT Post challenged this state of affairs and argued that the Amended Group 3 did not accurately transpose the findings in the TNT Post decision. It said the true effect of that decision was that only the services of the public postal services *falling within the universal service* were exempt from VAT, and that was not the position as regards access services, which were *not* part of the UK's *universal service* (as Ofcom had determined), even though they were mandated and price controlled.
- ii) The second point was a complaint by TNT Post about the historic position. This was essentially the same point, but applied to services other than access services which in the past had been regulated in the same way. Thus, TNT Post complained about the VAT treatment in earlier periods (before the UPS Order) of services which had been mandated and price controlled at that stage, but which had not formed part of the UK's *the universal service* (a complaint which effectively embraced services such as the present Sample Services). This is apparent from paragraph 74 of the Judgment, where Kenneth Parker J said:

“The historical position is not without significance, for TNT Post maintains that following the judgment of the Court of Justice the United Kingdom continued to fail to implement the EU VAT exemption correctly and continued to exempt services which, upon TNT Post’s interpretation of the judgment, ought [not] to have been exempted from VAT. TNT claims that it suffered damage by reason of this alleged illegality.”

180. Both issues, as will be readily apparent, involved the Court addressing whether the view of TNT Post taken by the UK Government in implementing the Amended Group 3 was correct, or whether in fact TNT Post required the perimeter of the EU VAT Exemption to be drawn by reference to the content of the *universal service*.

181. On the challenge to the exemption of access services, Kenneth Parker J disagreed with the idea that the scope of the EU VAT Exemption as defined in TNT Post extended *only* to those services designated as part of the UK's *universal service* as identified by Ofcom. He said the following at [58]:

“As to the specific language used by the Court, it is, in my view, notable that the Court did not in terms limit the scope of the exemption to those services, and those services alone, forming part of the universal service.

The Court could have used such a mechanistic formula. Furthermore, the Commission and Germany had expressly argued before the Court that:

‘the exemption is intended to apply only to those services of the universal service provider which count directly as part of the universal service provision’ (see the Opinion of the Advocate General, paragraph 68).

By its exact language, the Court was deliberately keeping open the possibility that the USP might ‘as such’ supply certain services, not directly forming part of the universal service, which nonetheless were supplied under conditions (especially as to price) that applied uniquely to the USP, by virtue of its status as the USP, and which were imposed specifically to promote the public interest recognised in the Directive, namely, offering postal services which meet the essential needs of the population at a reduced cost.”

182. Having so held, Kenneth Parker J went on to find that *access services*, although not classified by Ofcom as part of the UK’s *universal service* under the UPS Order, nonetheless met this test, and therefore their exemption from VAT under domestic law was consistent with the scope of the EU VAT Exemption. Such services were mandated, and thus in providing them Royal Mail was not acting as “*an ordinary commercial operator*” (see at [59]). The requirement to provide access services was imposed on Royal Mail precisely “*by virtue of its status as a USP*” (see at [62(ii)]). The structure promoted the public interest (*ibid.*), including by means of controlling prices ([62(iii)]). That being so, access services could not be disassociated from other services provided by Royal Mail as USP: they were “*intended to promote, and do promote, the relevant public interest*” ([62(v)]).
183. As to the second issue (the historic VAT treatment of non-*universal service* offerings), Kenneth Parker J adopted the same basic logic and arrived at the same result. TNT’s submission had again been that only services falling within the historic definition of the universal service under domestic law – i.e., those services listed in Condition 2(3) of the Postcomm Licence – could be exempt from VAT (see at [86]). That would obviously have excluded from the scope of the exemption the Controlled Services. Kenneth Parker J again disagreed. He considered that approach “*too narrow*” (see at [87]), because it would exclude from the scope of the exemption other services which Royal Mail was mandated in its capacity as the public postal services to provide in the public interest. At 88-89, he said (emphasis added):

“88. Postcomm, in the exercise of its overarching statutory duty to perform its regulatory function in a manner which it considered ‘best calculated to ensure the provision of a universal postal service’, had required Royal Mail, in its capacity as USP, to deliver each of the Controlled Services. No other postal operator was mandated to deliver any of the Controlled Services, including access services, nor do I discern any sound legal basis upon which Postcomm could have imposed any such obligation on another postal operator. Furthermore, to ensure the affordability of such services, Postcomm had imposed

strict pricing controls on Royal Mail's provision of the Controlled Services. To ensure satisfactory levels of service Postcomm had also imposed specific standards in respect of such services. To promote effective competition in the postal market, Postcomm had required Royal Mail in its capacity as USP, and Royal Mail alone, to give access to its network.

89. In these circumstances, whether or not a particular service fell within the universal service obligation ... Controlled Services including the access services were supplied by Royal Mail in its capacity as USP and were entitled to exemption from VAT.”

Winterhoff

184. The final case to consider, which formed a main part of the parties' submissions, is Winterhoff. This is a relatively recent decision, in 2019. Like TNT Post, and unlike Corbeau, Ilves Jakelu Oy, Confetra and Deutsche Post, Winterhoff was concerned directly with the scope of the EU VAT Exemption.
185. Two German companies – DIREKTexpress Holding and JUREX – had been appointed to provide a service involving the formal service of legal or administrative documents. In the case of DIREKTexpress the appointment was “*pursuant to the provisions of German public law*” (paragraph 16), and in the case of JUREX was in accordance with “*licences granted for that purpose by the Bundesnetzagentur (Federal Network Agency, Germany)*” (paragraph 26).
186. Did these services fall within the scope of the EU VAT Exemption? The local (German) Courts expressed doubts, including because (1) the *universal service provider* (Postal Services Directive Art. 2(13) – see [138] above) appointed under German law was Deutsche Post; and (2) individual consumers were not able to request the formal service of documents – the facility was for the use of courts and administrative bodies (see paragraph 59), and so it was questionable whether the services could be regarded as available to “*all users*” (Postal Services Directive, Art. 3). The questions referred (Judgment at paras 24 and 30) thus asked specifically whether DIREKTexpress and JUREX were to be regarded as a universal service provider under Art. 2(13) of the Postal Services Directive, and whether they were “*providing a universal postal service in whole or in part*”.
187. The Court concluded that the services in question did fall within the scope of the EU VAT Exemption. It seems clear, on a reading of the Court's decision, that its reasoning included an analysis of whether those services were within the Art. 3 *universal service*. The Court reasoned that they were. That was because of their “*specific characteristics and the context in which they were provided*” (paragraph 54). In summary:
- i) DIREKTexpress and JUREX were subject to rules which “*were not the result of individual negotiations but rather resulted from specific obligations under German legislation*” (paragraph 56). Thus, remuneration was fixed by legislation (paragraph 57), and performance of the relevant services was required as a “*public service*” task (*ibid.*)

- ii) The services *were* available to “*all users*”, even though used only by courts and administrative bodies. That was because “*users*” included not only the senders of mail, but also recipients: see Postal Services Directive Art. 2(17) (paragraph 60). Moreover, although it was true that those directly commissioning the sending of documents via the services were courts or administrative bodies, they undertook such activities “*on behalf of all those who may wish to serve a document*” (paragraph 61).
- iii) It did not matter that Deutsche Post was regarded in Germany as the universal service provider, because it was perfectly possible for different parts of the overall service to be provided by different people: a Member State was free to “*designate ... a number of providers to provide different elements of the universal service or to cover different parts of the national territory*” (paragraph 62).
- iv) Finally (and although ultimately this was a matter for the national Court to determine), it appeared that the services had to be provided in accordance with German legislation “*at affordable prices and at all points in the territory of Germany*” (paragraph 63).

188. The upshot was that the relevant services were to be regarded as part of the Art. 3 *universal service*, and that conclusion was not in any way affected by their characterisation under German law as services falling *outside* the universal service. Consequently, the services also were also VAT exempt having regard to the terms of the EU VAT Exemption.

Interpreting TNT Post: Discussion and Analysis

189. To begin with, it seems to me that the Court’s reasoning in TNT Post reinforces the view expressed above about the meaning of the “*dissociable services*” language, derived from Corbeau. In TNT Post, the language was used in just the same way as in the authorities in the previous section, and referred effectively to *express mail services* – i.e., services provided on a private law, commercial basis. That is clear, because in TNT Post the reference to Corbeau in para. 46 was in the context of the Court dealing with the German Government’s argument, that services provided on terms which had been individually negotiated could not be exempt under the terms of the EU VAT Exemption.
190. Consistent with that, I consider the Claimants are wrong to say that the overall analytical framework depends on a core distinction between (1) *basic, essential or traditional* postal services, and (2) “*dissociable services*” within the meaning of that phrase as derived from Corbeau - with all such “*dissociable services*”, including in particular *any* business-oriented services, necessarily falling outside the scope of the *basic, essential or traditional* postal service.
191. To my mind, this is a false distinction. As I have explained in dealing with Corbeau, the “*dissociable services*” language was really a descriptor, whose purpose was to identify a particular type of commercial service, developing in Europe at the time and of special interest to commercial operators, and now known as the *express mail service*. It was not, and cannot have been, an attempt to establish a test for helping to define the

scope of the Art. 3 *universal service*, which at the time had not yet been introduced into EU law. Although it certainly refers to the needs of economic operators, it does not support the conclusion that business related services must always fall outside the *universal service*.

192. This latter point is reinforced by at least two other important factors. The first is the express reference to special business tariffs in the context of the universal service in Art 12 of the Postal Services Directive (see above at [120]); the second is the discussion by Advocate General Kokott in TNT Post of the Commission's argument that bulk mail services should not benefit from the EU VAT Exemption.
193. The reasoning of the Advocate General is entirely inconsistent with the Claimants' submission. As she recognised, in fact it is quite artificial to try and draw a meaningful distinction between the interests of business users of mail services and other users: there is an overlap. Business users send mail to other users, including consumers, and private individuals, as the recipients of mail, benefit from commercial operators having access to a postal network at reasonable cost, not least because commercial operators are likely to pass on any increased costs to their customers (para. 86, *ibid.*)
194. Additionally, the Advocate General's reasoning recognised the importance, in delimiting the scope of the EU VAT Exemption, of Member States' own views of what was necessary in their own public interest. What is or is not in the public interest in a particular Member State will be a question of policy, which will be informed by the particular needs of the Member State in question. It is perfectly permissible, it seems to me, for a Member State to take the view that the overall public interest requires the provision of business-related postal services in some form. The Advocate General in TNT Post plainly thought the same, because for her, in the end, "*it is for Member States to decide how ... they weight private and public interests*" (see [161] above). The point is reinforced if one has regard to Art. 10 of the Postal Services Directive, which expressly recognises the principle of subsidiarity, and explains that the "*choice of exact procedures*" under the Directive is a matter for Member States, who are to be "*free to choose the system best adapted to their own circumstances*".
195. What then is the correct approach?
196. Despite the point mentioned below at [200], I am entirely persuaded by the reasoning adopted by Kenneth Parker J in the Whistl decision (above at [181]), and in my judgment that is the correct test to apply. Translated into the circumstances of this case, the correct approach is to ask whether the Sample Services were supplies made by Royal Mail "*as the public postal services acting as such*".
197. In reaching that conclusion, I am particularly struck by the significance of the Court in TNT Post having departed from the formulation offered by the Advocate General (compare [162] and [175] above). It is true that the Court's formulation leaves open the possibility that a supplier who qualifies as the public postal services may, in that capacity, be required to provide services which are strictly outside the Art. 3 universal service, and such services may also be VAT exempt. But it seems clear that is what the Court intended, because had it intended otherwise it could easily have adopted the more mechanistic formula proposed by the Advocate General. It did not do so. Its own formulation is clearer, because it provides a workable test which avoids the difficulties

of definition identified by the Advocate General in her Opinion, in seeking to deal with the question of bulk mail services. It recognises that the point at issue was actually about the purpose and scope of the EU VAT Exemption and not the Postal Services Directive, which strictly had only a subsidiary role as a “*useful point of reference*” (Judgment at para. 35). It provides, and seems designed to provide, a degree of flexibility which allows the EU VAT Exemption to be applied in a manner which avoids just the sort of minute (and unworkable) analysis of individual service characteristics which underpins the Claimants’ case in the present action. It recognises that whether the public postal services in any given case is acting in the public interest is really a policy matter for Member States themselves to determine, as to which prescriptive rules at EU level are likely to be unworkable. Relatedly, it also avoids the central difficulty which would arise in administering a test based on “*dissociable services*”, as the Claimants interpret that phrase, namely that such a test would require one to identify objectively and with precision the extent of the *essential* or *traditional* or *basic* service, in order then to be able to identify any improvement on or addition to it, which would therefore be *dissociable*. In truth, these concepts are quite elusive and difficult to give content to in any clearly defined or prescriptive way. In saying that, I accept that in TNT Post the CJEU itself referred to postal services which met “*the essential needs of the population at reduced cost*” (see above at [165]), and indeed Kenneth Parker J referenced that same language in stating his approach in Whistl (see [181]). In context, however, I think this idea of “*essential needs*” is best seen as referencing a policy criterion which is for the Member States to determine, rather than a clearly defined, self-standing EU law concept of the essential (or basic, or traditional) postal service, and an equally clear and objectively identifiable universe of “*dissociable services*” which must invariably fall outside it.

198. As Mr Herberg QC pointed out, Whistl is a decision of the Judge of the High Court. The correct approach for me, as another Judge sitting at first instance, is to follow that decision unless I am persuaded it is wrong: see R v. HM Coroner for Greater Manchester Ex P. Tal [1985] QB 67 at 81A. I am not persuaded it is wrong. It seems to me to be a correct reading of TNT Post and I agree with it.
199. In challenging continued reliance on the Judgment in Whistl, Mr Sykes QC said the reasoning in that case was confined to its facts, and could not stand in light of the later decisions of the CJEU, in particular Deutsche Post and Winterhoff. I disagree. Of the other cases post-dating TNT Post, none – apart from Winterhoff – was in fact concerned with the EU VAT Exemption. Instead Ilves Jakelu Oy and Confetra were concerned with the overall scope of the Postal Services Directive, and with the question whether activities which admittedly fell outside the scope of the universal service nonetheless qualified as “*postal services*”. Deutsche Post dealt with the inter-relationship of the Postal Services Directive and the relevant road traffic Regulation (Regulation No. 561/2006). I therefore see nothing in those decisions which directly cuts across the territory occupied by TNT Post.
200. I accept that Winterhoff is different, because that *was* a decision concerned directly with the scope of the EU VAT Exemption. I also accept there is a degree of tension between my reading (and Kenneth Parker J’s reading) of TNT Post, and the analysis in Winterhoff, because in the latter case part of the Court’s approach *was* to address whether the services in question fell within the scope of the Art. 3 universal service. But that does not lead me to think that my reading of TNT Post is wrong:

- i) As I have mentioned above ([186]), in addressing whether the services in question fell within the scope of the *universal service*, the CJEU was doing no more than addressing the specific questions which were referred to it by the German Court: these asked in terms whether the services were within the universal service or not.
 - ii) The answer the CJEU gave was that the services were within the universal service. It did not need to consider what the VAT position would have been had the answer been different.
 - iii) In any event, the main focus of the inquiry in Winterhoff was as to the capacity in which the two suppliers were acting. Critical to the answer arrived at was the fact that DIREKTexpress and JUREX were subject to rules imposed on them by German law which required them to provide the relevant services in the public interest. It seems to me that in substance, that is the same inquiry mandated by TNT Post. As Kenneth Parker J explained in Whistl, a *public postal services* will be acting *as such* in the TNT Post sense if it is subject to terms imposed on it in order to promote the public interest of “*offering postal services which meet the essential needs of the population at a reduced cost*”. That was the position of DIREKTexpress and JUREX in Winterhoff, although the analysis was more directly expressed in terms of the Article 3 universal service, given the way the questions had been framed by the referring Court. In any event, it was no part of the Court’s inquiry to ask whether the services were “*dissociable services*” in the sense relied on by the Claimants, i.e. the Court did not ask whether they were additions to the basic or traditional postal service.
201. Finally, I should say that neither am I persuaded by Mr Sykes QC’s further point, based on a particular feature of the regulatory position in Whistl. This was the peculiarity that although *access services* were not regarded by Ofcom as part of the UK’s *universal service*, that was because of a technicality (and probably a mistaken technicality), and so in substance (so the argument goes) the access services *were* to be regarded as part of the UK’s *universal service*.
202. As to this, although it is true that Kenneth Parker J made the point that mandated access services were excluded from the universal service for a technical reason, which “*may not in fact be correct*” (see at [54]-[55]), this point was not critical to his overall reasoning on access services (it appears only in the final sub-paragraph of paragraph [62], and even then only as something which is *also noted*), and it did not inform his reading of the TNT Post decision. Moreover, it played no part at all in his parallel analysis of the further question he had to address, namely the lawfulness of the historic treatment of Controlled Services (see [183] above).
- (4) The EU VAT Exemption: Overall Conclusions
203. Applying the above analysis, I come to the following conclusions on the first of the questions I have to address.

“Public postal services acting as such”

204. My main conclusion is that, in providing the Sample Services during the Relevant Period, Royal Mail was *“the public postal services acting as such”*, and so the Sample Services properly qualified for exemption from VAT having regard to the terms of the EU VAT Exemption.
205. That is because each of the Sample Services was regulated under at least Condition 4 and Condition 21 of the Licence (or their later equivalents), and in some cases they were regulated under Condition 2. They were therefore services which Royal Mail was required to provide, on regulated terms, in its capacity as the public postal services. No other mail services provider was subject to the same or similar licensing or regulatory obligations. Those obligations were imposed by Postcomm and then later by Ofcom, as I read it, specifically in furtherance of the public interest in having available postal services meeting the essential needs of the population at a reduced cost (see Whistl at para. [58], quoted at [181] above). The services were essential in the sense that Postcomm had determined that users could not be expected to live without them at least for the time being, while the newly liberalised market for postal services had a chance to develop and stabilise. That was a perfectly rational policy decision which this Court is in no position to second guess, and indeed has not been asked to.
206. The nature of the public interest being served seems to me clear from the regulatory background as I have sought to summarise it above. In 2004, Postcomm began the move away from a very broad universal service, comprising (as it had done originally) all the services previously offered by Royal Mail, towards a narrower concept of the *universal service* as it was to apply in the UK. But there were serious concerns about such a fundamental shift, including in particular a concern about the possible effects on users if existing services disappeared or increased in price and became unaffordable. At the time, the competitive market for postal services was in its early stages of development, and there was great uncertainty about how it would develop and specifically about whether it would develop in a way which satisfactorily addressed the needs of postal users. Postcomm acted in order to protect their interests.
207. That is why, although not classified as falling within the Condition 2 universal service (or its later equivalents), the majority of the Sample Services continued to be mandated and closely price and quality controlled. The purpose was to ensure their continued existence as essential postal services available to the population at reduced cost. Royal Mail, as *the public postal services*, was required in that capacity to provide the Sample Services for that purpose. In so acting, it was obviously performing a public mission and was not acting as a commercial endeavour.
208. That position persisted until the sweeping changes brought in by Ofcom in 2012, reflected in its March 2012 Decision. At that point, the financial pressures of continuing to perform its public mission had become almost unbearable for Royal Mail, and the balance of interest shifted. Royal Mail was facing an existential crisis, and increased pricing flexibility was necessary in order for it to be able to turn itself around (see above at [84]). In consequence, the regulatory obligations which until then had mandated the continued provision of the majority of the Sample Services were swept away.

209. In light of this history, I am quite unpersuaded by the contrary argument made by Mr Sykes QC in submissions, namely that I should regard the continued regulation of the Sample Services as motivated by a desire to prevent Royal Mail abusing its monopoly position. Mr Sykes QC argued that I should regard such ongoing regulation as an exercise of Postcomm's duty reflected in section 5(1) of the Postal Services Act 2000 (above at [42]), to "*promote effective competition between postal operators*". Mr Sykes QC said that was not the same as acting in furtherance of the public interest in the ongoing provision of essential postal services at reduced cost, and since the Postcomm's real intention in regulating the Sample Services was to prevent Royal Mail abusing a dominant position that should not engage the EU VAT Exemption.
210. I do not think this argument makes sense on the facts, however. It is true that the background to Postcomm's key 2004 Decision (above at [47]) was expected liberalisation of the postal services market, and a hoped-for increase in competition, but the problem addressed by the ongoing regulation of the Sample Services was plainly not just a risk of abuse of dominant position by Royal Mail. Had that been so, the problem could have been addressed purely through the imposition of price controls. But the regulation of the Sample Services was wider than that, and more fundamental: it mandated their continued provision, and imposed relevant quality controls. Such measures were obviously addressing a considered policy assessment that the continued availability of the Sample Services was essential, at least until the market had a chance to develop. Postcomm did not want to take the risk that they might disappear, and so required Royal Mail to carry on providing them.
211. In such circumstances, it seems to me clear that the logic reflected at [88] of Kenneth Parker J's Judgment in Whistl (above at [183]) applies equally here, so far as the Sample Services are concerned. Put simply, because it was the public postal services, Royal Mail was obliged to carry on providing services it did not necessarily wish to provide, on terms it would not necessarily have chosen for itself had it had a free hand commercially. That it was required to do so reflected a policy decision about what was needed for the greater good, given the public interest in having access to postal services meeting the essential needs of the population at a reduced cost. Services provided on that basis fairly qualify for exemption under the EU VAT Exemption.
212. Following the same logic, I should say that neither am I persuaded by the Claimants' argument ([100(iv)] above) that the overall regulatory trend between 2009 and 2012, which resulted in the majority of the Sample Services losing their VAT exempt status, reflected a desire to bring the domestic position into line with EU law as expressed in TNT Post. That cannot be correct. The changes introduced by the Amended Group 3 in January 2011 were intended to give effect to TNT Post. As I see it, however, the more fundamental changes which later followed in April 2012 were the culmination of a quite separate stream of regulatory activity, based on Postcomm's, and later Ofcom's, policy assessments of what was required in the public interest.

The Article 3 universal service

213. Even if I am wrong about that, and the scope of the EU VAT Exemption is coterminous with the scope of the Art. 3 *universal service* (see Winterhoff, above), I would nonetheless hold that the Sample Services do fall within the scope of the Art. 3 *universal service*.

214. I say that essentially because the Art. 3(1) outline definition is in fact very broad, and confers considerable autonomy on Member States, consistent with the principle of subsidiarity as referenced in Recital 10 to the Postal Services Directive. Art. 3(1) speaks of “*the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.*” In my judgment, and in line with Royal Mail’s submissions, the Sample Services all qualified as part of the *universal service*, applying this outline definition. The licensing and regulatory terms under which they were provided meant that (1) they had to be supplied permanently, (2) they were subject to quality control standards, (3) they were available generally across the UK, (4) they were subject to price controls and so were made available at affordable prices, and (5) they were available to “*all users*”.
215. In my view, it is no part of the test contemplated by Art. 3 to exclude business oriented services, or to exclude services on the basis that are *dissociable* services going beyond the bounds of any *traditional* or *basic* postal service. In other words, even if the Art. 3 test is the correct one to apply, in applying it I reject the first two points relied on by the Claimants in their classification of service characteristics - items (A) and (B) at [98] above. That is because they seem to me to be incompatible with a correct reading of Corbeau and of TNT Post, for all the reasons I have already given. (In saying this, I note that the Claimants’ item (B) incorporates what seems to me to be a discrete EU law argument, about the effect if separate services which are “*add-ons*” in the true sense are combined with other services which are properly VAT exempt. I will deal with that under a separate heading (below at [228])).
216. I likewise reject items (C) and (D).
217. Item (C) (see [98] above) is the idea that services offered on licence or contract terms which permit Royal Mail a right of termination cannot be part of the Art 3 universal service, because Art. 3 refers to users – in fact “*all users*” – having a *right* to the universal service, and there is no right if the provision of the relevant service is discretionary. Thus, to take an example, the fact that users must obtain a licence to use franking equipment means that it cannot be part of the universal service.
218. I do not think this can be correct. In talking of a *right*, Art. 3 cannot be referring to an entitlement free of any necessary restrictions. After all, I may have a right to buy a postage stamp, but it applies only if I can tender the purchase price. Likewise, Royal Mail must be at liberty to impose appropriate limitations on the availability of (say) franking. Requiring users to obtain a licence does not mean that franking is not available to “*all users*”. It is available on the same terms to all users who meet the relevant conditions of posting, in the same way that the formal service of legal documents was available to “*all users*” in Winterhoff. The fact that a discretion may exist to grant or terminate a licence does not affect this result. Royal Mail cannot refuse to grant a licence, and cannot resolve to terminate a licence, on arbitrary grounds. As Mr Herberg QC pointed out in his submissions, at all times Royal Mail was subject to higher order obligations under its Licence (and the later regulatory rules), which effectively prevented it acting capriciously or otherwise in a manner inconsistent with its public service function. Postcomm and Ofcom had enforcement powers available to ensure compliance. In my judgment any residual discretionary powers or rights that Royal Mail had do not mean that any of the Sample Services fell outside the Art.3 *universal service*.

219. Item (D) (see [98] above) is the idea that services offered on terms which include a volume discount cannot be part of the Art. 3 universal service. It is related to the point that business-oriented services are excluded. Again I reject it. In doing so I rely principally on the express terms of Art. 12 of the Postal Services Directive (see [120] above), from which it seems to me clear that bulk discounts are permissible, even within the universal service.
220. Before moving on, I should say I am also unpersuaded that the Claimants' arguments based on the characterisation of the Sample Services under domestic law (see [100] above) should make any difference to the analysis of the Art. 3 position I have now set out.
221. Winterhoff makes it entirely clear that the characterisation of services under domestic law is irrelevant to the question whether they qualify for exemption under the terms of the EU VAT Exemption. The services in that case were not regarded as part of the universal service under German domestic law, but that did not prevent them qualifying as part of the universal service under Art. 3 of the Postal Services Directive, given the terms on which DIREKTexpress and JUREX were required to provide them.
222. I also note that the Claimants blow hot and cold on this point: they say it is significant that the majority of the Sample Services were never covered by Licence Condition 2 (or its later equivalents), and so were never classified as part of the UK *universal service*; but at the same time they argue that one should ignore the fact that at all times franking *was* covered by Condition 2, without any distinction (in periods before August 2011) between single piece and non-single piece items. Such inconsistency emphasises the point that the headline characterisation of services under domestic law is not a reliable guide; what is important is the underlying substance.
223. My conclusion that the domestic law position is effectively irrelevant makes it strictly unnecessary for me to resolve certain further questions which occupied time in the parties' submissions, and which were specifically concerned with the status of two of the Sample Services under domestic law. I will comment on them briefly, however.
224. The first concerns franking, and the question whether, between August 2011 and April 2012 - i.e., during the period when the Postcomm definition of single piece was in play (see above at [70]) - franking fell within the Postcomm single piece definition even if combined with *Business Collections* (see above at [100(iii)]). Had it been necessary for me to determine that question, I would have said that it did. The issue is essentially one of characterisation under the domestic regulatory regime. It therefore seems to me relevant, and indeed determinative, to look at how franking was characterised by Postcomm itself. Postcomm's August 2011 Decision (above at [70]) is illuminating. At para. S.15, Postcomm said "*we consider that the current stamp and meter First and Second Class products which Royal Mail is obliged to provide under its universal service obligation are single piece products*". That is a clear reference to franking in its then current form being properly regarded as a single piece product, with no distinction drawn between cases where Business Collections was used alongside franking and those where it was not. The point is reinforced by consideration of Table 3 in the same Decision document, in which Postcomm compared the then current Stamp, Meter (i.e., franking) and PPI products offered by Royal Mail, and expressly noted that "*business collections*" were provided with each of those services. Thus, there

can be little doubt that Postcomm was aware of the practice of franking being combined with a collection service. It nonetheless considered the current franking service to qualify as single-piece under its definition. I see no good reason to depart from that classification.

225. The second, related issue is whether the form of PPI actually relied on as a Sample Service in this case is an example *single piece* PPI (which was covered by Licence Condition 2 from August 2011, and so part of the UK universal service), or *non-single piece* PPI (which was not, but which in any event remained regulated under Conditions 4 and 21 until 2012). Had it been necessary for me to resolve the point, I would have determined that the Sample Service relied on is an example of single-piece PPI.
226. That is because the PPI example selected by the Claimants for the purposes of the trial, in their solicitors' letter dated 14 May 2020, was PPI as pleaded by one of the test Claimants, namely Harrier. Under both the original Postcomm definition of single-piece in place from August 2011 to April 2012 (above at [70]), and the later Ofcom definition in place from 1 April 2012 onwards (above at [89]), the critical feature distinguishing single piece from non-single piece PPI was whether any volume-based pricing discount applied. But in the case of the Harrier pleading, no case was made out in relation to bulk postings using the PPI service, or that the PPI service Harrier used benefited from a volume discount.
227. It is true that under Postcomm's single-piece definition, in place for the short period between August 2011 and April 2012, the definition of *single-piece* also excluded services having other premium attributes, and that here the Claimants rely on two such factors, namely Business Collections and the enhanced compensation arrangements said to relate to PPI. However:
- i) I have dealt with the question of Business Collections above, in relation to franking, and reached the conclusion that the availability of Business Collections together with franking did not take it outside the Postcomm definition of single-piece. I am not persuaded that any different conclusion should apply in the case of PPI.
 - ii) As to enhanced compensation arrangements, in giving his evidence for Royal Mail, Mr Cable explained that the enhancements relied on applied to wholesale bulk PPI. As noted above, however, the Harrier pleading does not set out any case in relation to bulk postings.

Add-ons

228. At [98] above, I referred to the distinction which emerged during the parties' submissions between (1) embedded or inherent aspects of the Sample Services which the Claimants said provided *added value* to customers, and (2) bolt-on options in the true sense – i.e., additional services which could be added onto any of the Sample Services.
229. I have already dealt with (1) above. Where Sample Services had embedded features as part of an overall service which was mandated and quality and price controlled, then

such Sample Services were provided by Royal Mail as the *public postal services acting as such*, and were therefore exempt from VAT under the EU VAT Exemption.

230. The issue raised by the true add-ons at (2) above is a different one. As mentioned above at [101], three in particular were referred to in submissions, namely Business Collections, Timed Delivery and Early Collect. Although there was some debate about their status, and whether they were add-ons in the true sense or not, I find that they were: that was the evidence of Mr Cable for Royal Mail in his written Witness Statement, on which he was not challenged. I prefer the evidence of Mr Cable on this point to the evidence of the Claimant's Witnesses, insofar as there is any difference between them, on the basis that Mr Cable, as a representative of Royal Mail, was better placed to provide evidence on the proper characterisation of Royal Mail's own services.
231. As already noted, Business Collections was a mail collection service, free to customers spending more than a predetermined level – at the time £15,000 per year. The Claimants relied on it in particular in connection with their case on franking. Timed Delivery was a service under which incoming mail could be delivered to customers at specified times, and Early Collect was a service under which mail could be collected from Royal Mail – both were relied on by the Claimants in connection with their case in relation to Freepost.
232. It is clear that if one is dealing with what is effectively a different product, which is added on to a Sample Service, the question which arises is conceptually different to that of assessing the status of the same Sample Service if simply looked at on its own terms. If the add-on and the Sample Service are both VAT exempt, then no practical problem arises, because the combined supply is obviously also VAT Exempt; but if an add-on which is subject to VAT is added onto a Sample Service which is exempt, then one is faced with a more difficult problem. Here, Mr Herberg QC accepted in submissions that in principle Business Collections, Timed Delivery and Early Collect were all subject to VAT.
233. Mr Sykes QC sought to persuade me that in fact, the problem is straightforward, and is answered by the Deutsche Post case (above at [137]). Relying on Deutsche Post, he submitted that the joint supply is not part of the universal service, and that being so it does not qualify for exemption under the terms of the EU VAT Exemption.
234. I cannot agree with that submission, however, which seems to me to read too much into Deutsche Post. I have analysed Deutsche Post above. The context was very different. It was not concerned with the VAT Directive, but instead with a road transport Regulation which imposed limits on driver hours. The relevant exception under the Regulation only applied when vehicles were used exclusively for delivering items as part of the universal service. Add-ons which were akin to *express mail services* were combined with items forming part of the Art. 3 universal service. The conclusions were that (1) the combined items were not within the Art. 3 universal service, and (2) that being so, the exception did not apply because vehicles carrying such items were not exclusively delivering items as part of the universal service.
235. I do not think, however, that one can transpose that logic so easily into the VAT context, or more particularly, into the circumstances of this case. Even if one assumes that (1) Business Collections, Timed Delivery and Early Collect are in the nature of *express*

mail services, (2) they are subject to VAT, and (3) that if taken together with a Sample Service, the combined product is something which strictly speaking falls outside the Art. 3 universal service, that does not to my mind result in the same all or nothing outcome as prevailed in Deutsche Post having regard to the terms of the relevant road transport Regulation. One can quite well see how in that context a mechanical approach was required. The question was whether drivers were required to take compulsory breaks and the like. They either were or they were not. The determination that vehicles had to be occupied *exclusively* in performing the universal service mandated an essentially crude solution.

236. The VAT context, as Mr Herberg QC submitted, is different and more nuanced. There is a considerable body of case law, including case law at EU level, dealing with the issue of single or multiple supplies. In a given situation, are multiple separate supplies being made, or a single composite supply? Where supplies are separable, they can be subject to different VAT treatment; but where there is a single composite supply, identifying the correct overall VAT treatment is a complex matter involving identification of the predominant nature of the supply: see e.g. Purple Parking Limited v. Commissioners for Her Majesty's Revenue and Customs at [23]-[41]. That is conceptually a very different exercise to that contemplated by Deutsche Post. It might, for example, result in the conclusion that even if franking (VAT exempt) were to be combined with Business Collections (not exempt), in a manner which resulted in a single composite supply, the overall supply might nonetheless still be VAT exempt given the relative weighting of its constituent parts. The analysis in any given case is likely to be fact sensitive. In any event, it is quite different to the more crude analysis which was all that was needed in Deutsche Post, because there, once it was resolved that only vehicles operating *exclusively* within the universal service would qualify for the driver exception, all that was needed was to determine that *some part* of the composite supply – however small in relative terms – was *not* part of the universal service. It was simply not necessary to carry out the more nuanced evaluation involved in assessing the predominant nature of the overall supply.
237. That may well be necessary here, but is not a matter properly falling within the scope of the present trial, and to be fair to them, is not a point the Claimants invited me to resolve: they made no submissions on it, and it was not addressed in the evidence. Instead, the Claimants' argument was simply that one can short cut the analysis by adopting the logic of Deutsche Post. For the reasons given, I do not think one can. Quite a different approach is required by Purple Parking and other EU VAT cases, and there is nothing in Deutsche Post which suggests the CJEU was laying down a general rule intended to override that well-established body of VAT case law. Since the parties were effectively agreed that I could not and should not address the more detailed analysis, in the absence of the Deutsche Post shortcut, I will not attempt to do so. The point will need to be fought out, if at all, on another occasion.

Emanation of the State: Discussion & Conclusions

238. As matters have turned out, this is an issue of limited significance on which the parties were very largely (if not entirely) agreed.

239. It was common ground that the test to apply was that affirmed in Elaine Farrell v Alan Whitty and others (No.2) (Case C-413/15) [2017] ECLI:EU:C:2017:745, where the Grand Chamber explained the concept of emanation of the state as follows at para. [34]:

“Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers”.

240. In the present case, the debate focused on the second and third parts of this tripartite classification, i.e., during the Relevant Period:

- i) was Royal Mail subject to the authority or control of a public body, and/or
- ii) was Royal Mail required by such a body to perform a task in the public interest, and did it have special powers conferred on it for that purpose?

241. As I have mentioned above, Royal Mail was incorporated (as Consignia plc) in 2001. From that point, until it was privatised in October 2013, it was wholly State owned. Royal Mail therefore accepted that it was an emanation of the State during that period, because it was subject to the authority or control of the State.

242. Royal Mail was thus undoubtedly an emanation of the State during that part of the Relevant Period, expiring in April 2012, when the majority of the Sample Services were treated as VAT exempt under domestic law. Since I have determined that that exemption was consistent with the requirements of EU law, however, nothing much seems to flow from this, save in respect of Door-to-Door (see above at [67]), where Royal Mail conceded that its VAT exempt status during the Relevant Period prior to January 2011 was incompatible with the proper scope of the EU VAT Exemption.

243. After April 2012, following the introduction of the UPS Order, the majority of the Sample Services lost their VAT exempt status and became chargeable to VAT. The exceptions were franking (single piece) and PPI (single piece), which remained regulated and VAT exempt. In fact, in submissions Mr Sykes QC made it clear that the only ongoing issue after April 2012 was in relation to franking: the Claimants made no ongoing complaint about PPI. Between April 2012 and October 2013, as noted, Royal Mail accepts it was an emanation of the State given that it was in State ownership. What of the position after that?

244. Again, there was a large measure of agreement on this point. It seems to me that the situation more naturally falls within the third of the categories described in Farrell v. Whitty, rather than the second. After October 2013, Royal Mail was not in my view controlled by the State, because by then it was privately owned. The question, rather, is whether it was performing a task in the public interest, and for that purpose had been given special powers.

245. The parties were agreed that this test was satisfied, insofar as Royal Mail continued the provision of single piece franking. That was (and is) mandated pursuant to the

regulatory obligations imposed on Royal Mail under DUSP 1.6(a) and (b) – i.e., it is part of the obligation to provide the UK’s *universal service*, as finally defined by Ofcom. That was (and is), to use the language of Advocate General Sharpton in Farrell v. Whitty, “*a mission which has been entrusted to it by the State*” (Opinion at para. 141).

246. On the facts, however, it is unclear to me that this conclusion has any real practical effect. For all the reasons developed above, I have no doubt that single-piece franking, as it exists under domestic law, *was* properly exempt from VAT in all periods after April 2012 – it was supplied by Royal Mail as *the public postal services acting as such*, and in any event fell within the Art. 3 *universal service*.
247. It is also common ground, as I understand it, that anything properly classifiable as *non*-single piece franking under domestic law after April 2012 *would* attract VAT.
248. The only possible question, as I see it, is about the intermediate case posed above in the section in *add-ons* (see [236] above). A point presumably would arise if at some future stage (1) it were determined that a combination of single-piece franking, plus a separate *add-on* such as Business Collections, was properly to be classified under EU law as a composite supply, with VAT chargeable on the whole supply, but in circumstances where (2) under domestic law, no VAT was chargeable on the single-piece franking component of the joint supply. If that were the position reached, one can see it might be difficult to resist the conclusion that Royal Mail was acting as an emanation of the State in making the joint supply, because as Advocate General Sharpton indicated in her Opinion in Farrell v. Whitty at para. 141, the notion of public mission is a broad one, covering any activity with a public service element, and excluding only activities undertaken for “*a purely commercial purpose*”. The potential complexities do not end there, however, because such an outcome might equally well support the contention that in rendering the composite supply, Royal Mail was the *public postal services acting as such*, within the test in TNT Post.
249. Such matters, however, fall outside the scope of this Judgment, and I do not feel able to express any concluded view about them. They indicate the potential intricacies which can arise when the Court is invited to determine preliminary issues. Although there is a temptation to be helpful, there are limits to how far the Court should go in dealing with factual permutations which do not directly arise in the sample cases selected for determination. I consider I have reached the limits of what is safely achievable in the context of the present action.

Overall Conclusion & Disposal

250. In summary, I answer the two preliminary issues in this case as follows:
- i) The Sample Services, save for Door-to-Door, were properly exempt from VAT under the terms of the EU VAT Exemption during the Relevant Period. That is because, in providing them, Royal Mail was the “*public postal services acting as such*” (see TNT Post), that being the relevant test for exemption under EU law.

- ii) Royal Mail was an emanation of the State prior to 15 October 2013; and after that, was an emanation of the State insofar as it continued to provide franking (single-piece) under the terms of DUSP 1.6.1(a) and (b).

ANNEX 1

AGREED FACTS IN RELATION TO THE SAMPLE SERVICES

The text below is the Statement of Agreed Facts in relation to Sample Services, supplemented by the Claimants' notations added during trial (show in italics at the beginning of each paragraph), classifying the agreed features of the Sample Services according to the following key:

- A: Service directed at the particular needs of businesses*
- B: Did the service involve providing additional features?*
- C: Right to service/not subject to discretion*
- D: Not a uniform tariff*

Door-to-Door

1. *Features: A, B.* Door-to-Door enabled the user to send out unaddressed mail which Royal Mail delivered to entire Postcode Sectors. The customer would buy access to a Postcode Sector and every address in that sector would receive the same item. There was no stamp or other means of postage (such as PPI or franking) identifiable on the items. This service was designed to enable business or other high-volume mailers to deliver business items such as catalogues and leaflets.
2. *Features: A.* Royal Mail have a discretion as to which households to deliver to in some circumstances (e.g. where insufficient leaflets are provided to do an entire postcode) and Royal Mail are unable to deliver items to certain addresses (for instance, addresses that have opted out of receiving such marketing materials).
3. *Features: A, B.* The user must either arrange collection or arrange a handover at special sites. Accordingly, the user cannot post the mail in post boxes.
4. *Consequential on 3.* Handovers take place at one of six Royal Mail walk bundling centres.
5. *Consequential on 3.* Handovers are encouraged to be booked in advance, but are not required to be pre-booked unless the handover was taking place on a Monday.
6. *Consequential on 3.* Handover must take place at least 7/10 days before distribution.
7. *Consequential on 3.* Items must be handed over in the prescribed form and labelled.
8. *Consequential on A (Advertising Standards Authority requirements).* Samples of the

item could be provided in advance of the delivery schedule in order to ensure that the items would meet the required specifications and Royal Mail guidelines.

9. *Consequential on A.* Fees were chargeable in certain circumstances for failing to present items in line with the terms and conditions governing the supply of the services.
10. *Consequential on 3:* Delivery times are set out in delivery schedules, which could be adjusted by Royal Mail (for instance, for operational reasons).
11. *Consequential on 1:* Royal Mail may destroy surplus items.
12. *Features: A.* Royal Mail agreed to endeavour to avoid delivering competing items to postcode sectors indicated by the Customer in the Delivery Schedule during a delivery period agreed with the Customer.
13. *Consequential on 1.* There are cancellation charges if a service is booked but not used or the contract is terminated early.

Response Services/Freepost

14. *Features: A, B.* A Response Service is a recipient paid, end to end service which is often used by businesses to enable customers to send mail to the business without the sender incurring a charge. Pre-printed envelopes with addresses and licence numbers are provided to potential senders. The reply mail is sent without affixing postage. Royal Mail counts the number of replies received, delivers the mail and invoices the mail recipient only for the responses they receive.
15. Postal services that fit this description are called 'Response Services'. Freepost is a type of Response Service.
16. *Features: C.* Users have to apply for a licence to use Response Services.
17. *Features: C.* Royal Mail or the customer are entitled to terminate a customer's licence to use Response Services upon giving one month's notice at any time.
18. *Features: consequential on 14.* Users have to pay an annual licence fee to use the service.
19. *Features: A.* The service is only available to mail users who meet certain threshold

criteria, which included a minimum spend.

20. *Features: A, B.* Users of the first class response service are entitled to choose a single line address that is easy for customers to remember, rather than an ordinary geographical address.
21. *Features: consequential on 14.* Items were required to comply with design, layout and technical requirements.
22. *Features: consequential on 14.* Failure to comply with the design specification, layout and technical requirements made the user liable to surcharges.
23. *Features: A, D.* The price of the service was set by a rate card, which offered different prices based on the attributes of the service purchased (i.e. the volume and/or average weight of the mail).
24. *Features: consequential on 14.* Customers are entitled to customise reply items with their own text and graphics.

Packetpost

25. *Features: A, B.* Packetpost is an account service for senders of packets. Payment is in arrears.
26. *Features: A.* All mail must be placed in the containers provided by Royal Mail.
27. *Features: A, B, D.* Pricing is based either on the average weight of a posting (the daily rate service) or a flat rate (where a customer's weight and volume posting profile was assessed over a period of time) based on published rate cards.
28. *Features: consequential on 27.* Royal Mail carried out regular sampling of the posting to check that the average weight of the posting was as stated.
29. *Features: consequential on 26.* Dispatch requirements include:
 - a. Separating by product.
 - b. Separate items by service speed into separate containers.

- c. Separate items by format into separate containers.
- d. Count items and weigh consignment.

30. *Features: A, B.* Royal Mail collected Packetpost postings from customers.

31. *Features: A, D.* Prices for the Packetpost service (i.e. the daily rate and the flat rate based on volume) were set by a standardised rate card, and involved discounts based on the volume of the mail.

32. *Features: A.* This service was only available to users who met certain threshold levels (i.e. a certain number of packets had to be sent by the customer per year to qualify for the service).

33. *Features: consequential on 27.* Surcharges or adjustment fees could apply if items are not presented correctly or rework is required.

Walksort

34. *Features: A, B.* Walksort is the Royal Mail service where the user performs a high level of sortation before sending the mailing for delivery. As the name suggests, users of the service were required to sort their outgoing mail down to the level of the individual UK postal walk.

35. *Features: A.* To qualify for the service, mail must be sent to 10% of all delivery points within a given area.

36. *Features: A, D.* The pricing for this service involved lower prices reflecting the requirement to sort and the volume of mail.

37. *Features: A.* The service was only available to users meeting minimum volume requirements.

38. *Features: consequential on 34.* Users must use the Walksort database to properly sort and label items, which requires special equipment.

39. *Features: consequential on 34.* Mail must all be of the same shape, size and weight and arranged with the address facing in the same direction.

40. *Features: consequential on 34.* Royal Mail will supply bundle and blank bag labels as well as any other required stationary.

41. *Features: consequential on 34.* Sorted mail must be bundled and placed in the mail bags provided, which should weigh no more than 11kg.
42. *Features: consequential on 34.* The bundled items and bags must be labelled.
43. *Features: consequential on 34.* Users must include the correct documentation with the mailing.
44. *Features: consequential on 34.* Users *must* give Royal Mail at least 2 clear working days' notice of a posting.
45. *Features: B, consequential on 34.* Royal Mail collect the bundles/bags or they must be delivered to an agreed location as arranged in advance.

Franking

46. *Features: A.* All postage payable on franked letters must be prepaid.
47. The franking service is governed by schemes made by Royal Mail.
48. *Features: A.* Franked items are priced according to a rate card. Franked items are priced lower than stamps.
49. *Features: A.* Users must obtain authorisation/a licence to use franking equipment.
50. *Features: A.* The franking machines *themselves* must be hired or purchased from a manufacturer authorised by the post office. Hire agreements with third party suppliers could contain provision for additional charges and penalties to cancel.
51. *Features: A.* The licence may be *terminated* if the user does not comply with the conditions of the scheme and its obligations.
52. *Features: A.* The licence may be *terminated* in a number of circumstances, including, if the user ceases trading, dies or becomes bankrupt or insolvent.
53. *Features: A.* The Licence authorises the user to use the specified Franking equipment at the address shown on the licence only for the purpose of franking its own business letters, but not Letters or other mail of any third party.
54. *Features: consequential on 46.* Users *are* obliged to ensure that the current tariff is

loaded on to, or is used in respect of, their franking equipment.

55. *Features: consequential on 46.* A surcharge may be imposed if the mail did not conform to the requirements for the service.

56. *Features: consequential on 46.* Inspections by Royal Mail can be carried out without prior notice.

57. *Features: A, E.* Slogans may be printed on the envelope bearing the franking mark subject to Royal Mail's ability to reject the slogan if it interfered with the franking mark or if it was considered that it would cause offence or embarrassment.

58. *Features: A, E.* Franked letters may only be posted in the area designated by the Franking Mark.

59. *Features: E, consequential on 46.* Franked letters must be posted on the date shown in the Franking Mark.

60. *Features: A, E.* Franked letters must be presented for posting in trays, bags, pouches and envelopes in accordance with Royal Mail's requirements.

61. *Features: A, E.* Franked mail was required to be handed over as follows:

- a. If in a tray, container or bag – by being collected by Royal Mail, or an agent authorised to act on Royal Mail's behalf (where this has been arranged and any fee due to Royal Mail is paid) or deposited at a designated Royal Mail office or post office.
- b. If in a pouch – as above, with the further option to post in a Business Posting Box.
- c. In a Low Volume Posting envelope (subject to conditions including a maximum of two per day, each containing no more than 30 letters).
- d. If in Late Posting Envelopes (subject to conditions including a maximum of one per day) posted in a designated posting box (2000 Scheme) or any post box (2008 Scheme).

62. *Features: A, E.* In the case of trays and bags and pouches, the letters must be segregated by class and service in bundles of letters facing and orientated the same way.

63. *Features: A, E.* A user of the franked service is liable to surcharges in the event that

the mail does not confirm to the requirements for using the service.

Standard Tariff Letter or “Postage Paid Impression”

64. *Features: A.* Users must have a PPI licence number, an active Royal Mail PPI account, and an online business account.
65. *Features: A.* To open an account, customers must incur a minimum of £5,000 in postage invoiced through the account in each 12 month period.
66. *Features: A, B.* Payment is made 30 days in arrears.
67. A customer would include a unique Postage Paid Impression (or “*PPI*”) on the corner of the envelope which identified the customer.
68. *Features: A, E.* Items must be separately presented according to class, rate of postage, service type, format; in bundles of a convenient size; with addresses the same side up and facing the same way.
69. *Features: A, E.* Any bag, tray, container (or other receptacle) used should be identifiable, based on the above categories, through the use of appropriate labelling.
70. *Features: A, E.* Postings may only be undertaken from a point agreed to in writing by Royal Mail in advance.
71. *Features: A, E.* Customers must provide a fully completed posting docket when their mail is collected by, or handed over to Royal Mail.

ANNEX 2

**DETAIL OF LICENCE CONDITIONS AND TRANSITIONAL REGIME
EQUIVALENTS**

Postcomm Regime	Duty imposed	Equivalent Conditions in Transitional Regime
Condition 2 (“the Universal Service Condition”)		
2(3)(a) Public tariff, uniform throughout the UK	To provide the service in accordance with a public tariff that is uniform throughout the UK.	DUSP 1.3(a)
2(4)(a) 5 days a week delivery and collection	To ensure at least one delivery to every home or premises and one collection from each access every working day.	DUSP 1.4(a)
2(4)(b) Conveyance plus incidental services of receiving and collection etc	To provide a service of conveying relevant postal packets and the incidental services of receiving, collecting, sorting and delivering such packet.	DUSP 1.4(b)
Condition 4 (“the Quality Standards Condition”)		
4(7) Quality and performance standards	To use all reasonable endeavours to provide the Scheduled Services and to perform the standardised measures “to the highest possible extent in relation to the relevant scheduled standards for Scheduled Services”.	For services within DUSP 1.3(a) (ie. the equivalent of Condition 2 in the Postcomm regime), the obligation is in DUSP 5.4 For the other Sample Services the obligation is in CP1.3
	<i>Note: “standardised measures” are the percentage that all postcode</i>	

Postcomm Regime	Duty imposed	Equivalent Conditions in Transitional Regime
	<i>areas should achieve, the percentage of collection points served each day, the percentage of delivery routes completed each day and the percentage of items delivered correctly: see 4(1)(b), read with lines 9 – 12 of Annex to Condition 4.</i>	
	<i>Note: “scheduled standards” are the levels of performance set out in column 1 in the Annex to the Condition: see 4(1)(b).</i>	
	<i>Note: 4(7)(b) prescribes when “all reasonable endeavours” will be deemed to have been met, or presumed not to have been met.</i>	
4(11) – (15) Compensation scheme for failing to meet quality standards	To maintain and meet its obligations under a scheme for compensating users affected by a failure to meet the quality standards applicable in accordance with the scheduled standards.	CP 1.12 – CP.1.15
Condition 21 (“the Mandating and Terms Control Condition”)		
21(1) Duty to provide the service (except in so far as Postcomm directs)	Except in so far as Postcomm on the application of RM directs and after consultation with the National Consumer Council directs otherwise, the Licensee shall at all times offer and provide the Regulated Services on as wide a basis within the United Kingdom as they were provided in the month ending on 31 March 2006	T4.2
21(2) Postcomm control of changes to non-price terms	To provide the services on terms other than price that are no less beneficial to the persons for whom the services are provided as the terms on which they were provided in March 2006.	T4.3

Postcomm Regime	Duty imposed	Equivalent Conditions in Transitional Regime
	<i>Note: RM can apply to Postcomm for approval to change the terms. The National Consumer Council has to agree to such proposed changes or there is to be consultation if they do not agree: 21(3) and (4).</i>	T4.4
Price control 21(5) to (16)	To take all reasonable steps to ensure that in each formula year, RM sets prices so as to meet price control conditions in a prescribed formula (unless Postcomm directs otherwise, on application by RM)	T4.6 – T4.18
21(17) Geographically uniform tariff	The tariffs under which the services are offered shall be geographically uniform, subject to approval otherwise by Postcomm.	T4.19
	<i>Note: RM can apply to Postcomm for approval to offer any of the Controlled Services at a tariff which is not geographically uniform (21(18)).</i>	T4.20-T4.21