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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
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QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Commission

REFERENCE: Article 132(1)(a)

SUBJECT: Application of the exemption for “public postal services”

1. INTRODUCTION

At its 90th meeting on 11 December 2009, the VAT Committee discussed¹ the judgment of 23 April 2009 by the Court of Justice of the European Union (‘CJEU’) in Case C-357/07, *TNT Post UK Ltd*² (‘the TNT ruling’).

Following this meeting, the VAT Committee almost unanimously agreed on guidelines³ on the scope of the exemption provided for in Article 132(1)(a) of the VAT Directive⁴.

Whereas some Member States amended their VAT exemption for postal services in the wake of the TNT ruling and the VAT Committee guidelines, it would seem that the scope of the VAT exemption is still being interpreted differently. This is considered as one of the main barriers to a level playing field for e-commerce and parcel delivery by competitors of the postal operators providing a universal postal service. In the absence of a change to EU legislation on the matter, it could be desirable for the Member States to agree on the scope of the VAT exemption on public postal services.

2. SUBJECT MATTER

According to Article 132(1)(a) of the VAT Directive, Member States are required to exempt the supply by the public postal services of services other than passenger transport and telecommunications services, and the supply of goods incidental thereto.

The scope of this exemption should be interpreted in light of the case law of the CJEU, of Directive 97/67/EC⁵, as amended by Directives 2002/39/EC and 2008/6/EC (‘the Third Postal Directive’) and of the guidelines of the VAT Committee.

2.1. The notion of “public postal services”

The Third Postal Directive defines the concept of “universal service provider” in Article 2(13) as “*the public or private postal service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with Article 4⁶*”.

The notion of “public postal services” as used by the VAT Directive is somewhat different but still it has been interpreted by the CJEU in the TNT ruling in such a way that it covers both public and private operators, who undertake to provide, in a Member State, all or part of the universal postal service, as defined in Article 3 of the Third Postal Directive.

¹ See Working paper No 643.

² Judgment of 23 April 2009, *TNT Post UK Ltd*, C-357/07, EU:C:2009:248.

³ [Guidelines](#) resulting from the 90th meeting of 11 December 2009; Document B – taxud.c.1(2010)637456 – 662 (p. 136).

⁴ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006).

⁵ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14).

⁶ Point 13 of Article 2, in the wording given by Article 1(2) of the Third Postal Directive.

At its 90th meeting, the VAT Committee was invited to specify the term “undertake” used by the CJEU in the TNT ruling. The VAT Committee agreed almost unanimously that to be regarded as an operator who undertakes to provide all or part of the universal postal service in a Member State, the postal operator (public or private) must supply postal services under a specific legal regime provided for pursuant to Article 3 of the Third Postal Directive. This legal regime is substantially different to that under which other postal operators provide such services, as the universal service providers are bound by a number of legal obligations.

Accordingly, it is the special legal regime entailing particular obligations for the universal service providers, which qualifies them for the VAT exemption.

The CJEU confirmed this interpretation in its judgment of 21 April 2015 in Case C-114/14 *Commission v Sweden*⁷. Indeed, in that case the CJEU ruled that the difference between “public postal services” and other operators depends not on the nature of the services provided but on the fact that the operators who provide part or all of the universal postal service are subject to a special legal regime with specific obligations.

Nevertheless, questions remain as to which operators can benefit from the exemption of Article 132(1)(a) of the VAT Directive, notably when no postal operator has been designated as a universal service provider.

2.2. The supply exempted according to Article 132(1)(a) of the VAT Directive

In the TNT ruling, the CJEU held that the VAT exemption only applies to the supply provided 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. It does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated.

At its 90th meeting, the VAT Committee was invited to specify the scope of this exemption and clarify the expression “individually negotiated”. It almost unanimously confirmed that this exemption must be limited to the services falling under the “universal service” as provided for in Article 3 of the Third Postal Directive.

In accordance with Articles 3 and 4 of the Third Postal Directive, the universal service within the postal sector involves the permanent provision of certain basic postal services for at least five working days a week from a sufficient number of contact points within a national territory that takes into account the needs of users. Elements of the universal service must also meet specified quality targets and be available at affordable prices. Within these boundaries, the Member States have flexibility over what exactly constitutes a universal service to fit their domestic circumstances.

In addition, the VAT Committee almost unanimously agreed that the exemption provided for in Article 132(1)(a) of the VAT Directive should not apply to the supply by a universal service provider of postal services, and the supply of goods incidental thereto, which are dissociable from the service of public interest, including services which meet the special

⁷ Judgment of 21 April 2015, *Commission v Kingdom of Sweden*, C-114/14, EU:C:2015:249 paragraph 33.

needs of a specific customer or customers, as such supplies are not provided in the public interest, as required by the VAT Directive.

In any case, the supply by a universal service provider of postal services or goods incidental thereto, for which the terms have been individually negotiated, is regarded as meeting the special needs of the customer(s) concerned. It should therefore be excluded from the scope of the exemption provided for in Article 132(1)(a) of the VAT Directive.

2.3. More clarity required

Although this first step towards clarification was welcomed by the Member States, many postal operators argue that the proposed solution remains unclear. It is considered, in particular, that in applying the VAT exemption for postal services, Member States do not comply with the principles arising from the case law of the CJEU. This is rather an issue of compliance, and thus out of scope of the VAT Committee competence.

Moreover, it is argued that the VAT exemption in the postal sector could hinder the development of fair competition in the postal market. As the scope of the universal service is determined at national level, the application of the exemption across Member States can vary significantly. The same is true for the application of VAT to public and private postal operators. This may result in a breach of the fiscal neutrality principle; in addition, it may create distortions and inefficiencies in the postal sector and become a barrier to entry for private operators. Thus, the Commission has been called upon to consider a reduction of the scope of the universal postal service (for example to cover only over the counter standard letter and parcel mail for private consumers) as a means to reduce the range of services that could be eligible for exemption under Article 132(1)(a) of the VAT Directive⁸.

Accordingly, the purpose of this document is to seek to determine in more detail:

- which postal operators are exempted; and
- which postal services are exempted from VAT.

3. THE COMMISSION SERVICES' OPINION

At the outset, it should be recalled that the terms used to specify an exemption such as that set out in Article 132(1)(a) of the VAT Directive must be interpreted strictly, since this provision constitutes an exception to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. At the same time, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. The strict interpretation must not have as a consequence to deprive the exemptions of their intended effect⁹.

⁸ See e.g. 'FFPI contribution to the consultation on the ERGP report on the implementation of the Universal Service in the postal sector in view of the market developments' on <http://www.freefairpost.com/ffpi-contribution-to-the-consultation-on-the-ergp-report-on-the-implementation-of-the-universal-service-in-the-postal-sector-in-view-of-the-market-developments/>.

⁹ See paragraph 31 of the TNT ruling and the case law cited therein.

It should also be noted that the objective of the VAT exemption for postal services is to encourage certain activities in the public interest, as also evidenced from the title of the Chapter of the VAT Directive containing Article 132(1)(a). In the area of the postal sector, this takes the form of the more specific objective of offering postal services that meet the essential needs of the population at a reduced cost. According to the CJEU, this objective matches in essence the objective pursued by the Third Postal Directive, which is to offer a universal postal service. Consequently, the Third Postal Directive, although it cannot be used as a basis for the interpretation of Article 132(1)(a) of the VAT Directive, because its legal basis is different, constitutes a useful point of reference for the purposes of interpreting the term “public postal services” within the meaning of that provision¹⁰.

Before considering the main postal services targeted, the two conditions for the particular VAT exemption to apply will be examined hereafter.

3.1. Postal operators covered by the exemption

The first condition for the exemption is that the supply must be made by “public postal services”.

According to the VAT Committee guidelines, to fall under the definition of a “public postal service”, the postal operator must have undertaken the obligation to provide a universal postal service, that is to “supply postal services under a specific legal regime provided for pursuant to Article 3 of Directive 97/67/EC, as amended by Directives 2002/39/EC and 2008/6/EC, which is substantially different to that under which other postal operators provide such services”.

The CJEU refers to the organic sense of the expression “public postal services”, interpreting the wording of the provision as relating to the actual organisations which engage in the supply of the services to be exempted. According to the CJEU, a postal operator, which has the status of a universal service provider, “supplies postal services under a *legal regime which is substantially different*” to that under which other postal operators provide such services¹¹.

What renders the legal regime substantially different is the universal service obligations as laid down in Article 3 of the Third Postal Directive¹². According to the CJEU, it is these obligations imposed upon a universal service provider by a Member State that distinguish it from any other operator that does not need to comply with such obligations. It should be noted, however, that the public service obligations “concern only the postal services supplied in its capacity as the universal service provider”¹³.

In the past, the application of Article 132(1)(a) of the VAT Directive had in principle been limited to the incumbent postal operator, which used to be responsible for delivering postal services to all and in the public interest. All other postal operators had been required to charge VAT on their postal supplies. This uneven situation was justified until the full

¹⁰ See the TNT ruling, paragraphs 34 and 36.

¹¹ See the TNT ruling, paragraph 39.

¹² See the TNT ruling, paragraphs 39 and 40.

¹³ See the TNT ruling, paragraphs 44 and 45.

opening of the market that resulted in the abolition of the possibility for Member States to grant exclusive or special rights to public monopolies in the postal sector¹⁴.

Under the Third Postal Directive, Member States are still obliged to ensure that the provision of universal service is guaranteed. However, they are not required to designate one or more universal service providers, as was previously the case¹⁵.

It is unclear from the TNT ruling whether a Member State relying on market forces to ensure universal service being provided is nevertheless obliged to provide VAT exemption for the “supply by the public postal services” and, if so, which postal operators would be covered.

The TNT ruling is based on the legal situation in the UK under which a postal service operator may be obliged by administrative decision to provide the entirety of universal postal services. However, where there is no legal provision, according to which an operator is or may be obliged to supply all or part of the universal postal service in a Member State¹⁶, the operator providing a universal postal service is bound by its own commitment to ensure that service. The question is whether in this case, the operator can be considered to be a “public postal service”.

Even though the operator providing a universal postal service is bound by its own commitment to ensure that service, insofar as it commits to offer, at all points throughout the territory of a Member State, a universal postal service, it may also do so under a licence issued by the competent authorities of the Member State in question. In any case, the performance of the service at issue should be subject to State control, given the obligation of Member States to ensure that the provision of the universal service is guaranteed¹⁷.

According to the Third Postal Directive, a universal service provider is the public or private postal service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with the terms provided for by that Directive. Article 4 of this Directive stipulates the obligation of the Member States to notify the Commission of the identity of the universal service provider(s) they designate. This notification obligation is valid for any licensee providing a universal postal service in a Member State, notwithstanding the manner in which they have been designated.

The notification obligation seems to be valid also for universal service providers that have not been designated by a Member State. This would be the case for operators which have committed to ensure a part or the entirety of the universal postal service in a Member State. This conclusion can be derived from the very definition of the universal service provider in the Third Postal Directive: “*the public or private postal service provider providing a universal postal service or parts thereof within a Member State, **the identity***”

¹⁴ See Article 7(1) of the Third Postal Directive.

¹⁵ See recital 23 in the preamble of the Third Postal Directive.

¹⁶ This seems to be the case in Germany, with the exception of market failure i.e. where the universal postal service is not sufficiently or appropriately provided, certain licensees can be subjected to certain obligations.

¹⁷ Article 4(1) of the Third Postal Directive.

of which has been notified to the Commission in accordance with Article 4". It follows that even where formal designation has not taken place, Member States are obliged to notify the universal service provider(s) in their territory.

It may be concluded from the above that the operator(s) providing all or part of the universal postal service in a Member State should qualify as a public service provider within the meaning of Article 132(1)(a) of the VAT Directive irrespective of whether they have been designated by administrative decision or they have committed themselves to ensure that service. In both cases, such operators are considered to be subject to a special legal regime entailing specific obligations.

3.2. Postal services exempted from VAT

The second condition for the exemption relates to the postal services themselves.

It follows from the TNT ruling that the exemption does not apply to *all* postal services supplied by the "public postal services", but only to services supplied by the "public postal services" acting as such. As regards the criteria to identify the exempted postal services, the CJEU states that it follows in particular from the nature of the objective pursued by Article 132(1)(a) of the VAT Directive, which is to "encourage an activity in the public interest, that the exemption is not to apply to specific services dissociable from the service in the public interest, including services which meet special needs of economic operators"¹⁸. Thus, the exemption is and cannot be applied to specific services dissociable from the service in the public interest for which the terms have been individually negotiated.

3.2.1. Supply by the public postal services acting as such

The question arises as to what is exactly meant by the terms "supply by the public postal services acting as such". The CJEU has not taken over the wording used by the Advocate-General in her conclusions, that is "the universal services provided in the public interest".

There seem to be divergent views on the subject.

The VAT Committee was of the almost unanimous opinion that the exemption provided for in Article 132(1)(a) of the VAT Directive for the "public postal services" must be limited to the services falling under the "universal service" as provided for in Article 3 of Directive 97/67/EC, as amended by Directives 2002/39/EC and 2008/6/EC.

There is flexibility in the services that can be provided under the universal service obligation. The universal service must however include, as a minimum, one clearance and one delivery to the home or premises of every natural or legal person or, by way of derogation, to appropriate installations, for at least five working days a week¹⁹. It must consist of the following minimum services both domestic and cross-border:

- the clearance, sorting, transport, and distribution of postal items weighing up to 2 kilograms and postal packages up to 10 (maximum 20) kilograms;

¹⁸ Paragraph 46 of the TNT ruling.

¹⁹ Article 3(3) of the Third Postal Directive.

- services for registered items and insured items in both categories²⁰.

Postal item is an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, postal items also include for instance books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value²¹.

The universal service provider shall provide these services at “affordable”, “cost-oriented”, “transparent and non-discriminatory” prices²². Given the flexibility, there is significant variation in how Member States define the universal service obligation and the services included under the universal service obligation have changed over time. All Member States however include single piece letters and parcels in the universal postal service.

Within these bounds, Member States have discretion to define one or more categories of postal services as universal service. For example, one Member State may consider that it is sufficient to ensure nationwide provision of postal services designed for single piece documents and over-the-counter parcels because all mailers can communicate with all citizens using such services. Another Member State may consider that it also needs to ensure the nationwide provision of specialised services for documents and parcels sent in bulk.

The CJEU has clarified what is meant by the concept of universal service in its case law. Under Article 3(1) of the Third Postal Directive, a universal service involves the permanent provision of a postal service of specified quality at all points in the territory of a Member State at affordable prices for all users. Thus, the notion of universal service does not include specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service. Such services would include collection from the senders’ address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit²³.

The CJEU has recently ruled that a postal items service 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 users²⁴.

It has to be said that in the TNT ruling, the CJEU did not link the VAT exemption to universal services but rather to services provided by the universal service provider “in its capacity as such”. By the use of this wording, the CJEU wanted to exclude from the benefit of the exemption “transactions which bear no relation to postal services, such as, for instance, the sale of stationery or giftware in post offices”²⁵.

²⁰ Article 3(4) and (5) of the Third Postal Directive.

²¹ Article 2 of the Third Postal Directive.

²² Article 12 of the Third Postal Directive.

²³ Judgment of 19 May 1993, *Corbeau*, C-320/91, EU:C:1993:198 paragraph 19.

²⁴ Judgment of 15 June 2017, *Ilves Jakelu*, C-368/15, EU:C:2017:462, paragraph 20.

²⁵ See opinion of Advocate-General Kokott in the TNT ruling, EU:C:2009:7, paragraph 71.

A narrow interpretation of the services exempted could be seen by some to facilitate greater harmonisation of the exemption of postal services under Article 132(1)(a) of the VAT Directive. Indeed, the definition of the services that are part of the universal service varies significantly from one country to another. The reduction of the scope of the universal service in the postal sector that would be eligible for the exemption could align the application of the exemption in the Member States. Nevertheless, such issues are rather of regulatory nature (they would require a modification of the definitions provided for in the Third Postal Directive) and thus the VAT Committee would not be the appropriate forum to address them.

3.2.2. Supply whose terms have been individually negotiated

In the TNT ruling, the CJEU also held that the VAT exemption does not apply to supplies of services or of goods incidental thereto for which the terms have been individually negotiated. In its guidelines, the VAT Committee only reached an agreement on the terminology that is used in the TNT ruling.

In her conclusions, Advocate-General Kokott explained that a universal service does not exist merely when it is provided by means of the infrastructure of a universal service provider but that it must also be made available in accordance with the standardised terms and tariffs in force for the general public. Only then can it be regarded as a service which public postal services as such provide and which benefits the public interest in a particular way.

Contracts freely negotiated with customers individually are not provided by a provider acting as a *public* postal service, even when they are provided by means of the infrastructure of the universal service provider, since a service rendered on those terms is not available to every user in the same way, but only to users with particular purchasing power.

This is instead the case when the service is subject to price and regulatory control, as under the public service obligation.

“Price control” refers to services for which there is a regulatory requirement to offer them at a public tariff that is uniform throughout the State, and also to those which are subject to price control in the interests of the public. The latter includes services that are subject to a price cap, a set minimum price or a marginal control. Price control does not include services where there is no obligation upon the provider to supply at a uniform tariff. Nor does it include services where the price is indirectly constrained as a result of commercial competition.

“Regulatory control” underpins the concept of public postal services and refers to those services that “public postal services” are obligated to provide under the regulatory conditions imposed in relation to a universal service obligation.

According to the CJEU, the status of the client has no impact on the exemption.

3.2.3. *Main postal services*

The main postal services that may be the object of a universal postal service obligation are clearance, sorting, transport, distribution, services for registered items and services for insured items. Not all of them are defined in the Third Postal Directive. Definitions are provided for:

Clearance: the operation of collecting postal items by a postal service provider;

Distribution: the process from sorting at the distribution centre to delivery of postal items to their addressees;

Services for registered items: a service providing a flat-rate guarantee against risks of loss, theft or damage and supplying the sender, where appropriate upon request, with proof of the handing in of the postal item and/or of its delivery to the addressee; and

Services for insured items: a service insuring the postal item up to the value declared by the sender in the event of loss, theft or damage.

As already mentioned, under the Third Postal Directive, **postal items** include: items of correspondence²⁶, books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value.

On the other hand, postal services that in principle cannot be the object of a universal postal service obligation include express services, bulk mail and other.

Although not explicitly defined in that Directive, the term “express service” refers to a value-added service, where the extra value may take different forms and is reflected in a higher price than that charged for basic letter post service. As the Commission services have noted, “express and courier services constitute specific services that are characterised by being essentially different from universal postal services”²⁷. The CJEU has made clear that “express postal services are distinguished from the universal postal 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 special needs of economic operators and which call for certain additional services not offered by the traditional postal service.”²⁸.

The term “bulk mail service” could be understood as a synonym for direct mail. In a wider sense, it could, in general, include within its scope business mail, which is posted in large volumes by a sender but contains individual communications such as, for instance, invoices from a telecommunications undertaking or account statements sent out by banks.

No matter how the term may be understood, the exemption cannot apply where such items are carried at individually negotiated prices. Even insofar as a generally applicable postal

²⁶ Under Article 2(7) of the Third Postal Directive, an item of correspondence is a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals are not regarded as items of correspondence.

²⁷ See Working paper No 643.

²⁸ See *Ilves Jakelu*, paragraph 24.

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 public postal network.

Nevertheless, private individuals also benefit from that indirectly. 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 is not entitled to deduct input VAT, like, for example, a bank, the VAT levied on the postage will ultimately affect the price charged to its customers.

Finally, in the case of business mail that contains an individual communication and is carried at general tariffs, it is difficult to determine as from what quantity of posted items it should be regarded as a non-exempt bulk posting. Should that start at as low as 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? Given the difficulty in drawing a line, such postal items should not be treated differently from individually posted items with individual contents.

The VAT treatment of access services remains controversial. In the UK, the Administrative Court has held that the UK legislator had correctly included the supply of regulated access services within the exemption (the obligation of Royal Mail to grant access to its delivery network was only imposed on Royal Mail because it was the universal service provider)²⁹. The UK judge noted that “*the guiding principle in the end identified by the Court of Justice [in the TNT judgment] was far from obvious*”. He considered that the relevant UK legislation did not include access service in the universal service obligation for a technical reason but, given the nature and purpose of the access service, it could have been included. Opposing views have been voiced. It is questionable whether it is indeed in the interest of a substantial part of the users that these services are VAT exempted because in such case they are not able to deduct input VAT. On the other hand, such exemption may result in lower prices to the extent that a substantial part of these carries no VAT burden.

Given that the Third Postal Directive leaves it to Member States to delineate the scope of the universal service in their respective territories, it is clear that, consistently with EU law, a particular service may be exempted in one Member State but not in another.

3.3. Conclusion

In view of the above, the answer to the queries which have been explored by this document would be as follows:

- (a) Which postal operators are exempted?

The exemption of Article 132(1)(a) of the VAT Directive would cover any postal operator that qualifies as a universal postal service provider, that is the public or private postal

²⁹ Decision of the High Court of Justice of England and Wales of 23 October 2014 in the dispute between Royal Mail and Whistl (formerly TNT Post UK), R (Whistl UK Ltd (Formerly TNT)) v HMRC and Royal Mail [2014] EWHC 3480 (Admin), available on <http://www.bailii.org/ew/cases/EWHC/Admin/2014/3480.html>.

service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with the terms provided for by the Third Postal Directive, notwithstanding the manner in which it was designated.

(b) Which postal services are exempted from VAT?

The exemption covers only services supplied by the “public postal services” acting as such. Hence, these services must be limited to the services falling under the “universal service” as provided for in the Third Postal Directive. The universal service must include, as a minimum, one clearance and one delivery to the home or premises of every natural or legal person or, by way of derogation, to appropriate installations, for at least five working days a week. Such a service must consist of the following minimum services, both domestic and cross-border:

- the clearance, sorting, transport, and distribution of postal items weighing up to 2 kilograms and postal packages up to 10 (maximum 20) kilograms;
- services for registered items and insured items in both categories.

The definition of universal service provides for a minimum of service, leaving wide discretion to the Member States to include in the universal service a range of postal services. This has clearly been the intention of the EU regulator. It is only the EU regulator that is competent to modify the definitions of the Third Postal Directive. Such an exercise is out of the competence of the VAT Committee.

Specific services dissociable from the service in the public interest for which the terms have been individually negotiated cannot be exempted.

4. DELEGATIONS' OPINION

The delegations are requested to give their opinion on the issues raised.

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