Neutral Citation Number: [2024] EWCA Civ 177

Case No: CA-2022-002498

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MRS JUSTICE BACON AND JUDGE JONATHAN CANNAN
[2022] UKUT 00267

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE GREEN
and
LADY JUSTICE FALK

- -

Between:

NORTHUMBRIA HEALTHCARE NHS FOUNDATION TRUST	**Appellant**
- and –	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth for the **Appellant**
Howard Watkinson (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondents**

Hearing dates: 6 and 7 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 27 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns charges levied for car parking at sites operated by NHS foundation trusts. One component of car parking charges is VAT. HMRC's position is that, where foundation trusts choose to levy charges to park at their sites, they must charge VAT at the standard rate of 20%.

2. The Appellant in this appeal is Northumbria Healthcare NHS Foundation Trust (the "Trust"). In May 2017 it decided to challenge HMRC's view that VAT is chargeable and made a claim for the repayment of the output tax that it said it had wrongly accounted for over a three year period between 2013 and 2016. HMRC refused the claim and the Trust appealed. In the First-tier Tribunal ("FTT"), Judge Greg Sinfield dismissed the Trust's appeal: [2021] UKFTT 71 (TC) (the "FTT Decision"). The Trust's further appeal to the Upper Tribunal ("UT"), heard by Bacon J and Judge Jonathan Cannan, also failed: [2022] UKUT 267 (TCC) (the "UT Decision"). The Trust now appeals to this court with the UT's permission.

3. The VAT at stake in this appeal is relatively limited, but around 50 similar appeals by other NHS bodies are stayed behind it. The total tax at stake for past periods is in the region of £70m.

4. I should make three preliminary points. First, it is apparent from the evidence before the FTT, and indeed is common knowledge, that the topic of hospital car parking charges is one that has engendered strong views and controversy. I should make clear at the outset that we are not concerned with the merits of that debate.

5. Secondly, the Trust's claim to recover VAT does not extend to revenue generated in situations where the management of car parking was outsourced to a third party operator. As noted at para. 32 of the FTT Decision, we are concerned only with situations where the Trust operates car parks itself. We express no view about the impact that subcontracting arrangements might have on the analysis.

6. Thirdly, although I will refer for convenience to hospital car parking, the dispute extends to charges for parking at other healthcare facilities operated by the Trust. It was not suggested that there are any material differences between the Trust's sites for present purposes. However, in so far as it has more general application I should clarify that this decision relates to parking related to healthcare facilities, rather than parking on any other land owned by a foundation trust which it might choose to make available for parking by the general public.

7. We heard submissions from Michael Firth for the Trust and Howard Watkinson for HMRC. We are grateful for their work, and that of those instructing them, on the issues.

The facts

8. The UT summarised the FTT's factual findings as follows (with references to paragraphs of the FTT Decision):

> "6. Under the Trust's constitution, the principal purpose of the Trust is to provide goods and services for the purpose of the health service in England, but the Trust may also carry on activities for the purpose of generating additional income in order to better carry on its principal purpose (§14).
>
> 7. The Trust is required by its stakeholders and relevant guidance to ensure that its sites and services are accessible at reasonable cost. That obligation includes the provision of parking for patients and visitors at a reasonable price (§23). The area covered by the Trust is mostly rural, and availability of public transport can be limited or non-existent. Around 80% of visitors to the Trust's main hospital sites arrive by car (§11).
>
> 8. The Trust's parking facilities are mostly used by those accessing the hospital and healthcare facilities. The location of some of the Trust's sites means that they are unsuitable for parking and visiting somewhere else. Some of the sites are, however, able to be used by people for general purposes. As an example, one of the sites was used for unofficial airport parking, following which the Trust took steps to deter such users by changing its fees for parking at that site (§27).
>
> 9. The Trust provides free parking to certain hospital users, including cancer patients and those visiting patients that are in hospital for an extended period of time. The Trust's staff pay reduced rates for parking. Free parking is provided at particular local health centres for historic reasons, with the cost met from parking charges at other sites. Some sites make a loss on the provision of parking, but the Trust makes a small surplus at three of its four major sites, which is used to improve the provision of healthcare at the Trust (§§30–31).
>
> 10. The availability of alternative parking arrangements for the Trust's sites varies and is limited. Some sites have little or no alternative parking suitable for patients, staff or visitors as it would not be close enough to the hospital. Some sites based in towns such as Hexham, Blyth and Alnwick do have alternative parking facilities. The parking areas at those sites are limited and they are often fully utilised by those using the healthcare facilities, so would not be available to shoppers or commuters visiting the towns (§25).
>
> 11. The FTT also made findings of fact in relation to the contractual arrangements pursuant to which the Trust provided services to the Northumberland and North Tyneside clinical commissioning group and certain guidance issued by the Department of Health..."

9. I would elaborate on these points in the following respects.

10. At para. 24, the FTT found that car parking facilities were provided for staff, patients and visitors, and that:

> "The demand for parking spaces is such that the Trust must manage the access to and use of car parks, eg by adjusting visiting and shift times. I

> accept that the Trust would not operate as effectively if it did not manage parking efficiently."

11. The FTT also found that the provision of car parking was part of an integrated transport policy (para. 26).

12. As discussed below, the Trust placed heavy reliance on guidance issued by the Department of Health in 2015, entitled "NHS patient, visitor and staff car parking principles" (the "2015 Parking Principles"), and in particular statements in that guidance about concessions that should be made available. As well as making findings about this document the FTT also referred to the 2015 edition of the "Health Technical Memorandum 07-03" on "NHS car-parking management: environment and sustainability" (the "Health Technical Memorandum"), and to guidance on "Income Generation: Car Parking Charges – Best Practice for implementation" issued in December 2006 (the "2006 Car Parking Best Practice"). Both of these documents were also issued by the Department of Health.

The 2015 Parking Principles and other relevant guidance

The 2015 Parking Principles

13. The 2015 Parking Principles were issued in October 2015, replacing an earlier version issued in August 2014. They are in the following terms:

> "NHS organisations should work with their patients and staff, local authorities and public transport providers to make sure that users can get to the site (and park if necessary) as safely, conveniently and economically as possible.[1]
>
> Charges should be reasonable for the area.
>
> Concessions, including free or reduced charges or caps, should be available for the following groups:
> - disabled people[2]
> - frequent outpatient attenders
> - visitors with relatives who are gravely ill, or carers[3] of such people
> - visitors to relatives who have an extended stay in hospital, or carers[3] of such people
> - carers[3] of people in the above groups where appropriate
> - staff working shifts that mean public transport cannot be used.
>
> Other concessions, eg for volunteers or staff who car-share, should be considered locally.
>
> Priority for staff parking should be based on need, eg staff whose daily duties require them to travel by car.[4]
>
> Trusts should consider installing 'pay on exit' or similar schemes so that drivers pay only for the time that they have used. Additional charges should only be imposed where reasonable[5] and should be waived when overstaying

> is beyond the driver's control (eg when treatment takes longer than planned, or when staff are required to work beyond their scheduled shift).
>
> Details of charges, concessions and additional charges should be well publicised including at car park entrances, wherever payment is made and inside the hospital. They should also be included on the hospital website and on patient letters and forms, where appropriate.
>
> …"

14. As can be seen, there are a number of footnotes. The most relevant are footnotes 1 and 5:

> "1. Each site is different and very few will be able to provide spaces for everyone who needs one. Since 2010, national planning policy no longer imposes maximum parking standards on development, and no longer recommends the use of car parking charges as a demand management measure to discourage car use.
> …
> 5. 'Reasonable' implementation of additional charges practice might include additional charges for people who do not have legitimate reasons for parking (eg commuters), or who persistently flout parking regulations (eg blocking entrances). A period of grace should normally be applied before a parking charge notice is issued."

Other relevant guidance

15. Although the Trust's case rested on the application of the 2015 Parking Principles, other guidance considered by the FTT and UT provides relevant context and was used by the FTT to make some findings of fact.

16. The 2006 Car Parking Best Practice is a document that describes itself as providing "information and advice on operating commercial car parking schemes in the NHS as income generation activities". It states that it seeks to incorporate the recommendations of a July 2006 Health Select Committee report to the effect that trusts be advised to offer various concessions and to provide information about car parking charges to patients in advance of their treatment.

17. The 2006 Car Parking Best Practice refers at paras. 1 and 2 to "car parking shortages" and the need to consider how "misuse" of car parks (particularly if based near a town centre or motorway) for free or cheap parking will be avoided. Para. 3 states:

> "NHS bodies are allowed to charge for car parking and to raise revenue from it as an income generation activity as long as certain rules are followed. Income generation activities must not interfere to a significant degree with the provision of NHS core services. They must be profitable, as it would be unacceptable for monies provided for the benefit of NHS patients to be used to support commercial activities, and this profit must be used to improve health services."

18. In a chapter headed "Viability of the Scheme" the 2006 Car Parking Best Practice says this at para. 20:

> "NHS bodies should look at transport and car parking in a holistic way and determine a car parking structure accordingly, taking into account the different parking needs of staff, patients and visitors. For patients and visitors consideration will need to be given to healthcare needs and ability to pay."

Typical costs are listed and then:

> "How Much Should we Charge?
> 24. It must be remembered that you are in competition with both other means of transport and alternative car parking facilities. Hence attention should be given to:
>
> - the regularity of public transport and its charges;
> - other car parking charges in the area;
> - availability of free parking on nearby streets and roads;
> - your catchment area;
> - the need to cover costs;
> - the need to disincentivise non service users;
> - the need to make a profit to be used to improve health services."

19. The document goes on to refer to discounts for staff and then to variable charging for patients and visitors, stating at para. 26 that NHS bodies should be "sensitive in considering the position of those patients/visitors who have to use their car parks regularly".

20. The Health Technical Memorandum is a lengthy document that evidently replaced a 2006 version. The executive summary states that:

> "The purpose of this guidance is to help NHS organisations identify best practice in car-park management and sustainable transport in order to improve the patient and visitor experience and support staff on their journeys to and from work."

21. The summary also notes that it "contains a number of measures that have been used by NHS organisations to reduce the demand on parking and promote better use of car-parks on NHS sites". Paragraph 1 comments that "Car-parking has a large bearing on people's experience of the NHS and influences perceptions of local healthcare facilities" and that the parking principles introduced in 2014:

> "…provide clear and consistent ground rules that will help manage car-parking provision in the NHS and help to improve the patient experience across the NHS…"

22. Paragraph 3.5 states:

> "NHS sites that are close to city/town centres may need to ensure their car-parking charges are not lower than local car-parks otherwise commuters and

> visitors may be tempted to use their car-parks instead. It may be necessary to increase charges if this is occurring."

23. After giving guidance on tariffs, which NHS organisations are told should not be out of line with rates across other NHS sites in England, the document notes that:

> "3.7 NHS organisations should consider issuing parking charge notices only if all available solutions have been explored. Every effort should be made to contact the driver of the vehicle in question before a parking charge notice is issued. Where they are issued, each appeal received should be considered carefully and should be successful if there is a valid reason for the delay."

24. It is also worth noting para. 3.20, which notes that patients and visitors will most likely not be looking forward to coming to the hospital and that:

> "…it is important that NHS organisations ensure the journey is kept as straightforward as possible to avoid any unnecessary upset, anger and stress. Therefore, the car-parking layout should be assessed to ensure it will not cause difficulties for patients and visitors."

25. The document goes on to emphasise, among other things, ease of access and adequate signage to the main building, and the need to give specific consideration to disabled users, who are likely to represent a higher proportion of users at NHS sites than elsewhere (indeed, para. 5.60 expressly states that NHS organisations should increase the typical average percentage of capacity allocated to disabled bays). There is also this comment:

> "3.23 Car-park management plays a crucial part in the successful running of an NHS organisation. Without the appropriate car-park management, the patient and visitor experience will be poor. A contributory factor associated with missed appointments (known as Did Not Attends (DNAs)) is the difficulty of parking at a site. Analysing the current parking management set-up through surveys with staff and through site investigations will ensure that maximum car-park capacity can be achieved at all times and will reduce DNAs, as will identifying improvements for sustainable and public transport…"

26. Problems with parking capacity are also referred to in section 4:

> "4.1 Many NHS organisations suffer from crowded car-parks, with seemingly inadequate provision of spaces for all of the patients, visitors and staff who want to access the site.
> …
> 4.9 One of the issues that NHS organisations face with car-parking demand is at peak times of the day, which include visiting times, shift changeovers and associated overlap periods, and clinic start and finish times. During these times it can be significantly harder to find a parking space, causing potential congestion at the site. This can often result in patients missing appointments, which will affect the overall experience of their visit."

27. Paragraph 4.14 also states that car-park design should place patient and visitor parking "nearer to the point of use than staff parking", and observes at para. 4.15 that car-parking

provision "tends to be quite similar across NHS sites" and that "all NHS organisations would like additional parking", though it is "unlikely that this will occur".

The relevant VAT legislation

28. Whether VAT is chargeable on the provision of hospital car parking by the Trust during the relevant period turns on whether the Trust satisfied the requirements of Article 13(1) of Council Directive 2006/112/EC (the Principal VAT Directive, or "PVD"), as implemented by section 41A of the Value Added Tax Act 1994 ("VATA"). If it did then VAT is not chargeable.

29. Article 13 PVD contains a derogation from the general rule that supplies of goods and services by "taxable persons" (broadly, persons carrying out economic activities) are subject to VAT. It provides:

> "1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.
>
> 2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390b, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities."

30. Section 41A VATA, as in force for the relevant periods, provided:

> "**41A. Supply of goods or services by public bodies**
>
> (1) This section applies where goods or services are supplied by a body mentioned in Article 13(1) of the VAT Directive (status of public bodies as taxable persons) in the course of activities or transactions in which it is engaged as a public authority.
>
> (2) If the supply is in respect of an activity listed in Annex I to the VAT Directive (activities in respect of which public bodies are to be taxable persons), it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business unless it is on such a small scale as to be negligible.

(3) If the supply is not in respect of such an activity, it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business if (and only if) not charging VAT on the supply would lead to a significant distortion of competition.

(4) In this section 'the VAT Directive' means Council Directive 2006/112/EC on the common system of value added tax."

31. Section 41A was amended by the Taxation (Cross-border Trade) Act 2018 with effect from 31 December 2020. Although the amended version is not relevant to the determination of this appeal, it is worth setting it out for completeness. Subsection (2) of the current version is obviously intended to reflect the list contained in Annex I to the PVD. It is common ground in this appeal that none of the provisions of Annex I apply.

"41A Supply of goods or services by public bodies

(1) This section applies where goods or services are supplied by a public authority in the course of activities or transactions in which it is engaged as a public authority.

(2) Unless the supply is on such a small scale as to be negligible, it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business if it is in respect of any of the following activities—
(a) telecommunications services,
(b) supply of water, gas, electricity or thermal energy,
(c) transport of goods,
(d) port or airport services,
(e) passenger transport,
(f) supply of new goods manufactured for sale,
(g) engaging in transactions in respect of agricultural products in the exercise of regulatory functions,
(h) organisation of trade fairs or exhibitions,
(i) warehousing,
(j) activities of commercial publicity bodies,
(k) activities of travel agents,
(l) running of staff shops, cooperatives, industrial canteens, or similar institutions, or
(m) activities carried out by radio and television bodies which are of a commercial nature.

(3) If the supply is not in respect of such an activity, it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business if (and only if) not charging VAT on the supply would lead to a significant distortion of competition."

32. As can be seen from Article 13(1), public authorities are not regarded as taxable persons for VAT purposes if the transactions in question are ones in which they "engage as public authorities". However, this does not apply where that treatment "would lead to significant distortions of competition". It is common ground that, for the relevant period, Article 13(1) was appropriately implemented by s.41A, with the reference in s.41(3) to acting in

the course or furtherance of a business being synonymous for present purposes with whether the authority was treated as a taxable person.

33. HMRC accepts that the Trust is a body "governed by public law" for the purposes of Article 13(1) but says that (1) the Trust is not acting as a public authority and that, even if it were, (2) VAT would still be chargeable because there would otherwise be significant distortions of competition. As will be seen, the effect of the case law is that the first of these issues turns on whether car parking is provided under a "special legal regime".

34. In summary, the FTT agreed with HMRC on both issues (1) and (2). The UT reached the same conclusions, albeit that on issue (2) its conclusions were expressed with "some diffidence", given that the appeal had been dismissed on the basis that the Trust was not acting as a public authority.

The CJEU case law

35. Article 13, and its predecessor Article 4(5) of the Sixth Directive (Council Directive 77/388), have been the subject of relatively extensive consideration by the Court of Justice (the "CJEU"). Many of the principles established are at one level common ground between the parties, but there are significant differences as to their scope and practical application. It is therefore necessary to consider the case law in some detail.

36. The principal CJEU authorities that consider Article 13 or its predecessor are Joined Cases C-231/87 and C-129/88 *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* and *Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza v Comune di Rivergara* [1991] STC 205 ("*Carpaneto 1*"); Case C-4/89 *Comune di Carpaneto Piacentino v Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza* [1990] ECR 1-1869 ("*Carpaneto 2*"); Case C-446/98 *Fazenda Pública v Câmera Municipal do Porto* [2001] STC 560 ("*Fazenda*"); a line of cases brought by the Commission against Member States about motorway tolls which include Case C-276/97 *Commission v France* ECLI:EU:C:2000:424 ("*France (2000)*") and Case C-359/97 *Commission v UK* [2000] STC 777 (as well as cases against Ireland, the Netherlands and Greece); Case C-288/07 *HMRC v Isle of Wight Council* [2008] STC 2964 ("*Isle of Wight CJEU*"); Case C-554/07 *Commission v Ireland* [2009] ECR I-128 ("*Ireland (2009)*"); Case C-79/09 *Commission v Netherlands* EU:C:2010:171 ("*Netherlands (2010)*"); Case C-174/14 *Saudaçor - Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2016] STC 681 ("*Saudaçor*"); Case C-344/15 *National Roads Authority v Revenue Commissioners* ECLI:EU:C:2017:28 ("*National Roads Authority*"); Case C-665/16 *Minister Finansów v Gmina Wrocław* ECLI:EU:C:2018:431 ("*Gmina Wrocław 1*") and Case C-604/19 *Gmina Wrocław v Dyrektor Krajowej Informacji Skarbowej* ECLI:EU:C:2021:132 ("*Gmina Wrocław 2*").

37. We were also referred to Joined Cases C-259/10 and C-260/10 *Rank Group plc v HMRC* [2012] STC 23 ("*Rank*") and Case C-8/01 *Taksatorringen v Skatteministeriet* [2006] STC 1842 ("*Taksatorringen*"), which do not concern Article 13.

38. The domestic authorities on Article 13 are more limited. *Isle of Wight CJEU* resulted in further litigation, including an appeal to this court: *Isle of Wight Council v HMRC* [2015] EWCA Civ 1303, [2016] STC 2152 ("*Isle of Wight CA*"). Apart from those proceedings, the most recent consideration of Article 13 in the UT has been *HMRC v Chelmsford City Council* [2022] UKUT 149 (TCC), [2022] STC 1076 ("*Chelmsford CC*").

39. By way of overview (and without exhaustive case references), the principles established by the CJEU authorities are as follows:

    a) Insofar as it amounts to a derogation from the general rule that economic activities are subject to VAT, Article 13 must be interpreted strictly (*Saudaçor* at [49]).

    b) Article 13 must be given an autonomous and uniform interpretation, taking account of its context and objective (*Saudaçor* at [52] and [54]).

    Acting as a public authority

    c) In deciding whether a public authority is acting as such, the subject-matter and purpose of the activity is irrelevant (*Carpaneto 1* at [13]).

    d) Instead, what is determinative is the way in which the activities are carried on. The only criterion is the legal regime applicable under national law. The question is whether the public authority engages in the activities in question under the "special legal regime" applicable to it; in contrast, public authorities do not act as such where they act under the "same legal conditions" as those that apply to private traders (*Carpaneto 1* at [15]-[16]). This is the "special legal regime" issue already referred to. All relevant national law conditions must be considered (*Fazenda* at [21]).

    e) It is insufficient that the authority in question possesses public law powers if they do not have some impact on the activity (*Ireland (2009)*; *Saudaçor*).

    Significant distortion of competition

    f) The aim of the second subparagraph of Article 13(1) is to ensure that private operators are not placed at a disadvantage because they are taxed while public bodies are not (*Ireland (2009)* at [58]).

    g) The second subparagraph should not be construed narrowly (*Isle of Wight CJEU* at [60]).

    h) The question whether non-taxation "would lead to significant distortions of competition" must be evaluated by reference to the activity as such, without reference to any particular local market (*Isle of Wight CJEU* at [40] and [53]).

    i) That question encompasses both actual and potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical (*Isle of Wight CJEU* at [65]).

    j) Any distortion that is more than negligible is "significant" (*Isle of Wight CJEU* at [79]).

    k) The application of the second subparagraph of Article 13(1) requires an assessment of economic circumstances (*National Roads Authority* at [40] and [43]).

40. I will address the special legal regime and distortion of competition tests first, before returning to points a) and b) and a specific issue about the relevance or otherwise of a close link between the activities in question and the public authority's powers.

Acting as a public authority: the special legal regime test

41. The special legal regime test was first authoritatively stated in *Carpaneto 1*. The court referred to the twin conditions in the first paragraph of what was then Article 4(5) of the Sixth Directive (namely that the activity must be engaged in by a body governed by public law, and that it must be an activity they engage in "as" a public authority) and then explained that the meaning of the latter condition cannot depend on the subject-matter or purpose of the activity, in contrast to the carve-outs in Annex D (now Annex I to the PVD) and the VAT exemptions in Title X (now Title IX of the PVD, which includes Article 132), in the following terms:

> "12. As the Court held in its judgments of 11 July 1985 in Case 107/84 *Commission v Federal Republic of Germany* [1985] ECR 2663 and of 26 March 1987 in Case 235/*85 Commission v Kingdom of the Netherlands* [1987] ECR 1485, it is clear from that provision, when examined in the light of the aims of the directive, that two conditions must be fulfilled in order for the rule of treatment as a non-taxable person to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority.
>
> 13. A definition of the latter condition cannot be based, as has been argued, on the subject-matter or purpose of the activity engaged in by the public body since those factors have been taken into account by other provisions of the directive for other purposes.
>
> 14. The subject-matter or purpose of certain economic activities falling within the scope of VAT is a decisive factor, on the one hand, for the purpose of limiting the scope of the treatment of bodies subject to public law as non-taxable persons (third subparagraph of Article 4(5) of and Annex D to the Sixth Directive) and, on the other, for that of determining the exemptions referred to in Title X of the directive. Article 13(A)(1) of that title of the directive provides, inter alia, for exemptions in favour of certain activities carried out by bodies governed by public law or by other bodies regarded as social in nature by the Member State concerned by reason of their activities being in the public interest."

42. The CJEU went on to articulate the test that should be applied to determining whether bodies were engaged in activities "as public authorities", as follows:

> "15. An analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive shows that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting "as public authorities", it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law.
>
> 16. It follows that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities "as

> public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting "as public authorities". It is for the national court to classify the activity at issue in the light of that criterion."

43. This was reiterated in *Carpaneto 2* at [10] in substantially the same terms, and the language of "special legal regime" and "same legal conditions" has been picked up repeatedly in later cases.

44. In *France (2000)* the Commission argued that the provision of access to toll roads did not fall within the "core responsibilities" of a public authority, being ones that could not be delegated to a private operator, and thus could not fall within the derogation. The court rejected that argument. While providing access to roads on payment of a toll is an economic activity and is in principle a supply of services for consideration that falls within the scope of VAT (it being irrelevant whether the activity is regulated in the public interest), the Commission had not established that the service provider was operating under the same legal conditions as a private trader, whereas the French Republic had shown that a special legal regime applied. The court also observed that the exemption under Article 4(5) could not apply insofar as the activities were carried on by private traders, rather than bodies governed by public law. The same approach was adopted to a similar challenge in *Commission v UK*.

45. *Fazenda* is the first of the cases that concern car parking. The city council of Porto raised income from a variety of parking facilities, being meters on public highways, car parks on public property and car parks on private property owned either by the council or by private individuals who had made it available to the council. The Portuguese tax authorities sought to charge VAT on the council's receipts. The first question was whether the activity in question could, when engaged in by a body governed by public law, be regarded as being engaged in by that body as a public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive.

46. At [16]-[19] the CJEU repeated the formulation of the test to apply to determine whether a body was acting as a public authority set out in *Carpaneto 1* at [15]-[16] and the point that the test could not depend on the subject-matter and purpose of the activity, before going on to say at [20] that, similarly, whether the council owned the land in question and whether the land was public or private property was "not in itself determinative". It then said:

> "21. The national court must, in accordance with the case-law referred to in paragraphs 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators.
>
> 22. The fact that the pursuit of an activity such as that at issue in the main proceedings involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime."

47. The court's conclusion on the first question was as follows:

> "24. The answer to the first question must therefore be that the letting of spaces for the parking of vehicles is an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive if it is carried on under a special legal regime applicable to bodies governed by public law. That is the case where the pursuit of the activity involves the use of public powers."

48. I agree with Mr Firth's submission that the court's conclusion that a body will be subject to a special legal regime if the pursuit of the activity "involves the use of public powers" was not intended to be an exhaustive statement of the circumstances when a public authority may be treated as acting as such. Rather, it addressed the facts of the case, and in particular the point that part of the activity was carried out on private property. The court concluded that the special legal regime test would nonetheless be met because of the public nature of the powers used, such as the power to issues fines. The court was not saying that the test could not be met in other circumstances. This conclusion is supported in my view by the court's further reference to this point in *Saudaçor* at [70], referred to below at [92], and in *Gmina Wrocław 2* at [79]. I note that the UT expressed a similar view in *Chelmsford CC* and in this case at para. 34. As Mr Firth pointed out, *Netherlands (2010)* also provides a good illustration of the point: see below.

49. *Ireland (2009)* was a challenge brought by the Commission to Ireland's failure correctly to transpose Article 13 into domestic law. The specific subject-matter included off-street car parking, but was not confined to it. (By this stage the court had considered car parking both in *Fazenda* and in *Isle of Wight CJEU*, discussed below.)

50. The effect of the domestic legislation was that there was no provision requiring Irish local authorities to be regarded as taxable persons when they engaged in economic activities otherwise than as public authorities. The Irish government contended that all activities engaged in by local authorities in Ireland were undertaken pursuant to powers conferred under a specific statutory regime. The CJEU disagreed, holding that in failing to enact such a provision into national law, Ireland could not secure the correct application of the Directive and (at [49]) that:

> "… the mere fact that a body governed by public law acts within the framework of a special legal regime and in accordance with powers conferred upon it by statute does not mean that engaging in its activities necessarily involves the exercise of rights and powers of public authority."

51. In *Netherlands (2010)* the Commission unsuccessfully challenged a VAT exemption granted under Dutch law in respect of the supply of staff by public bodies to "Euroregions" in connection with the promotion of occupational mobility. On the issue of whether the bodies in question were acting as public authorities, the CJEU put the test in the following manner:

> "82. According to the case-law on the first subparagraph of Article 4(5) of the Sixth Directive, whose content correspond to that of the first subparagraph of Article 13(1) of Directive 2006/112, those provisions envisage the situation in which bodies governed by public law engage, as

> entities subject to public law, under the special regime applicable to them, in activities or transactions which may also be engaged in, in competition with them, by private individuals under a regime governed by private law or on the basis of administrative concessions. On the other hand, when those bodies governed by public law act under the same legal conditions as those that apply to private traders, they cannot be regarded as engaging in those activities or transactions 'as public authorities'…"

52. After observing that the Commission had not sought to apply the case law to the facts, it went on:

> "84. The fact, briefly alluded to by the Commission, that there are a large number of private operators in Europe, such as placement agencies, which supply staff under private law rules, is irrelevant in that respect. Indeed, that fact does not in the slightest demonstrate that the supply of staff to Euroregions or in the context of promoting occupational mobility referred to by the 2007 decree is engaged in by the bodies governed by public law at issue under the same legal conditions as those that apply to private traders rather than under the special legal regime applicable to them, and at the very most confirms that the activities engaged in by those bodies 'as public authorities' may be engaged in in competition with private individuals operating under a regime governed by private law."

53. The court referred to the Netherlands' detailed analysis and observed:

> "86. In particular, that Member State emphasised that under the 2007 decree, as its wording shows, those supplies of staff are subject to specific conditions that do not apply to individuals and are intended, as regards the promotion of occupational mobility, to ensure that only supplies whose purpose is to enable an official to acquire knowledge and experience at a different public body can benefit from not being subject to VAT.
>
> 87. The Kingdom of the Netherlands has also explained that the supply of staff to Euroregions was not intended to meet a staffing requirement, but was purely an important means whereby the participating municipalities and provinces could cooperate within Euroregions and contribute to performing the public duties entrusted to those Euroregions."

54. *Saudaçor* concerned a company of that name established by the Azores regional government to provide planning and management services to its health service. Article 10 of the legislative decree under which Saudaçor was created provided that it held the same public law powers as the regional government, which included a power to expropriate. The tax authorities sought to charge VAT on its supplies.

55. The CJEU held that a body in Saudaçor's position did conduct economic activities. Turning to Article 13(1), it considered whether such an entity could be regarded as a body governed by public law. At [57]-[58] the court explained that, while that status was not achieved merely because the acts in question fell within powers conferred by public law:

> "Nevertheless, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law."

56. The court concluded at [68] that it could not be ruled out that such a body could be classified as a body governed by public law. However, it could not be treated as carrying out activities "as" a public authority if the powers conferred under Article 10:

> "… did not amount to an instrument that could be used by Saudaçor in order to carry out the activities at issue in the main proceedings, namely the activities concerning the planning and management of the regional health service, the liability of which to VAT is disputed, since they are used for carrying out other activities." (*Saudaçor* at [72].)

57. Thus, as in *Ireland (2009)*, the mere possession of public law powers will not have the effect that the requirement to act "as" a public authority is met.

Significant distortions of competition

58. The second subparagraph of what is now Article 13(1) PVD first received detailed consideration by the Court of Justice in *Isle of Wight CJEU*. Following *Fazenda* a significant number of local authorities sought to recover VAT that they had accounted for on the provision of off-street car parking. There was a test case involving the Isle of Wight Council and three other local authorities. Initially the VAT Tribunal allowed their claims, but the High Court referred the matter for a preliminary ruling on certain issues relating to the meaning of the phrase "would lead to significant distortions of competition".

59. The first question was essentially whether the expression "distortions of competition" should be ascertained on a local basis or by reference to the totality of the Member State's territory. The local authorities argued that the question whether there would be distortions of competition should be ascertained on a public body by public body basis by reference to the area in question, whereas the UK government submitted that the most sensible approach was to take account of the entire national market rather than each local market. The court also received other submissions, including a submission from the Italian government that competition law principles should be applied, noting that there could not be any conceivable competition between parking facilities offered by different towns (a point also reflected in the local authorities' submissions). The Commission argued that the position fell to be determined in the abstract, having regard to the activity as such and without reference to local conditions.

60. The CJEU observed at [25] that, in the absence of guidance in the text, it was necessary "to take into account the scheme and purpose of the Sixth Directive, as well as the place of Article 4(5) in the common system of VAT established by it". It referred at [26]-[29] to the general rule that supplies of services for consideration are subject to VAT and the "very wide scope" given to VAT, provided the activities in question were of an economic nature. It went on:

"30. It is only by way of derogation from that general rule that certain activities of an economic nature are not to be subjected to VAT. Such derogation is laid down by the first subparagraph of art 4(5) of the Sixth Directive, under which activities engaged in by a body governed by public law acting as a public authority are not to be subject to VAT.

31. That derogation covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority. In those circumstances, the fact that such bodies are not subject to VAT on those activities does not potentially have an anti-competitive effect, inasmuch as they are generally engaged in exclusively, or almost exclusively, by the public sector.

32. However, even where those bodies carry on such activities in their capacity as public authorities, they are to be considered taxable persons, under the second and third subparagraphs of art 4(5) of the Sixth Directive, where their treatment as non-taxable persons would lead to significant distortions of competition or again if those activities, provided they are not carried out on such a small scale as to be negligible, are listed in Annex D to that directive.

33. A body governed by public law may, thus, be responsible, under national law, for carrying on certain activities of an essentially economic nature under the special legal regime applicable to them where those same activities can also be carried on in parallel by private operators, with the result that the treatment of that body as a non-taxable person may give rise to certain distortions of competition.

34. It is that undesirable result that the Community legislature sought to avoid by providing, in the third subparagraph of art 4(5) of the Sixth Directive, that the activities specifically listed in Annex D to that directive (telecommunications, the supply of water, gas, electricity and steam, the transport of goods, port and airport services and passenger transport, etc) are, 'in any event', unless they are negligible, to be subject to VAT, even when they are carried on by bodies governed by public law acting as public authorities.

35. In other words, the treatment of bodies governed by public law as non-taxable persons in respect of those activities is, unless such activities are negligible, presumed to lead to distortions of competition. It is thus clear from the wording of the third subparagraph of art 4(5) of the Sixth Directive that the treatment of those bodies as taxable persons results from the carrying-on, as such, of the activities listed in Annex D to that directive, irrespective of the question whether or not a particular body governed by public law faces competition at the level of the local market on which it carries on those same activities.

36. Furthermore, there may exist, on the national level, other activities of an essentially economic nature, not listed in Annex D to the Sixth Directive, the

> list of which may vary from one member state to another or from one economic sector to another, which are carried on in parallel both by bodies governed by public law in their capacity as public authorities and by private operators.
>
> 37. It is precisely to those activities that the second subparagraph of art 4(5) of the Sixth Directive applies, in providing that bodies governed by public law, even when they act as public authorities, are to be considered taxable persons where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> 38. The second and the third subparagraphs of art 4(5) of the Sixth Directive are, consequently, closely linked since they pursue the same objective, namely the treatment of bodies governed by public law as taxable persons, even when they are acting as public authorities. Those subparagraphs are thus subject to the same logic, by which the Community legislature intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons, so that the general rule stated in arts 2(1) and 4(1) and (2) of that directive, under which any activity of an economic nature is, in principle, to be subject to VAT, is observed.
>
> 39. Consequently, the second and third subparagraphs of art 4(5) of the Sixth Directive are to be interpreted as a whole.
>
> 40. It follows that the treatment of bodies governed by public law as taxable persons, either on the basis of the second subparagraph of art 4(5) of the Sixth Directive, or on that of the third subparagraph of that provision, results from the carrying-on, as such, of a given activity, irrespective of whether or not those bodies face competition at the level of the local market on which they engage in that activity."

61. In summary, therefore, the first subparagraph of what is now Article 13(1) contains a derogation from the general principle that VAT is chargeable. The second and third subparagraphs pursue the same objective of limiting the scope of the derogation, and must be interpreted as a whole. Therefore, the position must be assessed by reference to the activity in question, irrespective of whether there is competition in the local market. (I will return later to the reference at [31] to "closely linked to the exercise of rights and powers of public authority".)

62. The court then went on to explain at [41]-[43] that this conclusion was supported by general principles of Community law, specifically the principles of fiscal neutrality and legal certainty. Fiscal neutrality was a "fundamental principle of the common system of VAT" which "precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned". The second subparagraph was intended to ensure compliance with that principle. The court referred to Case C-430/04 *Finanzamt Eisleben v Feuerbestattungsverein Halle eV* [2006] STC 2043 at [24], where the principle was summarised as one "which precludes, in particular, treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes". It then said:

> "44. Whilst it is true that the Sixth Directive provides for certain derogations which may interfere to some extent with the application of the principle of fiscal neutrality, like the derogation under the second subparagraph of art 4(5) of the Sixth Directive…, since that provision permits the treatment of bodies governed by public law as non-taxable persons provided that such treatment would only distort competition insignificantly, the fact remains that that derogation must be interpreted in such a way that the least possible damage is done to that principle."

63. The court observed that the local authorities' argument would result in only some local authorities being taxable, despite the supplies of services in question being substantially the same. In contrast:

> "46. …if those distortions are analysed by reference to the activity as such, irrespective of the conditions of competition prevailing on a given local market, compliance with the principle of fiscal neutrality is ensured, given that all bodies governed by public law are either taxable or non-taxable persons, the sole strain on that principle concerning only relations between those bodies and private operators, and that to the extent that the distortions of competition remain insignificant."

64. Turning to legal certainty, namely the requirement that Community legislation "must be certain and its application reasonably foreseeable by those subject to it", a rule that "must be observed all the more strictly in the case of rules liable to entail financial consequences" ([47]), the difficulties involved in evaluating distortions of competition having regard to each local market, with its attendant difficulties including that local markets may not coincide with local authority areas and the potential for changes in those markets, would not provide the required certainty ([51]).

65. The court concluded on this issue in the following terms at [53]:

> "…[The] second subparagraph of art 4(5) of the Sixth Directive is to be interpreted as meaning that the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by private law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular."

66. The second question considered by the CJEU was whether the words "would lead to" in the second subparagraph encompassed only actual competition or extended to potential competition. The court observed at [60] that, because the first subparagraph was a derogation from the general rule that economic activity should be subject to VAT, it must be interpreted strictly. However, the second subparagraph "restores that general rule" and could not therefore be construed narrowly. The court went on to explain that the scope of the derogation would be unduly enlarged if the second subparagraph was confined to cases of distortion of actual competition, noting at [62] that treating public bodies as non-taxable is:

> "… liable, by itself, to discourage potential competitors from entering the market for the provision of off-street car-parking facilities."

67. The court concluded as follows:

> "63. It follows that the expression 'would lead to', for the purposes of the second subparagraph of art 4(5) of the Sixth Directive, encompasses not only actual competition, but also potential competition.
>
> 64. However, the purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, or by any objective evidence or by any analysis of the market, cannot be assimilated to the existence of potential competition. To make such an assimilation, that possibility must be real, and not purely hypothetical.
>
> 65. Consequently, the reply to the second question must be that the expression 'would lead to' is, for the purposes of the second subparagraph of art 4(5) of the Sixth Directive, to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical."

68. Finally, the court considered the meaning of "significant". Repeating some of its earlier comments about the second and third subparagraphs and noting a reference to "negligible" in the third subparagraph, it concluded at [79] that "significant" meant "more than negligible". In reaching that conclusion it referred again to the principle of fiscal neutrality:

> "77. … The argument put forward by the local authorities concerned that bodies governed by public law should be subjected to VAT only in cases where the distortions of competition resulting from their treatment as non-taxable persons are material, or even exceptional, would create a fiscal situation in which a significant number of private operators effecting the same transactions as those carried out by those bodies would be treated differently from them in respect of the levying of VAT, which would constitute a significant impairment of the principle of fiscal neutrality."

69. In contrast, a test based on negligibility would "bring about the least possible damage" to that principle ([80]).

70. The court returned to the second subparagraph of what was by then Article 13(1) PVD in *Ireland (2009)*. It repeated some of the observations made in *Isle of Wight CJEU* but also gave the following explanation at [58]:

> "…The situation is thus envisaged in which bodies governed by public law engage in activities which may also be engaged in, competitively, by private traders. The objective is to ensure that the latter are not put at a disadvantage because they are taxed while the former are not…"

71. *Netherlands (2010)* at [90] contains a similar reference to the aim being to ensure that "private operators are not placed at a disadvantage because they are taxed while [public] bodies are not". The court held that the Commission had failed to provide the information needed to establish a significant distortion of competition, whereas the Netherlands had

provided a reasoned explanation, including asserting that using private agencies to recruit staff was not viable.

72. *National Roads Authority* concerned a body established under Irish law (the "NRA") to manage the public road network. As well as entering into public-private partnerships to construct and operate toll roads the NRA operated two toll roads itself. The NRA challenged the application of VAT to its toll receipts. The revenue authorities argued that, in the light of *Isle of Wight CJEU*, a distortion of competition must be presumed to exist if activities of the same nature are carried out by private operators. It was not in dispute that the NRA was a public authority acting as such.

73. The referring tribunal had observed not only that toll roads in Ireland were too far apart to compete with each other but also that there was "no realistic possibility" of a private operator entering the market to compete with the two roads operated by the NRA (see at [24]-[27]).

74. Referring to *Netherlands (2010)*, the court repeated that the aim was to ensure that private operators are not placed at a disadvantage:

> "39. According to the Court's case-law on that provision, first, what is envisaged here is the situation in which bodies governed by public law engage in activities which may also be engaged in, in competition with them, by private economic operators. The aim is to ensure that those private operators are not placed at a disadvantage because they are taxed while those bodies are not..."

75. The court went on to explain in a bit more detail what was required to determine whether there would be a significant distortion of competition (citations omitted):

> "40. Secondly, that limitation of the rule that bodies governed by public law acting as public authorities are treated as non-taxable persons for VAT purposes is only a conditional limitation. Its application involves an assessment of economic circumstances…
>
> 41. Thirdly, the significant distortions of competition which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead to must be evaluated by reference to the activity in question, as such, without that evaluation relating to any particular market, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical…
>
> 42. The purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, any objective evidence or any analysis of the market, cannot be assimilated to the existence of potential competition…
>
> 43. As follows from the wording of the second subparagraph of Article 13(1) of the VAT Directive and from the case-law on that provision, its application presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly,

> that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances.
>
> 44. It follows that the mere presence of private operators on a market, without account being taken of matters of fact, objective evidence or an analysis of the market, cannot demonstrate the existence either of actual or potential competition or of a significant distortion of competition."

76. It is noteworthy that the court refers twice, at [40] and [43], to the need for an assessment of economic circumstances, as well as confirming that the assessment must be by reference to the activity in question rather than the local market, that it extends to potential competition and that a purely hypothetical possibility of a private operator entering the market must be excluded.

77. The court concluded that a body such as the NRA could not be regarded as being in actual or potential competition with private operators in circumstances where private operators could only enter the market if authorised by the NRA, the NRA retained ultimate responsibility for the provision of a safe and efficient road network and there was no real possibility of a private operator constructing a road that would compete with existing roads.

78. Mr Firth also relied on *Taksatorringen*. That case concerned both the insurance exemption and the cost-sharing exemption in what was then Article 13A(1)(f) of the Sixth Directive, which had a proviso limiting it to situations where "such exemption is not likely to produce distortion of competition". Taksatorringen was an association of insurance companies whose purpose was to assess damage to motor vehicles occurring within Denmark. Each member bore a share of its expenses. Taksatorringen challenged the denial of exemption to the supplies it made to its members. The court held that the insurance exemption did not apply but then considered the argument that reliance on the cost-sharing exemption was precluded by the proviso in any case where there was even a notional risk that an exemption may give rise to a distortion of competition.

79. The court's reasoning was as follows:

> "58. It is necessary at the outset to state that it is the VAT exemption in itself which must not be liable to give rise to distortions of competition on a market in which competition will in any event be affected by the presence of an operator which provides services for its members and which is prohibited from seeking profits. It is thus the fact that the provision of services by a group is exempt, and not the fact that this group satisfies the other conditions of the provision in question, which must be liable to give rise to distortions of competition in order that this exemption may be refused.
>
> 59. As the Advocate General has stressed in point 131 of his Opinion, if, irrespective of any taxation or exemption, the groups are assured of keeping their members' custom, there is no reason to take the view that it is the exemption granted them that closes the market to independent operators.
>
> 60. Moreover, it must be borne in mind that the aim of Article 13A of the Sixth Directive is to exempt from VAT certain activities which are in the

> public interest. That provision does not, however, provide exemption from the application of VAT for every activity performed in the public interest, but only for those activities which are listed and described in great detail in it…
>
> 61. It is, admittedly, true that it follows from the case-law cited in paragraph 36 of the present judgment that the terms used to designate the exemptions referred to in Article 13 of the Sixth Directive must be construed strictly.
>
> 62. It is, however, also no less true that it is not the purpose of that case-law to impose an interpretation which would make the exemptions set out in that provision more or less inapplicable in practice.
>
> 63. Consequently, although a comparative examination of the different language versions of Article 13A(1)(f) of the Sixth Directive shows that the expression 'provided that such exemption is not likely to produce distortion of competition' is not directed solely at distortions of competition which the exemption is likely to produce immediately but also at those to which it may give rise in the future, the risk that the exemption will by itself give rise to distortions of competition must none the less be real.
>
> 64. It follows that the grant of VAT exemption must be refused if there is a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition.
>
> 65. The answer to the second and third questions must therefore be that Article 13A(1)(f) of the Sixth Directive must be construed as meaning that the grant of VAT exemption under that provision to an association such as that in issue in the main proceedings and which satisfies all of the other conditions of that provision must be refused if there is a genuine risk that the exemption may by itself, immediately or in the future, give rise to distortions of competition."

80. What can be derived from this passage in *Taksatorringen* is as follows:

a) It must be non-taxation, rather than anything else, that must be liable to distort competition. That applies equally to the second subparagraph of Article 13(1): the question is whether treatment of the public authority as a non-taxable person would lead to significant distortions of competition.

b) A strict construction is required, but not one that would make exemptions "more or less inapplicable in practice". That also applies here: see below.

c) The language encompasses distortions that may arise in the future, but there must be a real or genuine risk. Again, that is consistent with the reference to a "purely hypothetical" rather than real possibility of a private operator entering the relevant market in *Isle of Wight CJEU*.

Strict interpretation and the principle of effectiveness

81. It is well established that, as a derogation from the general rule that economic activities are subject to VAT, the first subparagraph of Article 13(1) must be interpreted strictly: see for example *Saudaçor* at [49]. This is to be contrasted with the following subparagraph, which restores the general rule and accordingly should not be construed narrowly: *Isle of Wight CJEU* at [60].

82. However, applying a strict interpretation does not mean that the derogation should be deprived of effectiveness. As explained in *Saudaçor* at [49]-[50], while a strict approach is required:

> "… it is necessary to take into account the scheme and purpose of that directive, as well as the place of that provision in the common system of VAT established by it …"

83. In *National Roads Authority*, after repeating that the second subparagraph of Article 13(1) "aims to restore the general rule" that economic activities are subject to VAT, the court went on to say this at [37]:

> "However, that cannot mean that the second subparagraph of Article 13(1) of the VAT Directive should be interpreted in such a way that the derogation from treatment as a taxable person for VAT laid down in the first subparagraph of Article 13(1) of the directive for bodies governed by public law acting as public authorities is deprived of effectiveness (see, to that effect, judgment of 20 November 2003, *Taksatorringen*, C-8/01, EU:C:2003:621, paragraphs 61 and 62, and of 25 March 2010, *Commission v Netherlands*, C-79/09, not published, EU:C:2010:171, paragraph 49)."

84. The passage referred to in *Netherlands (2010)* is part of a discussion about the application of VAT exemptions contained in Article 132 of the PVD. As already discussed, *Taksatorringen* also concerned exemptions. The relevant paragraphs are set out at [79] above.

85. A similar approach can be seen in domestic case law, which has emphasised that "strict" does not mean "restricted". Rather, a "fair interpretation" must be applied. For example, in *HMRC v InsuranceWide.com Services* [2010] EWCA Civ 422, [2010] STC 1572, a case about the insurance exemption in Article 13B of the Sixth Directive, Etherton LJ said:

> "83. Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in *Card Protection* (see [1999] STC 270, [1999] 2 AC 601, para 24), this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at paragraph [17],

> the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them. I agree with his observation, in paragraph [17] of his judgment, that:
>
> > 'A 'strict' construction is not to be equated, in this context, with a restricted construction. The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected. But the court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.'"

Autonomous and purposive approach

86. As would be expected, Article 13 must also be given a uniform interpretation across Member States, taking account of its context and objective. This was made explicit in *Saudaçor* when the court was considering whether an entity such as Saudaçor could be treated as a body governed by public law:

> "52. In addition, the Court has also consistently held that it follows both from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the objective pursued by the legislation in question…
>
> 53. It must be noted that Article 13(1) of Directive 2006/112 makes no express reference to the law of the Member States.
>
> 54. It follows that the concepts referred to in that provision, including that of 'other bodies governed by public law', must be given an autonomous and uniform interpretation throughout the European Union."

87. Although the CJEU has considered the objective of the second subparagraph of Article 13(1) in some detail (see above), it has not clearly articulated the objective of the derogation contained in the first subparagraph. There is a comment in Advocate General Maduro's opinion in *Isle of Wight CJEU* at para.15 to the rationale for the derogation being:

> "… founded on the weak presumption that activities engaged in by public bodies as public authorities are activities of an essentially regulatory nature that are linked to the exercise of rights and powers of public authority. In those circumstances, the fact that the activities are not subject to VAT does not potentially have an anticompetitive effect vis-à-vis activities engaged in by the private sector, inasmuch as they are generally undertaken exclusively, or almost exclusively, by the public sector. Fiscal neutrality is thus observed."

This comment was not directly referred to by the court, but does find an echo in the reference to "closely linked to the exercise of rights and powers of public authority" in the CJEU's decision at [31], which is discussed further below. However, I do not find it of particular assistance in determining the objective of the derogation, as opposed to giving an indication of the sorts of things that may be covered.

88. The fact that the subject-matter and purpose of the particular activity is irrelevant in determining whether a public authority acts as such, and that Article 13(1) is not limited to core non-delegable functions, indicates that the objective of the derogation is not specific to any particular type of activity. Rather (and subject to the provisos in the second and third subparagraphs), the objective must be the broad public interest one of allowing public authorities flexibility in the exercise of their public functions to choose either to use more of the revenue generated for public services than they otherwise could, or to contain the cost of the service in question for its users.

Closely linked?

89. There are three references in the CJEU case law to the concept of activities which are "closely linked" to the exercise of a public authority's powers. The first is in *Isle of Wight CJEU* at [31], set out at [60] above but which I will repeat for convenience:

> "31. That derogation covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority. In those circumstances, the fact that such bodies are not subject to VAT on those activities does not potentially have an anti-competitive effect, inasmuch as they are generally engaged in exclusively, or almost exclusively, by the public sector."

90. This is part of a discussion considering the second subparagraph of Article 13(1), namely distortion of competition. *Isle of Wight CJEU* was concerned solely with the scope and meaning of that subparagraph.

91. The second case is *Ireland (2009)* where, after referring to Ireland's interpretation of Article 13 as leading to a result contrary to the general rule that supplies for consideration are taxable, the court said this at [49]:

> "That conclusion is not affected by Ireland's argument that, in so far as they engage in economic activities, local authorities in Ireland do so uniquely pursuant to powers conferred upon them under the specific legal regime applicable to them by statute. Apart from the fact that such argument concerns only activities engaged in by local authorities and not those engaged in by the State, it is to be noted that bodies governed by public law act as public authorities when they engage in activities which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority (*Isle of Wight Council and Others*, paragraph 31). Moreover, the mere fact that a body governed by public law acts within the framework of a special legal regime and in accordance with powers conferred upon it by statute does not mean that engaging in its activities necessarily involves the exercise of rights and powers of public authority."

(The last part of this passage was set out at [50] above but is repeated to provide context.)

92. The third case is *Saudaçor*. In considering whether Saudaçor could be regarded as acting as a public authority, the court first reiterated at [70] that it had "consistently held" that such activities are:

> "…activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators."

It added that the subject-matter and purpose of the activity are irrelevant and (citing *Fazenda*):

> "…the fact that the pursuit of the activity…involves the use of powers conferred by public law shows that that activity is subject to a public law regime."

93. The court then went on:

> "71. In that context, the Court has stated that the exemption provided for in the first subparagraph of Article 13(1) of Directive 2006/112 covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law (judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 31)."

94. I do not consider that the references to "closely linked" in these three cases are intended either to displace or provide an alternative test to that laid down in *Carpaneto 1* at [15]-[16]. As I have sought to demonstrate, the test laid down in *Carpaneto 1* has been consistently applied in subsequent cases, without qualification. This includes *Gmina Wrocław 1* (at [48]) and *Gmina Wrocław 2* (at [78]), both of which post-date *Saudaçor*, the most recent of the three cases.

95. Rather, what the court was doing in *Isle of Wight CJEU* was explaining the context of the derogation and in broad (and, I would respectfully suggest, incomplete) terms what it seeks to achieve. Both *Isle of Wight CJEU* and *Saudaçor* not only use the adverbs "principally" and "generally", such that the statement is not exhaustive, but also use the very phrase defined in *Carpaneto 1* at [15]-[16] (acting "as public authorities"). What is being described is the principal type of activity that falls within the derogation.

96. The reference to "closely linked" in *Ireland (2009)* is also in terms which do not purport to provide any exhaustive formulation. The court simply stated that bodies do act as public authorities when they engage in activities which are closely linked to the exercise of rights and powers of public authority. The court was addressing and rejecting Ireland's argument that it was sufficient to act within the "framework" of a special legal regime. As also stated in *Saudaçor* at [70], the position is different if the activity "involves" the exercise of public rights or powers.

The Tribunal decisions

97. The appeal to the FTT was on three grounds, namely that (1) the Trust should not be regarded as a taxable person pursuant to Article 13(1); (2) the supply of car parking was

exempt under Article 132 of the PVD because it was closely related to the supply of medical care; and (3) the supply of car parking services was not an economic activity. The FTT dismissed the appeal on all three grounds, only the first of which was pursued to the UT and to this court.

98. The FTT did not accept that car parking was supplied under a special legal regime rather than pursuant to a contractual agreement with those who wished to park. That disposed of ground (1), but it went on to consider whether non-taxation would lead to a significant distortion of competition. Its conclusions on that were expressed as follows:

> "64. I can deal with this ground of appeal shortly on the basis of facts already found …. On the basis of those facts, I have concluded … that:
>
> (1) the Trust participated in the market for car parking in areas where it provided parking; and
>
> (2) there was actual competition between the Trust's car parks and parking provided by private operators in or near those areas.
>
> Those findings would, in my view, apply equally to other NHS Trusts and bodies elsewhere in the United Kingdom such as those whose appeals are stayed behind this one.
>
> 65. Further, on the basis of my findings of fact, I conclude that treating the Trust as a non-taxable person would lead to actual or potential distortions of competition which are more than negligible. This is shown by the fact that the [Health Technical Memorandum] identified a need for bodies such as the Trust (which followed the [Health Technical Memorandum] and other guidance) to ensure that their car-parking charges are the same as or higher than those charged in local car parks to discourage commuters and visitors from using the hospital and health centre car parks instead. The implication of the [Health Technical Memorandum] is that lower charges (as might occur if the VAT element ceased to be chargeable) would lead to more people choosing to park in the Trust's car parks. A similar conclusion can be drawn from the extract from the Car Parking Best Practice quoted at [20] above and the fact that that one of the Trust's sites was used as parking for the local airport until the Trust increased its charges (see [27] above). It is, to my mind, obvious that if the Trust is not required to charge and account for VAT, it could undercut commercial car park operators by providing parking more cheaply. Whether the Trust chose to reduce its charges to patients and NHS staff by an amount equal to the VAT which was no longer chargeable or simply pocketed the additional income is nothing to the point. In both cases, there would be distortion of competition because either the cost of parking would be cheaper or the profit derived from it would be higher than in the case of parking provided by private operators. The amount of the potential difference in pricing or profit between parking provided by the Trust and that provided by commercial operators were VAT to cease to be chargeable by the Trust cannot, in my view, be described as negligible.
>
> 66. Accordingly, if I am wrong in concluding that the Trust must be regarded as a taxable person in relation to the supply of car parking, this ground of appeal would still not succeed because treating the Trust as a non-taxable person would lead to significant distortions of competition. "

99. In the UT, the Trust developed its argument that it was subject to a special legal regime. Before the FTT it had raised an argument based on its status under the National Health Service Act 2006 (the "NHS Act"). It also relied on being required to comply with guidance under the terms of its contract with the relevant NHS clinical commissioning group. The Trust's submissions to the UT focused, as they did before us, on the existence of external guidance and public law obligations in respect of it.

100. The UT rejected the Trust's argument and concluded that the Trust had not established any error of law. The CJEU jurisprudence "requires the tribunal to consider whether the way in which the activity is carried out involves or is closely linked to the exercise of rights and powers of public authority" (para. 52; see also paras. 29(5), 32, 35, 38 and 61). Ordinary principles of public law would apply to any body governed by public law, and the Trust's approach came close to that rejected in *Ireland (2009)* (paras. 58-59). There was no meaningful distinction between external guidance and that drawn up by the public body itself (para. 60). The UT also rejected an attempt to introduce new arguments about specific statutory constraints.

101. The UT also concluded that the FTT had not made an error of law on the question of significant distortions of competition. The guidance itself acknowledged the existence of competition and the FTT had also made a finding about parking at one site by persons travelling from the local airport. While (based on the *Isle of Wight* litigation) there was no irrebuttable presumption that a difference in treatment would lead to a distortion of competition and the language used was "would" not "could", the FTT applied the correct test (paras. 97-104). Applying *Rank* at [35], the disadvantage flowed from the differential treatment of identical or similar activities that met the same needs, and did not depend on whether the fiscal advantage was reflected in pricing or the retention of a higher profit (paras. 106-107). The contrary conclusion would run counter to the principle of legal certainty, and a fairly high degree of abstraction was required rather than a detailed competition investigation or an assessment of future decisions that might be taken (paras. 108-109). The approach taken in the *Isle of Wight* litigation was the consequence of the evidence before the FTT and the way in which the argument evolved: para 110. Similar arguments applied on the issue of whether the distortion would be significant (paras. 113-115). The FTT was entitled to reach the conclusion that it did on the evidence.

The grounds of appeal

102. The grounds of appeal can be summarised as follows:

Ground 1: The UT erred in concluding that the Trust did not supply car parking under a special legal regime, because (1) the provision of parking was closely linked to the exercise of the Trust's rights and powers as a public authority; and (2) the legally enforceable duty to follow external guidance is a special legal regime where there is external guidance that constrains the public authority's decisions in relation to the activity.

Ground 2: The UT wrongly failed to correct the FTT's application of an incorrect test for determining whether there was (1) a distortion of competition; and (2) a significant distortion of competition.

Ground 3: The UT erred in concluding that there was sufficient evidence to entitle the FTT to conclude that HMRC had discharged the burden of proof on the distortion of competition issue.

Whether the Trust acts as a public authority

The legal test to apply

103. I have explained at [89]-[96] above that the references in three CJEU decisions to activities that are "closely linked" to the exercise of powers conferred by public law were in my view not intended to displace or provide an alternative test to that laid down in *Carpaneto 1* at [15]-[16]. I therefore consider that the UT made an error of law in concluding that the CJEU jurisprudence required it to consider "whether the way in which the activity is carried out involves or is closely linked to the exercise of rights and powers of public authority" (see [100] above). Rather, the sole test is whether the activities are engaged in under a special legal regime, or under the same legal conditions as private operators.

104. The test draws a contrast between public authorities engaging in activities under a special legal regime applicable to them, on the one hand, and acting under the "same legal conditions" as private operators on the other. The test will be met if the activity "involves" the use of public powers, but that is not the only way of satisfying it: see [48] above. *Netherlands (2010)* illustrates this. The discussion in that decision focused not on the use of public law powers but on whether supplies of staff were subject to legal conditions which did not apply to private operators.

105. It is also clear from *Ireland (2009)* at [49] that merely acting within the "framework" of a special legal regime and in accordance with powers conferred is not sufficient. It must follow from this that the test would not be met simply because the powers that enable the authority to conduct the activity in question derive from a different source from those of a private operator. Rather, it is necessary to ask whether the public authority is acting under the same legal conditions as other operators, irrespective of their source, or under different legal conditions. Put another way, are there legal powers, rules or restrictions that impact on the way in which the public authority carries on the activity and which do not apply to private operators? That is consistent with the CJEU's focus on the <u>way</u> in which an activity is carried on.

106. I do not accept Mr Firth's submission that it would be sufficient for these purposes that the legal conditions in question "could" have an impact on the activity. The reference to "could" is derived from *Saudaçor* at [72], set out at [56] above. But there the CJEU was merely saying that Article 13(1) could not be satisfied in circumstances where the powers in question could not be used at all. It was not saying that a mere possibility of use was necessarily sufficient. Rather, in the context of the exercise of powers the CJEU has referred to activity which "involves the use of public powers" (see [47]-[48] above, referring to *Fazenda* at [24], *Saudaçor* at [70] and *Gmina Wrocław 2* at [79]; see also *Ireland (2009)* at [49]). The use of the word "involves" indicates that the powers in question need to have a real impact on the activity in order to amount to a special legal regime. Where what is relied on are not public law powers but some other form of legal condition, it logically follows that the condition should have an operative legal impact or effect on the way in which the activity may lawfully be carried out.

107. In this case it is necessary to determine both whether there is some form of legal condition that can qualify as a special legal regime, and to determine whether it affects the Trust's provision of car parking. This requires consideration of the guidance relied on by the Trust and its legal effect.

The Trust's case: 2015 Parking Principles combined with duty of adherence

108. In oral submissions, Mr Firth rested his case as to the existence of a special legal regime on ground 1(2) of the appeal, namely the existence of guidance that constrains the activity combined with a legally enforceable duty to adhere to that guidance unless there is a good reason to depart from it. The guidance on which he relied was the 2015 Parking Principles. Strictly, of course, the 2015 Parking Principles would not have been in place throughout the period with which we are concerned, but as I will explain there was predecessor guidance that would have been in place. In any event, Mr Watkinson placed no reliance on timing points of that nature.

109. It was also common ground that the Trust is subject to a public law duty to comply with policies unless there is a "good reason" for it not to do so: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [26] and [202]; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29]-[31]; *R (Lee-Hirons) v Secretary of State for Justice* [2016] UKSC 46, [2017] AC 52 at [17]; and *R (Hemmati and others) v Secretary of State for the Home Department* [2019] UKSC 56, [2021] AC 143 at [69].

110. However, Mr Watkinson submitted that the 2015 Parking Principles were "bare directory guidance" and too "soft" a basis to establish a special legal regime. Reliance merely on the existence of broad public law constraints such as following policies or guidance would empty the requirement to act "as" a public authority of real effect and enable a public body to determine its own VAT treatment through self-authored policies. It would contravene the requirement for legal certainty. In contrast, in *Chelmsford CC* the relevant policy documents reflected statutory obligations.

The legislative framework

111. As already mentioned, the 2015 Parking Principles were issued by the Department of Health. An earlier version of that document was issued in August 2014, but guidance about car parking charges existed well before that. Indeed, the 2006 Car Parking Best Practice states that it is an update to a document issued in 1996.

112. We asked the parties about the statutory framework under which the 2015 Parking Principles were produced. The parties agreed that this is to be found in ss.1 and 2 of the NHS Act. As in force in 2015, these provided:

> "**1. Secretary of State's duty to promote comprehensive health service**
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
> (a) in the physical and mental health of the people of England, and
> (b) in the prevention, diagnosis and treatment of physical and mental illness.

> (2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act.
> (3) The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.
> (4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.
>
> **2. General power**
> The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act."

113. The Secretary of State therefore has a broad responsibility to promote a comprehensive health service and must exercise his or her functions so as to secure that services are provided. To that end, s.2 confers a broad power to do anything "calculated to facilitate" or that is "conducive or incidental" to the discharge of those functions. I note that, in *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWHC 171 (Admin), Bean J said at [52]:

> "The origin of the power to issue guidance is to be found in the general enabling powers of section 2."

114. Section 43 of the NHS Act deals with the provision of goods and services by foundation trusts. As in force in the relevant period it provided:

> "**43. Provision of goods and services**
> (1) The principal purpose of an NHS foundation trust is the provision of goods and services for the purposes of the health service in England.
> (2) An NHS foundation trust may provide goods and services for any purposes related to—
> (a) the provision of services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness, and
> (b) the promotion and protection of public health.
> …
> (3) An NHS foundation trust may also carry on activities other than those mentioned in subsection (2) for the purpose of making additional income available in order better to carry on its principal purpose.
> …"

Do the 2015 Parking Principles and duty of adherence create a special legal regime?

115. The CJEU made clear in *Fazenda* at [21] that the national court must "analyse all the conditions laid down by national law for the pursuit of the activity". I agree with Mr Firth that no distinction is drawn as to the source of the conditions. To do so would run counter to the need to apply an autonomous and uniform interpretation of Article 13, bearing in mind the variety of legal sources across Member States.

116. There is support in other contexts for the proposition that guidance, combined with a duty to adhere to it in the absence of good reason, may amount to a form of law. In *R v*

Ashworth Hospital Authority, ex p. Munjaz [2005] UKHL 58, [2006] 2 AC 148, the House of Lords considered a code of practice produced by the Secretary of State that among other things contained guidance about the frequency of medical review for seclusion. The hospital's own policy departed from the code. The majority concluded that, even if seclusion in accordance with the hospital's policy did involve an interference with respect for private and family life within Article 8 ECHR, it was "in accordance with the law", so as to be compatible with Article 8.

117. Lord Bingham said this at [34]:

> "34. Mr Gordon, on behalf of Mind, submits that the interference is not "in accordance with the law" because not prescribed by a binding general law. I cannot for my part accept this. The requirement that any interference with the right guaranteed by article 8(1) be in accordance with the law is important and salutary, but it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. This could of course have been achieved by binding statutory provisions or binding ministerial regulations. But that was not the model Parliament adopted. It preferred to require the Secretary of State to give guidance and (in relation to seclusion) to call on hospitals to have clear written guidelines. Given the broad range of institutions in which patients may be treated for mental disorder, a matter on which Mr Gordon places special emphasis, it is readily understandable why a single set of rules, binding on all, was thought to be undesirable and perhaps impracticable. It is common ground that the power to seclude a patient within the hospital is implied from the power to detain as a "necessary ingredient flowing from a power of detention for treatment"… The procedure adopted by the Trust does not permit arbitrary or random decision-making. The rules are accessible, foreseeable and predictable. It cannot be said, in my opinion, that they are not in accordance with or prescribed by law."

118. Lord Hope explained at [91] that, in the context of Convention rights, "law" included the common law as well as measures based in statute, provided always that the measure was formulated with sufficient precision and was sufficiently accessible to satisfy the criterion of foreseeability (citing *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at [47] and [49]). He concluded that the hospital's policy satisfied these requirements. He also rejected an argument that the requirement for foreseeability and certainty was not met if the hospital was able to depart from the code, saying at [94]:

> "The requirement which the law lays down that those to whom the Code is addressed are expected to follow it unless they can give a good reason for not doing so provides a sufficient assurance of certainty and predictability to satisfy the requirements of article 8(2)."

Lord Hope added that the argument also missed the point because what was in issue was not the code but the hospital's policy.

119. Lord Scott agreed with both Lord Bingham and Lord Hope, adding at [103] that:

> "'The law', for article 8 purposes, does not consist only of statutes, directives, statutory codes and the like. It must include, also, the variety of duties and rights arising out of the circumstances in which individuals and institutions find themselves and their relationship with one another that are imposed by the common law."

120. *R (Hemmati and others) v Secretary of State for the Home Department* [2019] UKSC 56, [2021] AC 143 concerned the detention of asylum seekers pending removal. Regulation (EU) No 604/2013 of 26 June 2013 ("Dublin III") permitted detention where there was a significant risk of absconding, assessed by reference to "objective criteria defined by law". The CJEU had previously held that this required a binding provision of general application. The Supreme Court held that the published policy relied on by the Secretary of State did not meet the requirements of Dublin III but Lord Kitchin, with whom the other members of the court agreed, nevertheless went on to consider whether it constituted a binding provision of general application, and thus "law". He observed at [69] that the policy had "significant legal effects", noting that the law requires a practice adopted by a public authority to be "honoured unless there is good reason not to do so", that the court is the final arbiter as to what a policy means and that compliance is enforceable by individuals. He referred at [70]-[71] to the *Sunday Times* and *Munjaz* cases to support the propositions that in a Convention context law encompasses the case law of a common law system. However, the policy and domestic case law did not amount to law for Dublin III purposes because, in the relevant context, it did not have the necessary qualities of certainty and predictability: [72]-[74]. He left open whether a statement of policy and adherence to it could ever amount to a binding provision of general application for Dublin III purposes: [79].

121. I do not interpret Lord Kitchin's remarks as casting doubt on the proposition that guidance and a duty to adhere to it may constitute a form of law. The discussion at [72]-[79] focuses on the meaning of "objective criteria defined by law" in the specific context of article 2(n) of Dublin III, as interpreted by the CJEU. Further, earlier in his judgment Lord Kitchin referred to the *Lumba* principle in the following terms:

> "50. It is also submitted on behalf of the Secretary of State, and I accept, that the executive must follow [the relevant policy] unless there are good grounds for not doing so. Further, and as Lord Dyson explained in *Lumba*, at para [66], a purported lawful authority to detain may be impugned either because the defendant has acted in excess of jurisdiction or because the jurisdiction has been wrongly exercised. Both species of error render an executive act ultra vires, unlawful and a nullity. There is in this context no difference between a detention which is unlawful because there was no statutory power to detain and a detention which is unlawful because the decision to detain, although authorised by the statute, was made in breach of a rule of public law."

122. The analysis in this case must depend, as it does under the Convention and Dublin III, on substance and not form (*Munjaz* at [34]). The Trust is subject to a legally enforceable duty to comply with the 2015 Parking Principles unless it can show a good reason to depart from them. In principle, and subject to questions of legal certainty, that is capable of amounting to legal constraints on the way it carries on its car parking activities.

123. I have concluded that, in order to rely on legal conditions which are said not to be the same as those applying to private operators, those conditions should have an operative legal impact or effect on the way in which the activity may lawfully be carried out (see [105]-[106] above). In my view the 2015 Parking Principles satisfy that test.

124. Under s.1 of the NHS Act the Secretary of State has a wide ranging duty to promote a comprehensive health service and to exercise his or her functions so as to secure that services are provided in accordance with the Act. Section 2 confers broad powers for that purpose, which includes issuing guidance: see above. As far as foundations trust are concerned, they are empowered to carry on activities to generate additional income only in order "better to carry on" their principal purpose: s.43(3).

125. Turning to the terms of the 2015 Parking Principles, the starting point is quite different from that of a private operator. NHS organisations are required to "make sure that users can get to the site (and park if necessary) as safely, conveniently and economically as possible". Private operators are subject to no such direction. In contrast, their starting point and primary driver will be considerations of revenue maximisation and profitability.

126. Further, charges "should" be reasonable for the area and concessions for specified groups "should" be offered. Additional charges "should only be imposed where reasonable" and "should be waived" where a driver overstays for reasons beyond their control, with a "period of grace" normally being applied (a point also echoed in para. 3.7 of the Health Technical Memorandum: see [23] above). There is nothing to suggest that any of these constraints in the 2015 Parking Principles apply to private operators.

127. I reject Mr Watkinson's submission that the use of the word "should" is insufficiently directory. In principle, for example, a carer or visitor to a gravely ill relative could challenge an NHS organisation that did not offer them a concession by way of a judicial review, and succeed if no good reason to depart from the principles were established. The 2015 Parking Principles clearly have a real impact on the way in which car parking activities may lawfully be carried on.

128. I disagree with the UT that, because principles of public law would apply to any body governed by public law, the Trust's approach comes close to that rejected in *Ireland (2009)*. The Trust's position is materially different. The key distinction is that the 2015 Parking Principles, combined with the duty of adherence, have a real effect on the way in which the activity may be carried out: the content of the legal conditions under which the Trust offers car parking differs in material respects from that applicable to private operators.

129. I also consider that the 2015 Parking Principles meet the requirement for legal certainty. We are not concerned with the detention of asylum seekers as in *Hemmati*, which obviously require a significant level of specificity and predictability, or indeed with conditions for medical seclusion as in *Munjaz*. The question is whether the same legal conditions apply to private operators. It is evident that they do not. Some level of uncertainty as to the precise circumstances in which an NHS organisation could depart from the 2015 Parking Principles is not fatal (compare *Munjaz* at [94]).

130. Some of the comments made by Lord Bingham in *Munjaz* at [34] are also pertinent. Parliament has chosen to confer broad powers on the Secretary of State, and the guidance

issued needs to address a broad range of bodies the precise circumstances of which will differ.

131. Further, it is nothing to the point that an NHS organisation might choose to sub-contract its car parking activities. We are not concerned with that situation, and any supplies made by a private sub-contractor would in any event not be supplies made by a body governed by public law within Article 13(1).

132. As to Mr Watkinson's submission that the Trust's approach would enable a public body to determine its own VAT treatment through self-authored policies, I would respond as follows. First, we are not dealing with such a case so the point does not arise for decision. We are dealing with guidance issued on behalf of the Secretary of State pursuant to wide ranging powers granted under the NHS Act. A version of the guidance has been in place since at least 2014, and earlier guidance from 2006 picks up many of the same points. This is not material that is readily altered, and is certainly not material that has been produced with VAT considerations in mind. Secondly, it is by no means obvious to me that a self-authored policy would have the same effect for the purposes of Article 13(1). While policies that are self-authored by a public authority may well normally need to be complied with while they exist, they can be changed by the body in question. It must at least be arguable that what the CJEU meant to encapsulate within "special legal regime" and "legal conditions" was an externally imposed body of law which operates to constrain the body's behaviour, rather than rules or policies which the body has freedom to alter at any time.

133. I have already explained that I do not consider that the concept of activities being "closely linked" to the exercise of a public authority's powers displaces or provides an alternative test to that laid down in *Carpaneto 1* at [15]-[16]. However, even if I was wrong about that it seems to me that the facts found by the FTT indicate that the provision of car parking at hospital sites is closely linked to the exercise of the Trust's functions as a public body. Among other things, the FTT found the Trust "would not operate as effectively if it did not manage parking efficiently" and that car parking was part of an integrated transport policy (see [10] and [11] above). The 2015 Parking Principles make clear that NHS bodies must ensure that users can get to the site: see above. To state the obvious, that is the point of a hospital car park.

134. Mr Watkinson submitted that there is a clear separation between the Trust's principal role of providing health services and its power to carry out income generation activities, as reflected in s.43 of the NHS Act (see above at [114]), and that there is no obligation on it to provide car parking. It is of course true that the powers are separate, but what Mr Watkinson's submission seeks to do is to treat hospital car parking as not being closely linked to the Trust's core functions because it is being charged for and thereby happens to engage the income generation power. But what must characterise the activity for the purpose of determining whether it is "closely linked" can only be the activity itself, that is what is being done. The fact that a charge is levied is only part of the picture. Car parking to facilitate access to a hospital is different to, say, a gift shop concession.

135. In conclusion, I consider that ground 1 of the appeal is made out. The UT and FTT erred in law in deciding that the Trust did not provide hospital car parking under a special legal regime.

Whether there would be significant distortions of competition

136. It is worth briefly recapping the summary set out at [39] above so far as it concerns the second subparagraph of Article 13(1): its aim is to ensure that private operators are not placed at a disadvantage because they are taxed while public bodies are not; it should not be construed narrowly; its application must be evaluated by reference to the activity as such without reference to any particular local market; it encompasses both actual and potential competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical; any distortion that is more than negligible is "significant"; and an assessment of economic circumstances is required.

137. The first of these points bears emphasising. The objective is to ensure that private operators, including potential future entrants, are not placed at a disadvantage (*Ireland (2009)* at [58]; *Netherlands (2010)* at [90]; *National Roads Authority* at [39]). Further, as *Taksatorringen* illustrates (see [78]-[80] above), it must be non-taxation, rather than anything else, that is or would be causative of that disadvantage. The question is whether the treatment of public authorities as non-taxable, rather than other factors such as the non-profit making nature of the association in *Taksatorringen*, would lead to significant distortions of competition.

138. It is uncontroversial that there is no presumption that distortions will occur (*Isle of Wight CA* at [15]; *National Roads Authority*). Indeed, it is common ground, as it became in the *Isle of Wight* litigation, that HMRC bear the burden of proving that there would be significant distortions of competition (*Isle of Wight CA* at [23]).

139. The FTT made factual findings that the Trust participated in the market and that there was actual competition between its car parks and parking provided by private operators. The real controversy is not over that issue but whether there would be distortions of competition, and whether they would be significant.

140. I accept Mr Firth's submission that, to engage the second subparagraph of Article 13(1), HMRC must establish (on a balance of probabilities) that there would be significant distortions of competition in the counterfactual where hospital car parking is not subject to VAT. This must be tested not in the Trust's local market or markets, but by reference to the "activity as such" (*Isle of Wight CJEU* at [53]). Further, an assessment of economic circumstances is required. Failure to make an assessment would amount to the application of a presumption.

141. It is instructive to consider the approach applied in competition cases. In *Network Rail Infrastructure Limited v Achilles Information Limited* [2020] EWCA Civ 323, [2020] 4 CMLR 21, this court upheld a decision by the Competition Appeal Tribunal that Network Rail had breached competition rules by requiring suppliers to be vetted by a single supplier assurance scheme. On the issue of assessing the effect on competition, Henderson and Asplin LJJ (with whom Peter Jackson LJ agreed) held at [96]-[98] that it was necessary to demonstrate, with a reasonable degree of probability and by reference to the counterfactual, that the restriction affected actual or potential competition to such an extent that negative effects could be expected (an "appreciable" effect). When determining whether there would be an appreciable effect on competition, a detailed analysis of market share data is not necessary in all cases and a broad-brush approach to market share may be sufficient. These findings followed a passage at [95] where the legal principles applied by the CAT were set out. Those included the following:

> "There is no presumption of anti-competitive effect. It is necessary to show that the agreement has an appreciable effect on competition. Appreciable does not mean substantial; it means more than de minimis or insignificant. It must be demonstrated with a reasonable degree of probability that the agreement affects actual or potential competition to such an extent that negative effects on prices, output, innovation or the variety or quality of goods and services in the market can be expected…
>
> An effect on competition must be demonstrated by reference to the situation which would pertain on the market in the absence of the agreement or restriction in question: 'the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute'... This requires a consideration of the appropriate counterfactual situation."

These points have direct parallels in this case.

142. However, it is also important to bear in mind that there are some important differences between a competition law analysis and what is required for the purposes of Article 13(1) PVD. First, the CJEU has made clear that the second subparagraph of Article 13(1) must be interpreted with the principle of fiscal neutrality in mind: see [62] above. Secondly, the CJEU has determined that for Article 13(1) purposes the analysis must be by reference to the "activity as such" without reference to any particular local market, whereas in a competition case economic analysis will be used to identify the scope of the relevant geographical market that must be considered. Thirdly, and as already explained, the analysis in an Article 13(1) context is asymmetrical. It is concerned only with the risk of private operators being placed at a competitive disadvantage, rather than with an impact on competition at any point in a market, as would be the case for competition law purposes.

143. Returning to this case, I cannot detect that the FTT undertook the correct assessment. The analysis is limited to that set out at [64]-[66] of its decision (see [98] above). The evidence relied on was paragraph 3.5 of the Health Technical Memorandum (to the effect that NHS sites close to city/town centres may need to ensure that their car-parking charges are not lower than local car-parks (see [22] above)), the reference to "misuse" in the 2006 Car Parking Best Practice (see [17] above) and the use of one site for airport parking. However, none of that evidence actually supports a conclusion that non-taxation would give rise to distortions of competition. On the contrary, the focus is on making sure that hospital car parks are used only by those travelling to the hospital and not by others: see also footnote 5 to the 2015 Parking Principles which refers to the possibility of additional charges for "people who do not have legitimate reasons for parking (eg commuters)", and the reference in the 2006 Car Parking Best Practice to the "need to disincentivise non service users" (see [18] above). The use of one site for airport parking is a highly localised example, in contrast to the CJEU's guidance that findings should not be based on the local market, but the fact that the response was to raise prices is indicative that non-taxation would not disadvantage private operators. Rather, as in *Taksatorringen*, significant other factors are at play. Non-taxation would make no difference to the need to dissuade the inappropriate use of hospital car parks.

144. I also do not understand why it is said to make no difference whether prices would be reduced or additional income retained in the counterfactual. Any profits generated must

be used to improve health services. While additional revenue might be used to improve car parking in a way that could affect consumer choice (for example, improved lighting or security) there was no evidence or findings as to what would occur in that respect. The mere retention of income by an NHS body to fund the provision of healthcare cannot, it seems to me, have a distortive effect. It could have no impact on the position of either an existing or a potential future private operator. There would be no impact on the car parking market at all. The only consequence is that the NHS body will retain more of its receipts, at the cost of reduced tax revenue for central government.

145. The evidence relied on by the FTT relates to cases where hospital car parks may be used by individuals who are not travelling to the hospital. In assessing the counterfactual, it would also be necessary to consider whether private operators would compete, or potentially wish to do so, in attracting those who are travelling to the hospital. There is very little by way of relevant findings of fact. The most relevant are a statement in footnote 1 to the 2015 Parking Principles, that "very few [sites] will be able to provide spaces for everyone who needs one", the comments about problems with parking capacity in section 4 of the Health Technical Memorandum, including that "all NHS organisations would like additional parking" (see [26]-[27] above), and the findings (specific to the Trust) at para. 25 of the FTT Decision which include that some alternative parking is available at sites based in towns, whose own parking areas are often fully utilised. These findings would not support any conclusion that non-taxation of hospital car parking would have a distortive effect. Indeed, such findings as there are, combined with common sense, strongly indicate that by far the most important driver of consumer choice is proximity to the hospital and accessibility. Otherwise, it would not be the case that "very few" sites have spaces for everyone who needs them.

146. Both the UT and Mr Watkinson in his submissions to us relied on the *Rank* case already referred to (Joined Cases C-259/10 and C-260/10 C-260/10, [2012] STC 23). In that case the CJEU answered a number of questions about the application of the principle of fiscal neutrality in the context of the permission given to Member States to specify limitations on the betting and gambling exemption in Article 13B of the Sixth Directive. Rank sought repayment of VAT paid in respect of certain games played on mechanised cash bingo and slot machines on the basis that they were treated differently for VAT purposes but were comparable or identical from the consumer's point of view.

147. Of particular relevance are the following paragraphs of the CJEU's decision (citations omitted):

> "32. According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes ...
>
> 33. According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.
>
> 34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer…

> 35. That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition…
>
> 36. Having regard to the foregoing considerations, the answer to question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established."

148. As to whether supplies are "similar", the court said this:

> "44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other…"

149. Mr Watkinson relied on the statement at [35] of the court's decision. However, it is important to note what that statement is authority for. First, the context is fiscal neutrality rather than a statutory test which requires HMRC to demonstrate that there would be significant distortions of competition in a counterfactual situation (albeit that considerations of fiscal neutrality underpin the second subparagraph of Article 13(1): see above). Secondly, the second subparagraph of Article 13(1) contemplates some possible interference with the principle of fiscal neutrality, albeit that it must be interpreted in a way that does the "least possible damage" (*Isle of Wight CJEU* at [44]). Thirdly, the CJEU expressed a "general", and thus not invariable, rule. Fourthly, and more fundamentally, that general rule applies only where the supplies in question are "identical or similar" and "meet the same needs".

150. At one level, car parking offered by one operator can be regarded as similar (or even identical) to that offered by another operator: both offer the facility to park. But the analysis cannot stop there. The services must meet the same needs from consumers' perspective. They will not be similar (and a fortiori could not be "identical") where their use is not comparable or where differences do have a significant influence on the decision of the average consumer (*Rank* at [44]). We are dealing with a very different situation to consumer choice between slot machines.

151. The FTT's findings do not really address this. Such findings as there are tend to support the proposition that proximity and accessibility to the hospital is the key factor for those travelling to it: see [145] above. For those who are not travelling to the hospital, the guidance and other evidence indicates that they will be dissuaded from using a hospital car park (even if space was available): see [143] above. Many of those travelling to a hospital will also benefit from concessions, or for example from increased provision of

disabled spaces ([25] above), that will be unlikely to be available from a private competitor.

152. Mr Watkinson submitted that *Rank* at [35] showed that the level of analysis undertaken in the *Isle of Wight* litigation was unnecessary, and that the detailed review of evidence in that case was simply the consequence of the evidence before the FTT and the way in which the argument evolved. The UT accepted that argument but I do not agree with it. It would amount to saying that a wrong turn was taken when the case was remitted to the FTT following *Isle of Wight CJEU*, and thereafter that both Tribunals in that case and this court when upholding their decisions adopted the wrong approach. It does not take account of the qualifications with which the point is expressed in *Rank*: see [149] above. It also does not take account of the fact that the CJEU was explicit in *National Roads Authority* that an assessment of economic circumstances is required. Further, and contrary to how the point was put to us, the impact of *Rank* was specifically addressed in the *Isle of Wight* litigation.

153. Following *Isle of Wight CJEU*, Rimer LJ (sitting in the High Court) remitted the case to the FTT, rejecting HMRC's argument that there was a presumption of distortion of competition in circumstances where the scale of local authorities' activities in the market was not negligible, and holding that a factual enquiry was required ([2009] EWHC 586, [2009] STC 1098). In the course of his decision Rimer LJ gave specific consideration to HMRC's submission that the existence of a presumption was supported by what was said in *Isle of Wight CJEU* at [62] (see [66] above), and that its effect was that no further fact finding was needed. He said this at [16]:

> "Contrary to Mr Vajda's submission [for HMRC], para 62 was not saying, and does not mean, that the treatment as a non-taxable person of a public authority carrying on a car-parking activity would be presumed to discourage potential competitors from entering the market. It was saying no more than that it may do so, with para 64 underlining that this sort of question is not a matter of presumption but is a matter of fact."

Some aspects of Mr Watkinson's submissions effectively sought to revive this point. My response is the same as Rimer LJ's was in 2009.

154. On remittal to the FTT, both parties adduced a significant amount of evidence, including expert evidence. HMRC then sought to resurrect the same point before the FTT and failed. The FTT expressly recorded in that connection that it did not agree with HMRC's interpretation of *Isle of Wight CJEU* ([2012] UKFTT 648 (TC) at paras. 9 and 31). Further, by that stage the CJEU's decision in *Rank* was available, and was considered in some detail by the FTT at paras. 23-34 of its decision. The FTT rejected the proposition that differential treatment of competing suppliers amounted to a distortion of competition without more (para. 31) and concluded that *Rank* had not relevantly altered the law. However, the FTT found for HMRC on the facts on the basis that non-taxation would result in prices being lower by a non-negligible amount (being not less than an amount approaching 7.5%: para. 263). The FTT took into account that local authorities would wish to contribute to economic vitality by not deterring shoppers and that elected councillors would have regard to the unpopularity of car parking charges.

155. The argument based on *Rank* was not revived on appeal ([2014] UKUT 466 (TCC) at para. 9). In the Court of Appeal, the UT's decision affirming that of the FTT was upheld,

inter alia on the basis that the FTT was entitled to conclude on the considerable evidence before it that non-taxation of local authorities would distort competition.

156. Mr Watkinson summarised HMRC's case on the second subparagraph of Article 13(1) by submitting that (all other things being equal) it would be engaged where a "breach of the principle of fiscal neutrality is established on the facts by reference to the activity as such on a national market". For the reasons I have given I cannot accept this. It is not justified by *Rank*, was not the approach adopted in the *Isle of Wight* litigation (with good reason), and ignores the requirement for an assessment of economic circumstances explicitly required by *National Roads Authority*.

157. It also follows from what I have said that I consider that the UT made an error of law in concluding that the FTT adopted the correct approach. *Rank* at [35] cannot be applied without material qualification, and the approach taken in the *Isle of Wight* litigation was not merely the consequence of the evidence before the FTT and the way in which the argument evolved. What is required are findings of fact, based on evidence, that demonstrate that in the counterfactual of non-taxation there would be significant distortions of competition. An assessment of economic circumstances must be carried out. The aim of the second subparagraph of Article 13(1), namely that private operators are not placed at a disadvantage through non-taxation of public authorities, must also be borne firmly in mind. Distortion, let alone significant distortion, cannot be assumed based on participation in the car parking market, or based on a finding that competition exists. The necessary findings of fact are not present in this case.

158. Accordingly, I consider that grounds 2 and 3 of the appeal are also made out.

Remaking the decision

159. As a result of the errors of law that I have identified I would set aside and re-make the UT Decision by allowing the appeal against the FTT Decision and setting it aside. It would then be open to us either to re-make the FTT Decision or to remit the case. Remittal has not been suggested and I do not consider that it would be appropriate. In my view the appropriate course is to re-make the FTT decision by concluding that hospital car parking is provided by the Trust "as" a public authority, and that HMRC has not demonstrated that non-taxation would lead to significant distortions of competition.

160. In reaching those conclusions, I have considered whether it would be appropriate to make any additional findings of fact which might assist HMRC's case. In particular, I have considered not only the 2015 Parking Principles but the other guidance produced by the Department of Health that is referred to at [15]-[27] above, together with other documentary evidence including House of Commons papers on hospital car parking charges dating from 2015 and 2018. These papers were all produced at a national rather than local level, so are more relevant to the distortion of competition issue than local material such as the Trust's own policies. I also note that the Health Technical Memorandum states that car parking provision "tends to be quite similar across NHS sites" ([27] above), suggesting that what can be derived from these documents is generally representative.

161. I have not identified material that would assist HMRC, rather the reverse. For example, the 2006 Car Parking Best Practice emphasises the need for NHS bodies to look at transport and car parking in a "holistic" way and encourages sensitivity in relation to

those who have to use hospital car parks regularly. The Health Technical Memorandum discusses methods to manage (ie reduce) demand with a view to improving the "patient and visitor experience". It emphasises the need to ensure that journeys to hospital are "kept as straightforward as possible to avoid any unnecessary upset, anger and stress", with a focus on ease of access and adequate signage from the car park to the hospital and the importance avoiding missed appointments caused by car parking problems. The overall picture is one of managing limited capacity to meet demands in a way that best enables the organisation to perform its core functions. I saw nothing to suggest either the existence of surplus capacity that hospital authorities might wish to use by attracting drivers who are not travelling to the hospital, or any desire to dissuade private operators from relieving pressures on hospital car parks by offering an alternative place to park.

162. In order for HMRC to demonstrate that there would be significant distortions of competition, additional evidence would be required to particularise the distortions. This would need to include some form of economic assessment that would allow the FTT to conclude, as it did in the *Isle of Wight* litigation, that the counterfactual of non-taxation would have an effect on the market – most obviously through lower prices – and that this would distort competition in a non-negligible way.

163. One issue that would arise in undertaking such an assessment would be what the relevant "activity" is for the purposes of the analysis mandated by *Isle of Wight CJEU*: is it the provision of car parks generally (like off-street car parking in that case) or is there something specific about car parking at hospitals? And if it is the former, to what extent might differential tax treatment of the limited number of hospital car parks as compared to the total number of car parks actually have a distortive effect?

164. Assuming that point is resolved, the assessment might be expected to cover the scope for prices to be lower (between 0 and 20% on current VAT rates) and the likelihood of that occurring and to what extent, bearing in mind the references in the guidance to dissuading the use of hospital car parks by commuters and other non-service users. There would also need to be an assessment of the likely impact of any price reduction on consumers or actual or potential competitors, which would need to include some consideration of such matters as price elasticity and other drivers of demand. For example, if hospital car parks have little or no spare capacity now (with VAT in place) that might well suggest that users are not materially influenced by pricing considerations but rather by other factors, in particular proximity and accessibility. None of that analysis has been undertaken.

Conclusion

165. In conclusion, I would allow the appeal on all grounds, set aside the Tribunal decisions and allow the Trust's claim for repayment of VAT.

Lord Justice Green:

166. I agree.

Lady Justice Asplin:

167. I also agree.