



Michaelmas Term

[2025] UKSC 37

On appeal from: [2024] EWCA Civ 177

JUDGMENT

Northumbria Healthcare NHS Foundation Trust (Respondent) v Commissioners for His Majesty's Revenue and Customs (Appellant)

before

Lord Hodge, Deputy President

Lord Hamblen

Lord Burrows

Lord Richards

Lady Simler

JUDGMENT GIVEN ON

29 October 2025

Heard on 7 and 8 April 2025

Appellant

Nigel Fleming KC
Howard Watkinson

(Instructed by HMRC Solicitors Office & Legal Services (Stratford))

Respondent

Michael Firth KC
Harry Winter

(Instructed by BHW Solicitors (Leicester))

LORD HODGE AND LADY SIMLER (with whom Lord Hamblen, Lord Burrows and Lord Richards agree):

1. Introduction

1. Northumbria Healthcare NHS Foundation Trust (“the Trust”), like many NHS trusts, provides car parking to visitors and others in car parks at its hospitals (and hospitals operated by it). The central question on this appeal is whether it was a taxable person for value added tax (VAT) purposes when supplying those car parking services or whether in so doing it fell within the exclusion for public authorities acting as such pursuant to article 13 of Council Directive 2006/112/EC (the Principal VAT Directive or “PVD”) and section 41A of the Value Added Tax Act 1994 (the “VATA 1994”). The amount of VAT at stake in this appeal is £267,443, but we understand that there are up to 70 similar appeals by NHS bodies that are stayed behind this appeal, with the total tax at stake of up to £100m.

2. The Trust is plainly a public authority but that is not determinative. Resolution of this appeal depends on whether the Trust satisfies two conditions. The first depends on whether the Trust’s supplies of car parking are made pursuant to a “special legal regime” that applies to it as a public authority but not to private car park operators; and the second depends on whether treating the Trust as a non-taxable person would lead to significant distortions of competition.

3. The appellants are the Commissioners for His Majesty’s Revenue and Customs (“HMRC”). HMRC determined that VAT was chargeable by the Trust on its supplies of car parking at hospital and healthcare sites and refused to repay VAT that had previously been accounted for by the Trust during the VAT accounting periods between May 2013 and March 2016. The Trust’s appeals against that decision were dismissed by the tax tribunals but allowed by the Court of Appeal.

4. In short, the First-tier Tribunal (Judge Greg Sinfeld) (the “FTT”) rejected the Trust’s case that car parking was supplied by it under a special legal regime, namely guidance issued by the National Health Service (“the NHS”) and the Department of Health (“the DoH”) which required the Trust to take certain matters, such as reasonable cost and local travel plans in the area, into account that private operators are not required to consider. Further, the FTT held that even if the Trust were supplying car parking as a public authority, it would still be a taxable person because there would otherwise be significant distortions of competition: [2021] UKFTT 71 (TC). The Upper Tribunal (Bacon J and Judge Jonathan Cannan) (the “UT”) upheld those conclusions: [2022] STC 1869.

5. The Court of Appeal allowed the Trust’s appeal: [2024] EWCA Civ 177. Falk LJ (with whom Asplin and Green LJJ agreed) held that the first condition was satisfied. The Trust is subject to a legally enforceable public law duty to comply with car parking guidance issued by the DoH unless it can show a good reason to depart from it. The guidance meets the requirement of legal certainty, and together with the public law duty on the Trust to adhere to the guidance, this amounts to a legal constraint on the way it carries on its car parking activities. This constitutes a special legal regime applicable to the Trust’s car parking activities. Answering the second condition, the court held that the FTT made several errors of law in reaching its conclusion that there would be significant distortions of competition. These are discussed further below. The court therefore set aside that decision. Remaking the decision, and applying the correct approach (which, it held, required a focus on the most obvious way for non-taxation to distort competition in the market, namely through lower prices), the court held that HMRC had the burden of proof on this issue but had done none of the analysis of the likely impact of any price reduction on consumers or actual or potential competitors that was necessary. HMRC had therefore failed to prove that treating the Trust as a non-taxable person would lead to significant distortions of competition.

6. There are two broad grounds of appeal which challenge each of the Court of Appeal’s conclusions on the two statutory conditions. These are grounds three and four described below. The appellant also raises two subsidiary issues in grounds 1 and 2. The issues to be addressed on this appeal are therefore as follows:

(i) Was the Court of Appeal wrong to hold that the objective of article 13(1) of the PVD and its domestic implementing provision in section 41A VATA 1994, “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” (para 88 of the Court of Appeal’s judgment)? If so, is the error material to the Court of Appeal’s overall conclusion? We refer to this as ground 1.

(ii) What is the proper test for deciding whether a public authority is engaged in an activity as a public authority and what if any relevance does the concept of activities being “closely linked” have in that regard? (paras 133-134 of the Court of Appeal’s judgment). We refer to this as ground 2.

(iii) In relation to whether the Trust’s car parking activity was pursued under a special legal regime, can external guidance combined with the public law duty of adherence amount to a “condition of national law” such as to create a special legal regime? We refer to this as ground 3.

(iv) Is it sufficient for HMRC to discharge their burden of proving that non-taxation would lead to a significant distortion of competition simply to point to actual competition and rely on the decision of the Court of Justice of the European Union (“the CJEU”) in *Rank Group plc v Revenue and Customs Commissioners* (Joined Cases C-259/10 and C-260/10) [2012] STC 23 (“*Rank*”)? We refer to this as ground 4.

7. Although on the face of it the consequences of arrangements by which VAT is paid over by one public body (the Trust) to another (HMRC) may be thought not to matter because they are ultimately no more than a means of recirculating or reallocating revenue at national level, it is important to recognise the purpose of imposing VAT on services provided by state and other public bodies. The principal reason for this is that the taxation of publicly performed economic activities serves to prevent distortions of competition arising from VAT. This follows from the fact that public bodies would enjoy a competitive advantage if their activities were not subject to VAT but competing services provided by private economic operators were subject to VAT.

2. The facts

8. The FTT made careful findings of fact having heard evidence from two witnesses on behalf of the Trust and the UT helpfully summarised those findings. We gratefully adopt that summary (with references to paragraphs in the FTT decision) and with some elaboration on certain findings.

9. The Trust is an NHS Foundation Trust (“NHSFT”) created by section 1 of the Health and Social Care (Community Health and Standards) Act 2003 as a public benefit corporation. From the beginning of March 2007, the statutory basis for NHSFTs was found in Part 2, Chapter 5 of the National Health Service Act 2006 (“the NHS Act 2006”). Under section 30 of the NHS Act 2006, an NHSFT is a public benefit corporation authorised to provide goods and services for the purposes of the health service in England (in accordance with Chapter 5 of the NHS Act 2006).

10. The Trust operates 14 hospitals and several smaller community hospital facilities and healthcare centres in north-east England. The Trust provides healthcare services to a local population of around 500,000 people in a mostly rural area where the availability of public transport can be limited or non-existent for some patients and visitors. Around 80% of people attending the Trust’s main hospital sites do so by car (FTT paras 3 and 11).

11. It is common ground that the Trust’s provision of NHS medical services is not an economic activity for VAT purposes because such activities are non-business or outside the scope of VAT. The Trust’s provision of private medical services is an economic

activity but is exempt from VAT under article 132(1)(b) of the PVD as implemented in the UK by Item 4 Group 7 of Schedule 9 to the VATA 1994.

12. Under the Trust's constitution, the principal purpose of the Trust is to provide goods and services for the purpose of the National 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 (FTT para 14).

13. The Trust is required by 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 (FTT para 23). The Trust's parking facilities are mostly used to gain access to 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. The FTT found, however, that "That is not always the case and ... some sites may be used by people for general purposes unconnected with the Trust when spaces are available. An example of this is that one of the Trust's [car parking] 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 (FTT para 27).

14. The Trust provides free parking to certain hospital users, including cancer patients and those visiting patients who are in hospital for an extended period of time. The Trust's staff pay reduced rates for parking. Contractors working on the Trust's sites and needing to park pay something. The Trust provides free car parking at up to five local health centres for historical reasons. The cost of providing free parking is met from charges for parking on the Trust's other sites. The charges for car parking bring in income for the Trust. The income from parking charges does not cover the costs associated with providing car parking at all sites. The Trust makes a small surplus at three of its four major sites. The surplus is ploughed back to improve the provision of healthcare at the Trust (FTT paras 30–31).

15. The demand for parking spaces is such that the Trust must manage the access to and use of the car parks, eg by adjusting visiting and shift times. The Trust would not operate as effectively if it did not manage parking efficiently (FTT para 24). 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 (FTT para 25).

16. 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 also to certain guidance followed by the Trust in relation to car parking provision (FTT para 13).

3. The car parking guidance followed by the Trust

17. The Trust produced a document headed “Car Parking Policy and Procedures” in June 2016 which sets out the policy and purpose behind its management of car parking at the Trust’s sites. The policy and procedures followed guidance provided by the DOH and NHS pursuant to powers under section 2 of the NHS Act 2006.

18. That guidance included guidance issued by the DoH in October 2015, replacing an earlier version issued in August 2014, headed “NHS patient, visitor and staff car parking principles” and referred to in the judgments below as the “2015 Parking Principles”. This provides in material part as follows:

“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 people²

- frequent outpatient attenders

- visitors with relatives who are gravely ill, or carers³ of such people

- visitors to relatives who have an extended stay in hospital, or carers³ of such people

- carers³ 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 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. ...”

19. It is unnecessary to set out the text of all the footnotes that appear in the original document, but three are potentially relevant. They are footnotes 1, 5 and 6 as follows:

“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.

6. There are two trade associations: the British Parking Association and the Independent Parking Committee. If the car park operator is a member of either, their relevant code applies and an appeals service is available to motorists. NHS organisations should consider imposing a requirement for contractors to be members of such an association.”

20. In December 2006 the Department of Health issued guidance headed “Income Generation: Car Parking Charges - Best Practice for implementation” (“Car Parking Best Practice”) which describes itself in the preface as providing “information and advice on operating commercial car parking schemes in the NHS as income generation activities”. The document states in the preface:

“Income generation powers enable NHS bodies (abiding by specific rules) to raise additional income for health services by marketing any spare capacity resulting from a non-core function, or by exploiting intellectual property rights. Charging for car parking on healthcare sites is a common example of an income generation scheme. This document provides advice on the issues to be considered when setting up a car parking scheme or when reviewing existing ones, including what kind of car parking scheme to offer, what charges to impose and what concessions to consider.”

21. The preface also states that it seeks to incorporate the recommendations of a July 2006 Health Select Committee report to the effect that NHS trusts should be advised to offer various concessions and to provide information about car parking charges to patients in advance of their treatment.

22. Car Parking Best Practice refers at para 1 to “car parking shortages” and states at para 2 that one of the factors to be considered is: “How misuse of the car park (particularly if based near a town centre or motorway) by people using healthcare facilities for free or cheap parking will be avoided”.

23. Para 3 of Car Parking Best Practice 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.”

24. In a chapter headed “Viability of the Scheme”, para 20 of Car Parking Best Practice states:

“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.”

25. Typical costs for the provision of car parking are listed and under the title “How Much Should We Charge?” para 24 of Car Parking Best Practice states:

“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.”

Car Parking Best Practice 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”.

26. The Department of Health also issued the 2015 edition of the “Health Technical Memorandum 07-03 on NHS car parking management: environment and sustainability” (referred to below and in the judgments as “the HTM”). The executive summary states: “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.” The executive 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”. Paras 1.1 and 1.2 of the main text state 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...”

27. Para. 3.5 of the HTM 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.”

28. The HTM gives guidance on tariffs, which NHS organisations are told should not be out of line with the rates charged in other NHS sites in England and should take into account local rates in different areas of England. It also gives guidance on parking charge notices. Para. 3.7 of the HTM states:

“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.”

29. Para 3.20 of the HTM 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.”

30. The HTM emphasises 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. Para 5.60 of the HTM states that NHS organisations should increase the typical average percentage of capacity allocated to disabled bays. Para 3.23 of the HTM states:

“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.”

31. The HTM refers to problems with parking capacity, stating at 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.”

32. Para 4.14 of the HTM states that car park design should place patient and visitor parking “nearer to the point of use than staff parking”. Para 4.15 of the HTM states 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 this will occur”.

4. The EU and domestic legislative framework

33. The recitals to the PVD set out three relevant fundamental aims of the VAT system. First, that the VAT system should eliminate, as far as possible, factors which may distort conditions of competition, and should result in neutrality in competition, whether at national or Community level, such that similar goods and services bear the same tax burden in each member state (recitals 4 and 7). Secondly, that the VAT system achieves the highest degree of simplicity and neutrality when the tax is levied in as general a manner as possible (recital 5). Thirdly, resources accruing from VAT are amongst those to be used to finance the budget of the European Community; and having a common list of exemptions assists in the European Community's resources being collected in a uniform manner in all the member states (recitals 8 and 35).

34. Article 2(1)(a) and (c) of the PVD provides for VAT to be charged on a supply of goods or services for consideration within the territory of a member state "by a taxable person acting as such". Article 9(1) explains that a taxable person means "any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity." These provisions are implemented domestically by sections 1 and 4 of the VATA 1994 which provide for the charge to VAT on taxable supplies. Section 4 states that VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him and where it is not an exempt supply.

35. The CJEU has given the concept of "economic activities" a broad interpretation in its settled case law so as to include all types of economic activities (whatever the stage of production or distribution or provision of services). The term "economic activities" is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results.

36. The exception to the general rule that treats persons carrying on independent economic activities as taxable persons is at the heart of this appeal. Article 13(1) of the PVD provides that bodies governed by public law are not regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities. It is in the following terms:

“Article 13

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 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.”

37. This provision plainly presupposes that the activities of state and public bodies governed by public law are capable of being economic activities within the meaning of article 9(1) of the PVD (whatever form the consideration for their activities may take) in order then for the exclusion in article 13(1) to apply. Their activities are therefore capable of being subject to VAT. Moreover, not all activities of a public body are excluded from the scope of VAT. If that were the case, there would be no need for the exemptions referred to in article 13(2).

38. Article 13 was implemented in domestic law by section 41A of the VATA 1994. Section 41A has been amended by the Taxation (Cross-border Trade) Act 2018, but the pre-amendment version remains in effect for the VAT accounting periods relevant to this appeal. At the material time section 41A 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.”

Neither party to this appeal suggests that there is any relevant difference between UK and EU law in this regard, the reference in section 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.

39. A person who is treated as a non-taxable person in relation to an activity has no right, under EU or domestic law, to recover VAT on inputs used for the purposes of that activity.

40. Annex I to the PVD lists activities in respect of which bodies governed by public law are to be regarded as taxable persons (unless the activities are carried out on such a small scale as to be negligible). The list (now reflected in section 41A(2) as amended) covers the supply of various goods and services including “transport of goods”, “passenger transport” and “activities of travel agents” but not the supply of car parking.

41. In Title IX of the PVD Chapter 2 sets out “Exemptions for certain activities in the public interest”. These are no longer directly relevant to this appeal (the FTT having rejected the Trust’s case that the supply of car parking is an activity closely related to supplies of hospital and medical care and therefore exempt pursuant to article 132(1)(b)) but it is helpful to understand their place in the scheme of VAT treatment. Article 131 makes clear that “The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions...” Article 132 provides that member states must exempt certain supplies. In some cases, the scope of the exemption is limited by reference to both a particular activity and the identity of the person carrying on that activity: for example, article 132(1)(b) exempts “hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres

for medical treatment or diagnosis and other duly recognised establishments of a similar nature ...”

42. Article 132(1) also mandates exemptions for specific supplies that are “closely linked”, or “closely related” to some other main activity. As well as article 132(1)(b), other examples are:

“(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people’s homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing;

(h) the supply of services and of goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social wellbeing;

(i) the provision of children's or young people’s education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects; ...

(n) the supply of certain cultural services, and the supply of goods closely linked thereto, by bodies governed by public law or by other cultural bodies recognised by the Member State concerned; ...”

Exemptions for a closely related or closely linked activity must also satisfy the conditions in article 134, namely the supply must be essential to the exempted transactions; and the basic purpose of the supply must not be to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.

43. Article 133 of the PVD permits member states to make the grant of exemptions in article 132(1)(b), (g), (h), (i), and (n) to bodies other than those governed by public law subject to one or more of the following conditions:

“(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT.”

44. The hospital and medical care exemption provided for in article 132(1)(b) of the PVD is implemented domestically by section 31(1) and Item 4 of Group 7 of Schedule 9 to the VATA 1994. Section 80 of the VATA 1994 provided, at the relevant time, that where a person had accounted to HMRC for VAT including an amount of output tax that was not output tax due, HMRC were liable to credit the person with that amount on a claim being made for that purpose. The Trust made its claim for what it said was the overpaid output tax in relation to car parking under section 80.

45. As to the relationship between articles 13 and 132, article 13 (if it applies) has priority over article 132 because if the public body is not treated as a taxable person, there is no supply to exempt: the transaction was never liable to VAT in the first place, irrespective of the terms of article 132. This is consistent with article 131 which expressly provides that the exemptions that follow it are without prejudice to other Community provisions, which would include article 13. (There are also different consequences arising from being treated as a non-taxable person in relation to an activity as compared with being a taxable person whose supplies are exempt. It is unnecessary to set these out.)

46. At the heart of this appeal are the two conditions in article 13(1) and section 41A under which (for activities not listed in Annex I to the PVD) a supply of goods and services by a public body is not treated as a supply by a taxable person. First, the supply must be made in respect of activities or transactions in which the entity is engaged “as a public authority”; and secondly, the supply must not lead to “significant distortions of

competition”. Both conditions had to be satisfied for the Trust to attract exemption in this case.

5. The legal principles applicable to the first condition (acting as a public authority)

47. Article 13 (together with its predecessor, article 4(5) of the Sixth Directive 77/388), has been the subject of extensive consideration by the CJEU. Many of the principles established by the CJEU are uncontroversial but there are differences between the parties as to their scope and practical application. At this stage we address the case law concerning the first subparagraph of article 13 and do so under five headings.

(i) Autonomous and uniform interpretation

48. The starting point is the well-established principle that article 13 must be given an autonomous and uniform interpretation across the member states, taking account of the context of the provision and the objective pursued by it. It follows that the concepts referred to in article 13(1) including “bodies governed by public law” who act “as public authorities” must be given an autonomous and uniform interpretation throughout the European Union in light of their context and purpose (see eg paras 52-54 in *Saudaçor - Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* (Case C-174/14) [2016] STC 681 (“*Saudaçor*”)).

(ii) Purpose or objective of article 13

49. The Court of Appeal correctly observed that the CJEU has not clearly articulated the objective of the derogation in article 13(1). We agree.

50. Notwithstanding that, in para 88 of the judgment, the Court of Appeal concluded that:

“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.”

There is nothing in the language of article 13 or its context to support the public interest objective identified here. Furthermore, we have been shown nothing in the legislative

history, travaux préparatoires, the recitals, or any CJEU authority (including in the opinions of Advocates General) that suggests its purpose is a back-door way for public authorities to hold on to more revenue than they otherwise could, driven by public interest considerations.

51. Rather, the purpose can be spelled out from the language of article 13 itself. It is a limited (and strictly interpreted) exception from the general principle of VAT that activities of an economic nature (supplies of services for consideration) are subject to VAT. As a matter of ordinary language, the purpose of the first subparagraph is to exclude from VAT the activities of public bodies, which are economic in nature, when performed under a public law regime. This has the effect, for example, that a person is not required to pay VAT on fees for activities such as applying for a passport, a driving licence, or court fees. The premise being that the activity is “carried on by way of a sort of monopoly: as that activity is subject to the legal regime specific to that body, it cannot in principle be engaged in by other bodies, in particular private bodies”: see para 26 in the opinion of Advocate General Szpunar in *National Roads Authority v Revenue Commissioners* (Case C-344/15) EU:2016:661 (“*National Roads Authority*”). Put another way, the 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”: see the judgment of the Grand Chamber of the CJEU in *Revenue and Customs Commissioners v Isle of Wight* [2008] STC 2964 para 31 (“*Isle of Wight CJEU*”).

52. However, recognising that there may be situations where the public body engages in economic activities that are also performed in parallel by taxable private entities, the second and third subparagraphs limit the application of the exemption. This is because in this situation the treatment of the public body as non-taxable may give rise to distortions of competition. That result is avoided by specifying that certain activities (listed in Annex 1) are subject to VAT “in any event” unless they are negligible (because they are presumed to lead to distortions of competition); but the limitation in the second subparagraph also expressly recognises that there may be other essentially economic activities (not listed in Annex 1) carried on in parallel by public bodies and private operators. It follows that the second and third subparagraphs pursue the same objective of limiting the scope of the exception provided for in the first subparagraph of article 13(1), to ensure that public bodies are subject to VAT in line with the general characteristics of the VAT system where they perform economic activities also performed by private bodies and competition would be significantly distorted if they were treated as non-taxable persons (see *Isle of Wight CJEU* paras 35-39). In other words, these two subparagraphs ensure compliance with the fundamentally important principle of fiscal neutrality (which requires that two supplies which are similar in the eyes of the consumer should be taxed in the same way) by ensuring that public bodies are not treated as non-taxable persons when they actually or potentially compete with private law entities in a more than negligible way (see discussion below at paras 92-105).

53. A secondary objective of article 13(1) may well be to serve the purpose reflected in the recitals to the PVD of ensuring that the target of VAT taxation is captured as comprehensively as possible. The Court of Appeal’s analysis of the purpose is not consistent with this aim.

54. In answer to this point (raised by ground 1) the Trust submits that the Court of Appeal’s identification of the purpose of article 13(1) in para 88 of its judgment has no effect on the test applied by the Court of Appeal in determining whether the derogation applies to the Trust’s car parking activities. We disagree. The Court of Appeal clearly regarded it as important to make the point it did about the broad public interest objective of permitting revenue retention. As we have said, there is no support for it. We think it is wrong and that it must inevitably have coloured the Court of Appeal’s approach to the two conditions it had to address.

(iii) Strict interpretation of derogations

55. The third principle established by the case law is that as a derogation from the general rule that any activity of an economic nature is subject to VAT, the first subparagraph of article 13(1) must be interpreted strictly: see *Saudaçor* at paras 49 and 55. By contrast, the second subparagraph restores the general rule and is not therefore to be construed narrowly: *Isle of Wight CJEU* at para 60.

56. The CJEU has explained that applying a strict interpretation does not mean that the derogation should be deprived of effectiveness. Rather, a fair interpretation must be applied. A similar approach has been taken in domestic case law. For example in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] 1 WLR 1674, Chadwick LJ held, “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” (para 17). (See to similar effect *National Roads Authority* EU:2017:28 at para 37).

57. As the CJEU said in *Saudaçor* at para 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 ...”

Compliance with the principle of fiscal neutrality is a fundamental feature of the VAT system. The CJEU has acknowledged that while the PVD allows for certain derogations which may interfere to some extent with the application of the principle of fiscal neutrality (like the derogation in the second subparagraph of article 13(1)) it does so only where the treatment of bodies governed by public law as non-taxable persons “would only distort competition insignificantly” and the derogation “must be interpreted in such a way that the least possible damage is done to that principle” (*Isle of Wight CJEU* para 44).

(iv) Public body acting as a public authority

58. As we have explained, the twin conditions in the first subparagraph of article 13(1) (and its predecessor, article 4(5) of the Sixth Directive) that must be fulfilled in order for the rule of treatment as a non-taxable person to apply are that 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”. There is no dispute that the Trust is a body governed by public law. The second condition is the focus of this part of the appeal.

59. In *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d’Arda v Comune di Carpaneto Piacentino; Ufficio Provinciale Imposta sul Valore Aggiunto di Piacenza v Comune di Rivergaro* (Joined Cases C-231/87 and C-129/88 [1991] STC 205; [1989] ECR 3233 (“*Carpaneto I*”) the CJEU considered whether certain activities engaged in by local authorities were excluded from the scope of VAT. The activities included concessions in respect of graves, cemetery vaults and chapels, and selling concessions of surface rights and the sale with full ownership of rights of land in connection with the subsidised building of homes. The CJEU held that in deciding whether a public authority is acting as such, the subject-matter and purpose of the activity engaged in is irrelevant (para 13). Those are decisive factors in relation to the application of Annex 1 and the mandatory public interest exemptions (para 14).

60. Instead, the CJEU held that what determines the scope of the treatment of public bodies as non-taxable persons “is the way in which the activities are carried out ... In so far as that provision makes such treatment of bodies governed by public law conditional on 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.” (*Carpaneto I* para 15).

61. Bodies governed by public law “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’”

(*Carpaneto I* para 16). The CJEU made clear that it is for the national court to classify the activity at issue in the light of that determinative criterion.

62. The CJEU did not expand upon what was meant by a “special legal regime” applicable to public authorities in *Carpaneto I* perhaps because, as the Commission explained in its First Report on the Common system of VAT, “It is left to the Member States to define the activities engaged in by public bodies ‘as public authorities’. It was not possible to produce a Community definition because of the wide divergences between Member States on this point.” (COM (83) 426 final, pp 30-31, referred to by Oskar Henkow in “The VAT/GST Treatment of Public Bodies” – (2013) Wolters Kluwer, footnote 44). The differing attitude to privatisation and deregulation across member states must also inevitably have increased such differences.

63. In subsequent cases, however, the jurisprudence of the CJEU has established that a public body will be acting under a special legal regime if national law conditions require it to carry out the specific activity in a way that does not apply to private traders; or the body is using a specific public power to carry out the activity. These are different ways of establishing that an activity is being carried on under a special legal regime. But what ultimately matters is the legal way in which the activity is carried out.

64. *Fazenda Pública v Câmara Municipal do Porto* (Case C-446/98), [2001] STC 560; [2000] ECR I-11435 (“*Fazenda*”) is a case where the pursuit of the activity involved the use of public powers. It concerned car parking. The city council (Porto) raised income from a variety of parking facilities, including 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 made them available to the council. The Portuguese tax authorities sought to charge VAT on the council’s receipts from car parking charges. The first question was whether the activity in question, as engaged in by a body governed by public law, could 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.

65. The CJEU repeated the test established in paras 15-16 in *Carpaneto I*, making clear that neither the subject matter or purpose of the activity, nor whether the council owned the land nor whether the land was public or private property were determinative of whether it was carrying on the activity as a public authority. Instead, it was for the national court to determine whether the activity was 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. As the CJEU held:

“21. The national court must, in accordance with the case law referred to in paras 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.

23. In view of the nature of the analysis to be carried out, however, as the court has already held, it is for the national court to classify the activities at issue in the light of the criterion adopted by the court (see *Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda v Comune di Carpaneto Piacentino* [1991] STC 205 at 235, [1989] ECR 3233 at 3275, para 16, and *Comune di Carpaneto Piacentino v Ufficio Provinciale Imposta sul Uilore Aggiunto di Piacenza* [1990] ECR I-1869 at 1886, para 11).

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.”

In other words, the fact that pursuit of the activity involved 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, showed that the activity was subject to a special legal regime. Thus, while a private operator might impose an additional payment or a contractual penalty (under civil law) for exceeding the parking time paid for, the power to punish this behaviour with a fine showed that the pursuit of the activity involved the use of public powers. Moreover, the overall context and the way in which the activity is carried out are important factors in defining an activity as one engaged in as a public authority (see para 35 of the Advocate General's opinion in that case).

66. The concept of “public law powers” refers to activities which involve “acts of will which affect private individuals by requiring their obedience or, in the event of

disobedience, by compelling them to comply”. This extends to powers vested in a body as a public authority that are exercised in a tangible way by means of an authorisation, licence, permit, concession, registration, issue of a certified copy or by means of penalties for failure to comply with laws or regulations (see paras 36-38 of Advocate General Mischo’s opinion in *Carpaneto I*). In *Fazenda* the CJEU gave the examples of authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time (para 22).

67. The mere fact that a public body has a statutory basis for acting is insufficient. That is unsurprising: all public bodies have only the powers granted to them by their enabling legislation and it cannot be said that, because their every activity must have some statutory basis, that the activity is therefore being conducted under a special legal regime. It is not every statutory duty or power which creates different legal conditions from those that apply to private economic operators. Accordingly 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: see *Commission of the European Communities v Ireland* (Case C-554/07) [2009] ECR I-128 (“*Commission v Ireland (2009)*”) where the CJEU rejected the argument that local authorities in Ireland could be exempt simply on the basis that they acted pursuant to overarching powers conferred on them by statute (in particular the Constitution of Ireland and the provisions of the Local Government Act 2001) (para 49). It is therefore necessary to look beyond the framework of the special legal regime and statutory powers given to the body to identify a more precise exercise of rights and powers of public authority that has some impact on the activity in question.

68. Where the activity is not undertaken using the relevant power, there will be no special legal regime. *Saudaçor* is an example of this kind of disconnect between public powers and the activity in question. It involved a body established by the Azores regional government to provide planning and management of the regional health service under programme agreements concluded between the company and the regional government. Article 10 of the legislative decree under which *Saudaçor* was created provided that in the performance of its functions, *Saudaçor* held the same public law powers as the regional government, which included the power to carry out expropriations. The tax authorities sought to charge VAT on its supplies.

69. In examining whether *Saudaçor* acted as a public body in relation to its activities, the CJEU applied the *Carpaneto I* test and followed *Fazenda* in noting that the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime. *Saudaçor*’s regime had both public and private characteristics. The CJEU said that it could not be ruled out that such a body could be classified as a body governed by public law (para 68). However, the CJEU continued that the body 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 Sudaçor 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” (para 72). This was not, as the Trust has suggested, a finding that a power to expropriate makes the body a public body and may also amount to a special legal regime. Rather, the point made by the CJEU was that the expropriation power would not amount to a special legal regime if it was being used for other activities and was not being used in the activity of planning or managing healthcare.

70. Just as in *Commission v Ireland (2009)*, the mere possession of public law powers will not have the effect that the requirement to act as a public authority in the relevant sense is met.

71. Finally, we note under this heading that car parking activities were also considered by the CJEU in the *Isle of Wight* litigation. The question was whether local authorities which charged members of the public for off-street car parking were non-taxable for these purposes. The VAT tribunal had already determined that the Isle of Wight Council’s activity of operating off-street car parks was an activity in relation to which it was acting as a “public authority”: [2004] V & DR 68 and (2004) VAT Decision 18557. There was no appeal from that decision and the contested issue in the lengthy proceedings that followed concerned the distortion of competition proviso. However, both Advocate General Maduro and the Commission expressed reservations about that conclusion. At para 11 of his opinion, the Advocate General said, “it is not certain that the provision of off-street parking is subject to a legal regime specific to the public body”, and the CJEU’s judgment (at para 23) may also suggest a similar reservation.

(v) Closely linked

72. At paras 89 to 93 of its judgment in this case, the Court of Appeal discussed 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: these are found in *Isle of Wight CJEU* at para 31 (set out at para 52 above), *Commission v Ireland (2009)* at para 49 and *Sudaçor* at para 71.

73. At para 94 the Court of Appeal made clear that it did 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 I* at paras 15-16. We agree with that conclusion, as do the parties. It is unnecessary therefore to address the alternative reasoning set out by the Court of Appeal in paras 133 and 134, or HMRC’s challenge to it (as reflected in ground 2). Put simply, those paragraphs are not material. The test in *Carpaneto I* applies. The purpose and subject matter of the activities are irrelevant in

applying article 13(1), though they are relevant in applying the exemption in article 132(1)(b). What matters are the two conditions that must be fulfilled for the principle of treatment as a non-taxable person to apply: (i) the activities must be carried out by a body governed by public law, and (ii) they must be carried out by that body acting as a public authority.

6. Does the Trust act as a public authority in providing car parking (ground 3)?

74. Having set out the relevant legal principles, we can now address the question of their application to the circumstances of this case and, in particular, whether the Court of Appeal was correct to reverse the conclusions of the tribunals below and hold that the Trust did act as a public authority in the provision of car parking services to members of the public.

75. As we have indicated, the Court of Appeal accepted the Trust's case that the existence of externally imposed guidance in the form of the 2015 Parking Principles (and its predecessor guidance to the same or similar effect) that constrains the car parking activity, combined with a legally enforceable duty to adhere to that guidance unless there is a good reason to depart from it, were sufficient to constitute a special legal regime for the purposes of satisfying the second condition in article 13(1) of the PVD.

76. In reaching that conclusion, the Court of Appeal's reasoning can be summarised as follows:

(a) The Secretary of State for Health has 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, section 2 of the NHS Act 2006 confers a broad power to do anything "calculated to facilitate" or that is "conducive or incidental" to the discharge of those functions.

(b) Section 43(3) of the NHS Act 2006 enables NHS foundation trusts to carry out activities other than those carried out for the purposes of the health service, "for the purpose of making additional income available in order better to carry on its principal purpose".

(c) As a matter of general principle (adapting or adopting what was said in *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148 ("*Munjaz*") and *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56, [2021] AC 143 ("*Hemmati*")), guidance that meets the requirement for legal certainty and a duty to adhere, absent good reason not to do so, may constitute a form of law.

(d) Here, the 2015 guidance was issued on behalf of the Secretary of State pursuant to wide ranging powers granted under the NHS Act 2006. 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.

(e) The position would probably be different if the guidance was internal or self-authored because it could 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 public body’s behaviour, rather than rules or policies which the body has freedom to alter at any time.

(f) The 2015 guidance requires the Trust to “make sure that users can get to the site (and park if necessary) as safely, conveniently and economically as possible” whereas private operators are subject to no such direction.

(g) It requires that charges “should be” reasonable for the area and concessions for specified groups “should be” offered; and additional charges “should only be imposed where reasonable” and “should be waived” where a driver overstays for reasons beyond his or her control, with a “period of grace” normally being applied. None of these constraints apply to private operators.

(h) The guidance therefore has a real impact on the way in which car parking activities by the Trust may lawfully be carried on; and the legal conditions under which the Trust offers car parking differ in material respects from those applicable to private operators. The guidance meets the requirement for legal certainty given the context.

77. In our judgment and for the reasons set out below, the Court of Appeal was wrong to hold that in principle, external guidance, combined with the general public law obligation to adhere to it in the absence of good reason can amount to a condition of national law for identifying a special legal regime for the purposes of article 13(1) of the PVD.

78. We accept that it is necessary to consider all conditions laid down by national law for the pursuit of the activity in issue; and that no distinction should be drawn between conditions laid down by national law simply by reference to their source. The question is one of substance and effect. As a matter of general principle, what is required is a legal

obligation in national law that governs or materially affects the way in which the activity must be carried out. Furthermore, to be a special legal regime, the law in question must have the quality of legal certainty that is fundamental to the VAT system.

79. In our view, provisions of primary, secondary and even tertiary legislation (published by a government department under the authority of primary or secondary legislation, for example, in the form of a VAT notice, that has the force of law) plainly impose legal obligations with the necessary legal certainty and have the potential to govern or have a material effect on the way in which an activity is carried out. Mere guidance, on the other hand, does not. Guidance (even when externally imposed) does not impose any legal obligations. It provides a framework within which a public body should ordinarily act. That is insufficient. The flexibility which is a feature of guidance militates against guidance constituting a special legal regime in the VAT context.

80. The general duty to adhere to guidance cannot alter that because it too allows departure from the guidance. A general public law obligation to follow guidance is not a “condition laid down by national law” for the pursuit of the activity in issue. It is in the nature of a public authority that its activities will be governed to a greater or lesser extent by both public law and private law, and ordinary principles of public law will apply to any body governed by public law. Indeed it is difficult to conceive of a public body supplying goods or services which would not be subject to at least some public law obligations.

81. Although the Court of Appeal limited its conclusion to external guidance, in our view there is no real distinction between internal and external guidance in this context. Both internal and external policies or guidance are an essential element in securing the coherent, consistent and procedurally fair performance of public or administrative functions. The basic principles of public law in relation to policies and guidance (for example, the requirements to have, publish, and adhere to guidance absent good reason) apply equally whether it be internal or externally imposed. Although an internal policy can potentially be changed more easily, while it is in force the body must apply the policy or guidance absent good reason for departing from it. It is stuck with it in the same way as it would be stuck with external guidance. This is not an obvious or real difference as the Trust suggests. The duty of adherence on public bodies applies to all guidance, whether externally imposed or merely internal. Accordingly, we can see no principled basis for concluding that the Court of Appeal’s statement (at para 128) 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, would not also apply if the guidance had been internal.

82. Moreover in the case of internal guidance, since the potentially taxable person can decide whether or not to prescribe its own guidance, it could unilaterally determine (whether directly or indirectly) its own tax status. That is fundamentally contrary to the

requirements of the VAT regime and inconsistent with principles of legal certainty and fiscal neutrality, which as the CJEU has observed, must be observed all the more strictly given the financial consequences that follow (*Isle of Wight CJEU* at paras 47-52). The consequence of the Court of Appeal judgment in this case is that a public body (or its non-legislative overseer) could write its VAT treatment simply by producing guidance to govern or materially affect the way in which the relevant activity is carried out. Such an outcome is contrary to legal certainty and amounts to a taxpayer, not the legislature, writing its own tax treatment. The type of policy/guidance that the Trust seeks to rely on to establish a special legal regime may be subject to judicial review proceedings in the Administrative Court, and can be withdrawn, updated or replaced.

83. While it is true, as the Trust submits, that contracting parties can negotiate contractual arrangements leading to a particular VAT consequence so long as those arrangements reflect the economic reality of their commercial transaction, a party cannot contract out of taxable status. Nor is there any parallel with the circumstances discussed in *Eynsham Cricket Club v Revenue and Customs Commissioners* [2021] 1 WLR 3220, where the taxpayer chose to operate within one legal regime (that governing community amateur sports clubs) rather than another (that governing charities), each with its own attendant tax consequences. In each of these cases the regulatory regime was a legally binding regime and once chosen determined the different VAT treatment applicable to the body in question. That is different from guidance which does not have the force of law and can both be departed from and changed.

84. More generally, the first condition in article 13(1) is being a public body subject to public law. Policies and guidance (whether internal or external) are part of basic good practice obligations of a body governed by public law; and an essential element in securing the coherent, consistent and procedurally fair performance of public or administrative functions. Since every “body governed by public law” is subject to the general obligation to follow guidance, that same obligation cannot, without more, also be the basis for a special legal regime that fulfils the second condition in article 13(1) of the PVD that the public body be also “acting as” a public authority. Otherwise, this deprives the requirement of meaningful effect. It contradicts the need to construe the derogation strictly and defeats the purpose of the provision. As HMRC suggest, it comes close to the impermissible reasoning that “since I am a public authority, whatever I do, I am acting as a public authority.”

85. Nor do we derive any assistance from the cases of *Munjaz* and *Hemmati*. The context in both cases was so different from this one and neither leads to the conclusion that the types of guidance relied on by the Trust are a condition of national law for the purposes of article 13(1) of the PVD.

86. The jurisprudence of the CJEU discussed above establishes that the derogation in article 13(1) is to be strictly applied. Simply acting within the framework of a special

legal regime in which a body has public powers is not enough. The mere existence of a general statutory power enabling the activity to be performed is not enough. In this case, neither the broad licence to provide services relating to healthcare in section 43(2) of the NHS Act 2006, nor the broad licence to engage in income generating activities in section 43(3) of the NHS Act 2006 provides a special legal regime for the pursuit of car parking services and pursuit of that activity neither involves nor is closely linked to the exercise of rights and powers of public authority, thus distinguishing the public body from the situation of a private economic operator carrying out similar activities.

87. As the CJEU has repeatedly emphasised, the determining factor is whether the activity itself is governed by the ordinary legal conditions that apply to private traders or whether it takes effect under a special legal regime applicable to the public body. If (as *Commission v Ireland (2009)* shows) the fact that a public body merely acts in accordance with powers conferred on it by statute is insufficient to establish that its activities involve or are closely linked to the exercise of rights and powers by a public authority, the same must also be true of the fact that the public authority is subject to general principles of public and administrative law, including the general duty to follow guidance.

88. Moreover, as it seems to us, HMRC are correct to submit that the Court of Appeal's analysis permits the Trust, which failed to meet the criteria for the specific exemption in article 132(1)(b) of the PVD for "hospital and medical care and closely related activities undertaken by bodies governed by public law" and did not appeal that finding, instead effectively to claim the same exemption (through being a non-taxable person making the supply) based on the general provision in article 13(1) instead. If correct, the Court of Appeal's conclusion would have the effect that where a body governed by public law does not meet the criteria for a relevant public interest exemption in article 132(1) of the PVD because (say) the supply is not essential to the exempted transaction, it can, nonetheless, obtain precisely the same exemption in effect by asserting that the supply is "closely linked" to the exercise of its functions as a public body. This impermissibly extends the scope of the article 132 exemption and permits the general to override the specific.

89. For all these reasons, the Court of Appeal was wrong to identify a special legal regime based on nothing more than an obligation that every public body has, namely the general duty to follow guidance absent good reason for departing from it. The legal conditions under which the Trust is providing car parking services are not any different, because of their function as a public authority, from the legal conditions under which their private sector counterparts are providing what may from the point of view of the consumer be indistinguishable services.

90. In our view, this was not a proper application of the article 13(1) derogation. Our conclusion on this ground means that this appeal must therefore be allowed.

7. Does the supply lead to a significant distortion of competition (ground 4)?

91. Strictly speaking ground 4 does not arise but since we heard full argument and there are other cases stayed behind this one, it is important that we address it.

(i) Significant distortion: the applicable legal principles

92. To recap, the second subparagraph of article 13(1) of the PVD provides for a second condition that must be met to establish non-taxable status:

“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.”

As we have explained, the aim of this requirement is to ensure that private operators are not placed at a disadvantage because they are taxed while public bodies are not. The purpose of the competition proviso is to guarantee fiscal neutrality (which, as we have explained, requires two supplies which are similar in the eyes of the consumer to be taxed in the same way) and to ensure that private operators are not placed at a disadvantage because of the non-taxable status of a public authority. It follows that the provision must be interpreted in such a way that the least possible damage is done to the principle of fiscal neutrality.

93. The second subparagraph of what is now article 13(1) PVD was considered in detail by the CJEU in *Isle of Wight CJEU*. Following *Fazenda* the Isle of Wight Council and three other local authorities brought a test case to recover VAT that they had accounted to HMRC for on the provision of off-street car parking. The VAT tribunal allowed their claims, but the High Court referred the case to the CJEU for a preliminary ruling on questions relating to the meaning of the phrase “would lead to significant distortions of competition”.

94. The first question was 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 local authority by local authority basis by reference to the area in question, whereas the UK Government submitted that the entire national market rather than each local market should be considered.

95. In its judgment, the CJEU emphasised the force of the general rule that supplies of all services for consideration are subject to VAT provided the activities in question are of an economic nature (paras 26-29); and that it is only by way of derogation from that general rule that certain activities of an economic nature are not to be subject to VAT. The derogation in the first subparagraph of what is now article 13(1) from the principle that VAT is chargeable is premised on the fact that it principally covers activities engaged in exclusively, or almost exclusively, by the public sector which are therefore unlikely to have anti-competitive effects vis-à-vis private operators. Nonetheless, where the carrying on of such activities by a public authority would have anti-competitive effects if it were not a taxable person, the second and third subparagraphs pursue the same objective of limiting the scope of the derogation, and these subparagraphs have to be interpreted as a whole. The CJEU held that it followed accordingly that:

“the treatment of bodies governed by public law as taxable persons, either on the basis of the second subparagraph of article 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.” (para 40)

96. The CJEU explained that this conclusion was supported by general principles of Community law, and in particular the fundamental principles of fiscal neutrality and legal certainty. The CJEU made clear that the second subparagraph was intended to ensure compliance with fiscal neutrality which precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes and therefore “precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned” (paras 41-43). At para 44 the CJEU said:

“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 article 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.”

97. The result of the local authorities’ argument, which focussed on the locality governed by a particular local authority, was that only some local authorities would be

taxable even if the supplies of services in question were substantially the same. However, as the CJEU explained, if the 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” (para 46).

98. As for legal certainty, the CJEU held that this had to “be observed all the more strictly in the case of rules liable to entail financial consequences” (para 47). The difficulties involved in evaluating distortions of competition by reference to each local market, 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 (paras 49-51). It therefore concluded that the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public 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.” (para 53)

This formulation, as the UT stated in para 109 of its decision in this case, involves looking at the issues at a fairly high degree of abstraction. See also Rimer LJ in *Isle of Wight* [2009] STC 1098, para 18.

99. The second question asked of the court was whether the second subparagraph was concerned only with actual competition or whether it extended to potential competition. The CJEU held that the scope of the derogation would be unduly enlarged if the second subparagraph was confined to cases of distortion of actual competition, observing 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” (para 62). It continued:

“63. It follows that the expression ‘would lead to’, for the purposes of the second subparagraph of article 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 article 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.”

100. The CJEU also addressed the meaning of “significant”. It held that “significant” meant “more than negligible” (para 79), explaining that the consequence of the argument put forward by the local authorities that bodies governed by public law should be subjected to VAT only in cases where there were material or exceptional distortions of competition, would be “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” (para 77). By contrast, a test based on something more than negligible would “bring about the least possible damage” to fiscal neutrality (para 78).

101. In *National Roads Authority*, a public body established under Irish law (the “NRA”) to manage the public road network also entered into public-private partnerships to construct and operate toll roads and operated two toll roads itself. The NRA challenged the application of VAT to its toll receipts. There were findings that toll roads in Ireland were too far apart to compete with each other, that there was “no realistic possibility” of a private operator entering the market to compete with the two toll roads operated by the NRA (by constructing a toll road which would compete with the Westlink motorway or the Dublin tunnel), and that, in practice, a private operator wishing to construct a private toll road would encounter almost insuperable difficulties. Despite those findings, the revenue authority argued that, in the light of *Isle of Wight CJEU*, a distortion of competition is presumed to exist even where the activities concerned do not compete with each other. The CJEU rejected that approach. It held that the second subparagraph of article 13(1) envisaged public bodies engaging in activities which may also be engaged in by private economic operators, in competition with them. The application of the second subparagraph involved an assessment of economic circumstances. Further the CJEU stated:

“41. ... 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 [*Isle of Wight CJEU* at para 64].

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.”

102. It is important to appreciate that in *National Roads Authority* there was neither actual nor potential competition with private toll road operators. Indeed, as the CJEU emphasised, it was common ground that there was no real possibility of a private operator entering the market in question by constructing a road that could compete with already existing national roads (para 49); and the possibility of private operators entering this market was “purely theoretical” (para 50). It followed that there could be no actual or even potential distortion of such competition. The CJEU’s statement at para 44 must be understood in that context. In our judgment it does not set a requirement that in all cases concerning the application of the competition proviso there must be a detailed market or competition analysis.

103. Finally, we should refer to *Taksatorringen v Skatteministeriet* (Case C-8/01) [2006] STC 1842 (“*Taksatorringen*”), relied on by the Trust. The case concerned (among other things) the “cost-sharing exemption” in what is now article 132(1)(f) of the PVD,

which affords a VAT exemption for groups providing services to their members at cost which was subject to a condition that “such exemption is not likely to cause distortion of competition”. *Taksatorringen* challenged the denial of the VAT exemption in relation to the supplies it made to its members. The CJEU rejected an 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 distortion of competition, holding 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 ... 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” (paras 58 and 59).

104. So, *Taksatorringen* makes clear that it must be non-taxation, rather than anything else, that is or would be causative of the distortion in competition. Put another way, 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.

105. In summary, the following points emerge from the CJEU’s jurisprudence discussed above:

(a) The second subparagraph of article 13(1) cannot be construed narrowly, since by contrast with the derogation in the first subparagraph, the second subparagraph restores the general rule that any activity of an economic nature should be subject to VAT.

(b) The purpose of the second subparagraph is to protect the commercial position of private operators, by ensuring that they are not placed at a disadvantage because they are taxed whilst bodies governed by public law are not taxed, and in this way to secure adherence to the principle of fiscal neutrality (which requires two supplies which are similar in the eyes of the consumer to be taxed in the same way).

(c) The provision must be interpreted in such a way that the least possible damage is done to the principle of fiscal neutrality and is not to be construed narrowly (*Isle of Wight CJEU* paras 44 and 60).

(d) The evaluation of distortion of competition must be by reference to the activity “as such” without reference to any particular local market in which it occurs and at a high level of abstraction.

(e) Competition includes both actual and potential or future competition, provided that the possibility of a private operator entering the relevant market is real and not purely hypothetical as it was in *National Roads Authority*. It is against that background that the requirement for an assessment of economic circumstances must be understood.

(f) 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 distortion of competition.

(g) A mere possibility of a distortion of competition is insufficient. But any distortion that is more than negligible is “significant” for these purposes.

(ii) Proving distortion of competition

106. The question is therefore whether the different treatment of the activity for VAT purposes would lead to a more than negligible distortion of competition, including a distortion of potential competition, provided that there is a real and not just a hypothetical possibility of market entry by a private operator.

107. It is common ground that HMRC bear the burden of proof on this question.

108. As to how that burden is discharged, the first point to make is that there is no presumption of law to the effect that differential taxation of public bodies and private operators will distort competition between them, once actual or potential competition has been established. That suggestion was correctly rejected in *Isle of Wight CA* [2016] STC 2152. It might be the case, as a matter of fact and common-sense logic, that differential taxation will have that effect in a given case. But what is important is to appreciate that these are questions of fact in every case, and to the extent that any presumption of fact is raised, it is rebuttable, as the *Isle of Wight* series of cases established. The public body and HMRC are therefore in principle entitled to adduce evidence directed at showing whether, on the particular facts of the case, distortion would occur.

109. Secondly, the inquiry into distortion of competition requires a fact sensitive analysis, and the evidence that may be relevant for that assessment will turn on the circumstances of the individual case. Since the CJEU ruled out a “local authority by local authority” approach involving an inquiry as to the actual or potential economic consequences on identifiable geographic markets of treating the local authorities as non-

taxable persons in respect of their off-street car parking activities (see *Isle of Wight CJEU*) the inquiry is to be approached at a fairly high level of abstraction.

110. Thirdly, it follows that it is not necessary in every case to produce the kind of detailed factual and expert evidence that was adduced in the *Isle of Wight* case to determine the existence of a distortion of competition for the purposes of the second subparagraph of article 13(1) PVD. The evidence in that case was adduced because of the way in which the local authorities put their case. Likewise, in *National Roads Authority*, the CJEU said it is necessary to consider the “economic circumstances” of the individual case by evaluating the “activity in question, as such” and the facts, objective evidence and market analysis to support any conclusion on the existence of actual or potential competition (para 40-42). But as we have explained, this must be understood in the context of a case where there was only a “purely theoretical possibility” of market entry by a private operator. Neither case set a requirement that in all cases concerning the application of the competition proviso there must be a detailed market or competition analysis.

111. Fourthly, and in any event, we caution against any suggestion that the approach applied in competition cases can be read across to the inquiry required by the second subparagraph of article 13(1). The Court of Appeal identified parallels (para 141 of the judgment) but it also identified important differences between a competition law analysis and what is required here (para 142). We consider that the differences significantly outweigh the similarities, and the comparison is ultimately an unhelpful one. Significantly, the question in a competition case requires conclusions to be reached about circumstances in actual markets that can be investigated whereas in an article 13(1) case it involves a comparison (at a high level of abstraction) between a situation in which the activity is non-taxable with the situation in which it is taxable.

112. HMRC relied on the judgment of the CJEU in Cases C-259/10 and C260/10 *Rank Group plc v Revenue and Customs Commissioners* [2012] STC 23 (“*Rank*”) to contend that the statement at para 35 in *Rank*, combined with a finding of actual competition, amounts to proof of a distortion of competition for the purposes of the second subparagraph of article 13 in this case. The judgment in *Rank* addressed the principle of fiscal neutrality as applied to different types of gaming machine, but the CJEU also made observations about the relationship between distortion of competition and fiscal neutrality in that context. The CJEU reasoned that 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 (para 32). It is the similar nature of two supplies of services that entails the consequence that they are in competition with each other (para 33). As a result, if two supplies are identical or similar from the point of view of the consumer and meet the same needs of the consumer, proof of the existence of actual competition is not additionally required for breach of the fiscal neutrality principle to be shown (para 34). At para 35, the CJEU stated: “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”.

113. While it is certainly the case that the statement in para 35 of *Rank* has clarified the principle of fiscal neutrality by confirming that demonstrating a distortion of competition is not an ingredient in establishing a breach of that principle, we do not consider that it can be treated as a trump card in the manner suggested by HMRC. The statement was not made in relation to a legislative test requiring proof of a distortion of competition or with the special position of public bodies in mind. It does not override the words of article 13(1) and the case law specifically addressing the legislative conditions that must be met.

114. Nonetheless, we see no reason why HMRC cannot rely on the proposition of fact (as a matter of logic or common sense) that differential tax treatment of similar offerings does generally distort competition, as the CJEU observed at para 35 of *Rank*. In this regard, we agree with observations made by the tax tribunal in *Isle of Wight* ([2010] UKFTT 264 (TC) at para 11) to the effect that:

“We do not regard Rimer LJ’s judgment [in *Isle of Wight CA*] as prohibiting HMRC from relying on common sense propositions such as that consumers do not generally wish to pay more than they need for a service, at least to the extent that quality of service is not an issue, or that if there are two categories of rival supplier and one category does not have to account for VAT on its turnover while the other does, the non-taxable supplier will be placed in the advantageous position of being able to price more cheaply than the other while retaining the same turnover and/or to price at the same level while retaining more turnover. HMRC have paragraph 62 of [*Isle of Wight CJEU*] as authority for the proposition that non-taxation of Local Authority car parks is liable by itself to discourage private entry into the market. But the Appellants are plainly entitled to adduce evidence to the effect that, in the case of off-street car parking, cheaper pricing will not result from the tax advantage and/or that, if it does, will not affect demand.”

115. It is always open to a public authority to adduce evidence that there is in fact no distortion of competition in the circumstances of a particular case. The general rule that two supplies in actual competition with each other give rise to a distortion of competition is a function of the need not to damage fiscal neutrality and provides no proper cause for complaint. Moreover, that the test might be hard to satisfy does not mean that there is a breach of the principle of effectiveness, nor does it set an impossible hurdle for the public authority concerned.

8. The nature of the service provision or activity in question

116. The service provision (or activity) in question in this case is car parking for reward at or near hospital sites. The actual purpose of the activity or motivation of the user in using the service is irrelevant and to incorporate it into the definition of the service would make the exercise unworkable. It follows that the service provided is not car parking *to visit* the hospital since there might be mixed use in the sense of car parking combining a visit to the hospital and a visit elsewhere (for shopping etc); nor is car parking restricted to hospital users only. There is no evidence of the latter restriction and no finding to that effect in any event. The need of the consumer is simply to park his or her car at or near the hospital.

117. Given this, any comparison for the purpose of considering competition would have to be a comparison between hospital car parking and private car parking near the hospital. It follows that a commercial car park close to a hospital must logically be in competition with the hospital car park without the need for further investigation. The supplies of places to park are identical or at least similar from the point of view of the consumer and meet the same needs of the consumer.

9. The FTT findings of significant distortion

118. In para 41, the FTT referred to the Car Parking Best Practice guidance as stating explicitly in para 24 that car parking on NHS sites is in competition with alternative car parking facilities, and to paragraph 3.5 of the HTM (the Health Technical Memorandum) which warns NHS bodies that sites close to city/town centres may be used by persons not attending the healthcare facility, eg commuters and visitors to the area, if the car parking charges are lower than local car parks. As the FTT observed, these documents demonstrate that the market for car parking includes both the Trust's car parks and other car parks or parking areas in or near the Trust's hospitals and health centres. The FTT also relied on the fact that until the Trust changed its charges, one of the Trust's sites was used by people travelling from the local airport and was thereby in competition with airport parking.

119. From this evidence, the FTT concluded that there was actual competition between the Trust's car parks and parking provided by private operators in or near those areas; and by implication that the two types of supply (private operator and Trust car parking) are similar (para 64). The FTT made clear that these findings applied equally to other NHS Trusts and bodies located elsewhere in the UK.

120. The FTT's findings and its analysis involved an assessment of the supplies in question and whether and to what extent the Trust's supplies are in competition with private or commercial supplies that fulfil the same need.

121. At para 65 the FTT held that these findings meant that treating the Trust as non-taxable *would* lead to actual or potential distortions of competition which were more than negligible. As the FTT explained:

“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 HTM identified a need for bodies such as the Trust (which followed the HTM 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 HTM 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 para 20 above and the fact that one of the Trust’s sites was used as parking for the local airport until the Trust increased its charges (see para 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.”

122. The UT concluded that the FTT made no error of law on the question of significant distortions of competition. The guidance itself acknowledged the existence of competition and the FTT 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).

10. The Court of Appeal's approach

123. The Court of Appeal recognised at para 137 that the objective of the second subparagraph of article 13(1) is to ensure that private operators, including potential future entrants, are not placed at a disadvantage (*Commission v Ireland (2009)* at para 58; *National Roads Authority* at para 39). Further, at para 139 it acknowledged 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 was therefore whether there would be distortions of competition, and whether they would be significant. The judgment referred to the limited analysis conducted by the FTT and its reliance on the guidance (as summarised above) and continued as follows:

“143. ... 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’ ... 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 paras 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.” (Emphasis added)

124. These passages correctly recognise the FTT’s findings that there was significantly greater demand for car parking than the available supply in the Trust car parks; that this was replicated on a national level; and that, even in relation to alternative parking available at sites based in towns, the parking areas are often fully utilised.

125. In these circumstances, it is difficult to understand the Court of Appeal’s conclusion (italicised in para 144 cited above) that these findings “would not support any conclusion that non-taxation of hospital car parking would have a distortive effect”. As a matter of simple economics, great unmet demand for car parking near a hospital should attract private car park operators. Such potential incomers into the market could offer parking to all those prepared to pay for it, including hospital visitors, by setting up a car park near the hospital. But the fact that the Trust can retain the additional income that would otherwise be payable to HMRC by way of VAT is a barrier to entry for potential future entrants. This is not purely theoretical as was the situation in *National Roads Authority* with the toll roads. Private car parking is a lucrative, nationally widespread economic activity. There is a real possibility that private operators would be deterred by the difference in tax treatment in this case.

126. The Court of Appeal wrongly criticises the FTT’s conclusion that, if the Trust simply took the additional income without lowering its charges, that would still distort competition. The thinking appears to have been that keeping income, as opposed to reducing prices, could not have a distortive effect (see para 144 of the Court of Appeal’s judgment set out above) because it involves an NHS body keeping the income. This is where the Court of Appeal’s “purpose” analysis at para 88 of the judgment might have come in. It is wrong as we have explained at paras 50 to 54, and a non sequitur in any event.

127. The identity of the supplier is irrelevant to the analysis. More importantly, it is unnecessary to look at what is actually done with the income from the VAT saving in order to establish a more than negligible distortion of competition. Although evidence that higher income, and hence higher profits, would lead to reduced prices and/or expansion of the activity to the disadvantage of private operators is one way of proving distortion, it is not the only way. Another is, as the UT explained (at para 107): “the disadvantage flows from the fact of the differential treatment of identical or similar activities meeting the same needs. That disadvantage cannot be excluded where the public body chooses to maintain its pricing but retain a higher profit from that”. This important point formed no part of the Court of Appeal’s analysis.

128. The Trust submits that this amounts to “an impossible test”. We disagree. As already indicated, it is open to the Trust or other public body to adduce evidence that there is in fact no distortion of competition in the circumstances of a particular case.

129. Here, as a matter of logic and common sense, the two activities are plainly similar from the point of view of the consumer and meet the same needs of the consumer so as to be in competition with each other. There was a finding of actual competition in any event, together with substantial unmet demand for car parking near the hospital sites. If, further, the two activities are treated differently for the purposes of VAT then it follows that there will be a distortion of competition since the treatment of one body as non-taxable is liable, by itself, to discourage potential competitors from entering the market for the provision of car parking facilities in the same geographical location. The ability of the public body to make a greater profit from the relevant activity by comparison with the competing private operator, as a result of differential fiscal treatment, will also as a matter of fact produce a distortion of competition.

130. The Trust challenges the FTT’s decision for failing to conduct the necessary analysis of whether the distortion of competition would be significant. Whereas for example, the tribunal in the *Isle of Wight* case found that non-taxation of local authorities would depress pricing by at least 7.5%, there was no such analysis here. The Trust submits that there was no evidence to support the conclusion that any distortion would be significant; without considering what effect the distortion of competition would have, the FTT’s finding at para 65 that the distortion could not be described as negligible was

unsupported. The Trust produces a series of hypothetical numerical examples to demonstrate the limited financial benefit to a public body not subject to VAT and the consequent absence of any basis for concluding that there would be a significant distortion.

131. We reject this submission. The CJEU case law establishes that the assessment of distortions of actual or potential competition as more than negligible is to be by reference to the activity in question and an analysis of the national market. It does not require an assessment of the effect of non-taxation on the pricing or retained profit decisions of the public body in question. The FTT was certainly not required to conduct the sort of assessment that the tribunal embarked on in the *Isle of Wight* case. Like the UT we consider that the analysis at para 65 was sufficient and there was no error of approach.

11. Was the evidence sufficient?

132. The remaining question is whether there was sufficient evidence to support the FTT's finding of a significant distortion of competition.

133. In our judgment, and for the reasons given above, there was sufficient evidence for the FTT to find a more than negligible distortion of competition in this case. There is no requirement to carry out a granular analysis of the competitive conditions of the specific local market or markets in which the Trust provides car parking, supported by factual and expert evidence, in order to establish the existence of a significant distortion of competition. Such a requirement would run counter to the CJEU's emphasis in *National Roads Authority* that the existence of a significant distortion of competition "must be evaluated by reference to the activity in question, ... without that evaluation relating to any particular market" (para 41). The analysis conducted by the FTT was an economic assessment by reference to the activity in question. The conclusions were ones that the FTT was entitled to reach on the evidence before it, and we can see no error in the FTT's approach to that evidence.

12. Conclusion

134. For all these reasons we allow the appeal on ground 3. We would also have allowed the appeal on ground 4.