



Neutral Citation Number: [2026] EWCA Civ 363

Case No: CA-2025-000596

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER): JUDGE RAGHAVAN
[2024] UKUT 00397 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2026

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE FOXTON

Between :

THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS
- and -
COLCHESTER INSTITUTE CORPORATION

Appellants

Respondent

Peter Mantle (instructed by **the General Counsel and Solicitor to His Majesty's Revenue and Customs**) for the **Appellants**
Michael Firth KC (instructed by **Knights Professional Services Limited**) for the **Respondent**

Hearing dates : 11 and 12 March 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Foxton :

1. The Appellants (“HMRC”) appeal against the decision of the Upper Tribunal (“UT”) in decision reference [2024] UKUT 00397 (“*CIC UT 2024*”). In *CIC UT 2024*, the UT held that the provision of education by the Respondent (“CIC”) constituted the supply of services “for consideration” for the purposes of Article 2(1) of the Principal VAT Directive (2006/112/EC) (“PVD”) in return for funding provided to CIC by two government agencies.
2. In reaching that conclusion, *CIC UT 2024* followed an earlier decision between the same parties, *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC) (“*CIC UT 2020*”). On this appeal, HMRC challenge both decisions on the following grounds:
 - i) The UT in *CIC UT 2020* erred in law in its analysis of a decision of the Court of Justice of the European Union (“CJEU”), Case C-151/13 *Le Rayon d’Or Sarl v Ministre de l’Economie et des Finances* of 27 March 2014 (“*Rayon d’Or*”): Ground 1.
 - ii) The UT in *CIC UT 2020* erred in its interpretation and application of the “direct link” requirement between the supplies made and the consideration received to meet PVD requirements: Ground 2.
3. HMRC must succeed on both grounds of appeal to succeed.

The facts

4. The argument on this appeal was essentially concerned with the reasoning in *CIC UT 2020*. Strictly, the facts for the purposes of this appeal are to be taken from the findings of the First Tier Tribunal (“FTT”) in *CIC UT 2024* which are helpfully summarised in an Annex to *CIC UT 2024*. However there are additional factual findings in *CIC UT 2020* on which the UT relied in reaching its decision. Mr Mantle sensibly agreed that there was no difference between the facts in the two cases, and that the court could have regard to the factual findings in both cases.
5. CIC is a body corporate incorporated as a further education corporation under the Further and Higher Education Act 1992, and registered for VAT. Its main campus is in Colchester, Essex, but it has satellite facilities in Braintree and Clacton. CIC is an “eligible body” for the purposes of Item 1, Group 6 of Schedule 9 of the Value Added Tax Act 1994 (“VATA”).
6. CIC’s courses are “vocational”, with the aim of providing its students with technical knowledge and skills. Many of those courses lead to accredited qualifications. However, CIC also provides non-accredited full cost and commercial vocational courses to meet the needs of local employers. Each of the courses provided by CIC which are the subject of this appeal are within the meaning of “education” or “vocational training”, in Item 1 of Group 6 of Schedule 9 VATA.
7. This appeal relates to CIC’s VAT prescribed accounting period from 1 November 2015 to 31 January 2016. In the academic year 2015/2016 (as with preceding years) CIC was funded primarily by three government agencies: the Skills Funding Agency (“SFA”),

the Education Funding Agency (“EFA”) and the Higher Education Funding Council for England (“HEFCE”).

8. This appeal relates to funding from the EFA and SFA (the “Funding Agencies”). While Mr Mantle pointed to occasional points of distinction between the terms of funding from these two agencies, he did not ultimately contend that the sources of funding might fall to be characterised differently for PVD purposes. In my view he was right to accept that the two sets of funding ought to admit of the same PVD classification. Similarly, in *CIC UT 2020*, [79], the UT observed that there was “no meaningful distinction to be drawn between them”.
9. The EFA funded the provision of education and vocational training for students aged 19 and under, certain categories of students aged over 19, and students with learning difficulties aged between 19 and 25. For the year 2015-16, EFA funding amounted to approximately £18.5m.
10. The SFA funded all or part of the provision of education and vocational training for students aged 18 and over who have not achieved a specified level of academic qualification, or who are entitled to free education or training due to their personal circumstances and for courses related to areas of the economy that are treated as priority areas for learning. CIC's income in respect of such students amounted to approximately £4.2m per annum.
11. CIC receives tuition fees for other students who are not eligible for EFA, SFA or HEFCE funding. CIC also generates income from the rental of studio and other space in the evenings, weekends and in the holidays and other income from MoT testing and motor vehicle repairs.
12. CIC provides courses to students from age 16 upwards. Students of all ages are educated or trained together, and there is no separation between them on grounds of age.
13. Funding by the Funding Agencies was provided pursuant to s.14 Education Act 2002 which provides:
 - “(1) The Secretary of State (in relation to England) or the National Assembly for Wales (in relation to Wales) may give, or make arrangements for the giving of, financial assistance to any person for or in connection with any of the purposes mentioned in subsection (2).
 - (2) Those purposes are—
 - (a) the provision, or proposed provision, in the United Kingdom or elsewhere, of education or of educational services;
 - (b) the provision, or proposed provision, in the United Kingdom or elsewhere, of childcare or of services related to childcare;
 - (c) enabling any person to undertake any course of education, or any course of higher education provided by an institution within the further education sector ...”

14. Section 15 provides that financial assistance may be provided “in any form” including grants (which do not ordinarily have to be repaid) and loans (which ordinarily do). Section 16 provides for financial assistance to be given on such terms as the Secretary of State considers appropriate.
15. I accept Mr Mantle’s submission that the language of s.14 is wide enough to embrace both the funding of those who are to receive education or education services, and the funding of those who are to provide such services.
16. CIC entered into separate agreements with the EFA and the SFA each year in relation to the funding that those agencies provided for the next academic year. The agreements were in standard form, and were not negotiable. The agreements are lengthy, and refer to (and incorporate by reference) a series of other documents (some of which are in electronic form and are published on the internet). Taken together, these agreements and the other associated documents set out the basis on which the funding agencies would fund CIC, and the obligations placed on CIC to deliver education and vocational training, and to provide information to the funding agencies.
17. As a condition of EFA and SFA funding, CIC is required to upload the Individualised Learning Record (“ILR”) for each student on a monthly basis to a national Data Service Hub. There are in excess of 200 fields of data for each student (*CIC UT 2020*, [22]).
18. CIC’s contract with the EFA is set out in a document entitled “Conditions of Funding Agreement”:
 - i) Part One paragraph 5 reserves the Secretary of State’s right to act outside of the general conditions “should he need to secure the interests of the students *he funds*” (emphasis added).
 - ii) Clause 2.1 requires CIC to “provide the Services”, defined as “the services to be supplied by [CIC] as set out in this Funding Agreement.”
 - iii) Clause 3.4 requires CIC to use the funding “solely for the purpose of delivering the Services agreed”
 - iv) Clause 4.1 provides that “in consideration of [CIC’s] performance of its obligations as set out in the EFA Conditions of Funding, the EFA shall pay to [CIC] the Funds set out in Appendix 1”.
 - v) Clause 4.5 provides that the EFA can recover the value of errors revealed by an audit which have resulted in over-claims and over-payments, clause 4.6 providing that these can be recovered either through deductions from future payments or following the submission of an invoice. CIC has no similar right to payment where an audit reveals an under-payment (clause 4.7).
 - vi) Clause 4.8 permits the EFA to undertake an audit at the end of the academic year and “notify [CIC] of the actual number of students delivered to”, and if the EFA determines that there has been an overpayment, recover the amount in full. The precise scope of this clause remains unclear.
 - vii) Clauses 5.5.2, 5.7.2, 5.9.1.2 and 5.9.2 give the EFA power to suspend or cap the recruitment of students in particular circumstances.

- viii) Clause 9.1 provides for CIC to have “primary responsibility for receiving feedback from the students in respect of the Services” from students and, where relevant, employers.
 - ix) Clause 11.1 requires CIC to provide data on “each individual Student” as set out in the “Individualised Learner Record”.
 - x) The agreement used the definitions “Learner” and “Student”, both defined as “any persons to whom [CIC] is required to deliver any of the Services”, thereby identifying the Services which CIC is being paid to provide as services CIC is required to deliver to students.
19. The basic funding allocation was determined by the following funding formula:
- (Student numbers) x (National funding rate per student) x (Retention factor) x (Programme cost weighting) + (Disadvantage funding) + (Large programme funding).
20. This amount is then multiplied by an area cost allowance for some colleges, but this did not apply to CIC.
21. More detail as to the operation of the EFA funding formula is provided in *CIC UT 2020*, [24]:
- i) The figure for student numbers is taken from the previous year, which was compared with the student numbers calculated from the year to date 1 February figure, and the number recruited by 1 November, and where there was a significant increase or decrease in student numbers, EFA were entitled to revise the allocation accordingly.
 - ii) The national per student funding rate was based on a full-time course of 540+ hours of tuition, which was then adjusted by reference to bands reflecting the planned hours per course and the lagged student numbers in each band.
 - iii) The retention factor was based on the number of students in the previous year who did not drop out and who attended their course to the anticipated end date.
 - iv) The programme cost weighting reflected the fact some courses were more expensive to deliver than others, calculated by reference to the courses undertaken in the previous year.
 - v) Disadvantage funding related to economic deprivation, students who are leaving care and students with learning difficulties and disabilities.
 - vi) Large funding programme funding was for courses which required more than 600 hours.
22. The terms of the EFA's funding agreement prohibits CIC from charging fees to students for the courses that the EFA funds.
23. A document produced by the EFA described as “A field guide to the 16 to 19 FE funding factors allocation toolkit” (“the Field Guide”) sets out “funding for the academic year 2016 to 2017 for students” and states:

“We measure the learning delivered by your organisation by counting the number of students and looking at their programme sizes ...”

It notes that “where there is a significant increase or decrease in student numbers we may revise the [funding] allocation accordingly”. The document refers to six student bands, classified by reference to the annual timetabled hours for the course.

24. CIC’s agreement with the SFA is contained in a document entitled “Financial Memorandum”:
- i) Clause 1.1 states that the Financial Memorandum records the agreement between the Secretary of State and CIC “regarding the amount of funding to be paid by SFA to [CIC] for learning provision (‘the Provision’) and sets out the terms and conditions on which that funding is provided”.
 - ii) “Learner” is defined as “any third party including any student, apprentice, trainee or similar to whom the College is required to deliver the Provision”, once again reflecting the fact that under the agreement, CIC is required to deliver learning to third parties.
 - iii) “Provision” is defined as “the education and training to be delivered by the College under this Financial Memorandum”.
 - iv) Clause 6.2 provides that “the College is free to spend its funding as it sees fit providing it fulfils the conditions of funding imposed by the SFA”, with the SFA having the right to deduct or recover the value of funding used in “a way not specified”.
 - v) Clause 7.2 provides that the SFA is not liable to “make any payment in excess of the Maximum Value of each Learning Programme” without a contract variation, “Learning Programme” being defined as “a programme of education and/or training delivered by the College under this Financial Memorandum”.
 - vi) Clause 7.4 provides that “the Provision is to be delivered in accordance with any specific requirements of the SFA”.
 - vii) Clause 8.1 requires CIC to submit data “on each individual learner”.
 - viii) Clauses 8.6, 16.4 and 16.5 refer to the learners as the persons to whom CIC is “delivering the provision” or “providing the services”.
 - ix) Clause 19.1 gives CIC primary responsibility for receiving feedback and investigating complaints from students “in respect of the Provision”.
 - x) Clause 23 permits the SFA to impose additional conditions on funding where “it is necessary to do so to secure delivery of education and training of a reasonable quality” by CIC.
25. The SFA funding formula was calculated by reference to current-year performance data, with colleges required by the SFA to submit a funding claim based on in year performance from the February return and project forward based on their current enrolment and assumptions on likely retention rates using historical trends. A summary

of the funding process prepared by Mr Gary Horne, Deputy Chief Executive of CIC, explains that variations through the year are sent to colleges by which in-year over-performance or under-performance can be reflected in increased or decreased allocations for apprenticeships subject to business case reviews.

26. The amount paid by the SFA is subject to a claw-back for under-delivery against allocation, which is reconciled at the end of the year (and repayable in the following January). No additional payments are made to CIC for over-delivery.
27. A document produced by the SFA entitled “Operational Performance-Management Rules 2015 to 2016” (“the OPMR”) provides for an in-year reduction of “contract value” if performance falls below the standard national profile by stipulated percentages. The OPMR states:
 - i) When summarising the changes from the previous OPMR, that there would be two performance reviews, and if delivery at either review is a specified percentage below the standard national profile, the contract value would be reduced by some or all of the under-value (an “in-year” reduction – there was no provision for an in-year upwards adjustment).
 - ii) In principles 10 to 12, that the SFA will use data provided by colleges to review the funding allocation and contract value and that:

“If we have evidence that you will not deliver a funding allocation or contract value in full, we may reduce the funding allocation or contract value to a level that is in line with your actual delivery.

We will take your performance into account when agreeing your funding values for 2016 to 2017.

We may adjust your 2016 to 2017 funding allocations or contract values to reflect your final funding claim or final ILR and EAS data for 2015 to 2016.”
28. Neither the SFA nor the EFA agreements set out the particular type of course which CIC was obliged to provide. However, CIC is only funded by these agencies for providing courses leading to qualifications that have been approved by the Government and which are listed on a website maintained by the Government. Theoretically, CIC could have provided courses leading to qualifications that have not been approved – but it would not have been funded by either the EFA or the SFA to provide such courses – and it therefore did not do so.
29. Students who are accepted by the College are issued with a document headed “Receipt”. This sets out the course or courses on which the student is enrolled. In relation to students whose costs are not met in full by one of the Funding Agencies or the HEFCE, the Receipt will set out the fees payable for those courses, the amount paid on enrolment by the student, and any amount that remains outstanding. In the case of a student whose costs are met in full by one of the Funding Agencies or HEFCE, the Receipt sets out a “fee” for the course (and any associated examinations), but also states that the student is entitled to a “waiver” and that the outstanding balance is nil.

30. For students who are fully funded by the EFA or the SFA, the “fee” set out on the “Receipt” does not accurately mirror the funding actually received by CIC for that particular student – the figure is the baseline funding amount per student for that course. The actual amount paid in respect of that student by the Funding Agencies will depend on their respective funding formulae.
31. The actual funding received from the EFA by CIC to deliver its courses could be more or less than the aggregate of the amount stated on the Receipts issued for EFA funded courses. Similar issues arise in respect of SFA funded students – such that the amount actually received by CIC from the SFA (together with any fees charged to the student) in any year would not exactly match the aggregate shown on the Receipts issued in respect of SFA funded courses.

The decision in *CIC UT 2020*

32. The *CIC UT 2020* proceedings arose out of a claim by CIC for overdeclared output tax for the VAT periods 04/10 to 01/14. The premise of that claim was that the provision of education and training services to students was a business activity, with the funding provided by the EFA and SFA constituting consideration for education and training services provided by CIC to those students eligible to receive such services free of charge.
33. The FTT rejected CIC’s claim, on the basis that there was no direct link between the services provided by CIC to students, and the funding received from the EFA and SFA which was said to constitute the consideration for those services.
34. The FTT’s conclusion was reversed by the UT (Mrs Justice Whipple and Judge Swami Raghavan) on appeal. In reaching that decision, the UT placed particular reliance on the decision of the CJEU in *Rayon d’Or* in which it was held that a healthcare lump sum paid by the state sickness insurance fund to care home providers constituted consideration for the care provided by those homes to their residents for the purposes of Directive 2006/112 Article 73:
 - i) At [74], the UT rejected a submission that the decision in *Rayon d’Or* was limited to a particular type of supply, namely where the nature of the supply is the making of particular facilities or services available, rather than their actual supply (referred to as a *Kennemer* supply for reasons explained at [51]-[52] below).
 - ii) On that basis, the UT held that the case before them was not distinguishable from *Rayon d’Or* and that the UT was bound to reach the same outcome which was determinative of the appeal ([74]).
 - iii) In any event, having reviewed the agreements between CIC and the Funding Agencies, the UT concluded that there was a sufficiently direct link between the payments received from the Funding Agencies and the education and training provided to students eligible to receive the same free of charge that the latter was property characterised as services provided for consideration ([86]-[88]).
35. However, the UT found in HMRC’s favour on a separate point, such that the appeal from the FTT failed. In those circumstances, HMRC was unable to seek permission to appeal from the UT’s decision on the consideration point.

The proceedings in *CIC UT 2024*

36. In the present case, HMRC raises an assessment in the amount of £123,642 to CIC for VAT period 11/15-01/16. That decision was upheld on review on 13 July 2016, and CIC brought an appeal against the review decision to the FTT on 16 August 2017.
37. That appeal was stayed pending the FTT and UT decisions in *CIC UT 2020*. When the appeal to the FTT in *CIC UT 2024* was heard, it was common ground that the issue of whether CIC was making supplies for consideration was effectively determined by the decision of the UT in *CIC UT 2020*, and the FTT (Tribunal Judge Brooks) found for CIC in a decision of 4 March 2024.
38. On 23 May 2024, the FTT gave permission to appeal. On the appeal, HMRC reserved its argument as to the correctness of *CIC UT 2020* and the appeal was dismissed by Judge Raghavan on 4 December 2024. Judge Raghavan refused HMRC's application for permission to appeal to the Court of Appeal by a decision dated 11 February 2025.
39. Falk LJ granted permission to appeal on 6 May 2025.

The legal context

Introduction

40. VAT is 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 that person (s.4(1) VATA). Section 5 of VATA defines "supply" as "all forms of supply, but not anything done otherwise than for a consideration".
41. These provisions implement the PVD, Article 2 of which provides:

"The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such."
42. Article 73 of the PVD provides:

"In respect of the supply of goods or services ... the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply."

The requirement for a direct link between the consideration and the services

43. In Case C-16/93 *R J Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 ("*Tolsma*"), the CJEU stated at [13]:

“In its judgments in Case 154/80 *Cöooperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12, and Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11, the Court stated on this point that the basis of assessment for a provision of services is everything which makes up the consideration for the service and that a provision of services is therefore taxable only if there is a direct link between the service provided and the consideration received (see also the judgment in Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] ECR 1443, paragraphs 11 and 12).”

44. In *Wakefield College v HMRC* [2018] EWCA Civ 952, [15], the Court of Appeal stated that consideration for VAT purposes “need not be full value or indeed bear any particular relation to the value of the goods or services supplied.” At [52], the Court stated:

“A supply for consideration ... requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient ... That is what is meant by ‘a direct link’ between the supply of the goods or services and the consideration provided by the recipient ...”

45. On the appeal both Mr Mantle and Mr Firth KC were content to express the requirement of a direct link by reference to the concept of reciprocity – was the payment said to amount to consideration provided in return for the provision of services by the recipient?

Must the price be stipulated for each supply, and what does this require?

46. Mr Mantle argued that for a payment to constitute consideration for the provision of a service under the PVD, the price of that service must be “stipulated.” In argument, Mr Mantle appeared to equate the concept of “stipulation” with a separate and specific identification of the price of the particular supply which he said in this case would require the stipulation of a price specific to each funded course provided to each eligible student. Mr Mantle referred the court to two cases said to establish this requirement:

- i) *Tolsma*, [12] where the CJEU stated:

“The court has already held with reference to the concept of the ‘provision of services against payment’ in art 2(a) of the Second Directive ... that taxable transactions, within the framework of the VAT system, presuppose the existence of a transaction between the parties in which a price or consideration is stipulated. The court concluded that where a person’s activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are not therefore subject to VAT.”

- ii) *Balgarska natsionalna televizia v Direktor na Direktsia ‘Obzhalvane i danachno-osiguritelna praktika’ – Sofia pri Tsentralno upravlenie na NAP C-21/20*, 16 September 2021 (“*Balgarska*”), [33], which observed of the

relationship between the provider of a national “free to air” television channel and viewers that:

“That provider and those viewers are not linked by any contractual relationship or transaction in which a price was stipulated, or even by a voluntary legal commitment made by one party towards the other.”

47. However, those judgments use the word “stipulated” to mean “required”, not to mean that there must be a separate statement of the price applicable to each individual service recipient in cases where a bulk price or flat rate is paid in return for the provision of multiple services at different times and/or to different recipients. There was no “stipulation” in the latter sense in *Rayon d’Or*. It is clear that the precise amount of consideration may only be determined after the services are provided, as in *EQ v Administration de l’Enregistrement des Domaines et de la TVA* Case C-846/19, judgment of 15 April 2021 (“EQ”) in which the court fixed, ex-post, the remuneration of lawyers for providing guardian services to vulnerable persons (which might involve third party consideration where the state paid for services provided to indigent recipients: [40]. The CJEU stated at [44]:

“The fixing of the remuneration as described above, which occurs as the person supplying the services in question deploys his or her activities and submits the relevant statements of account to the competent judicial authority, does not in any way prevent the view being taken that the amount thus fixed has been determined in advance and according to well-established criteria, in accordance with the case-law cited in the preceding paragraph above, provided that the procedures for fixing that amount are foreseeable and capable of ensuring that the person supplying services will receive, in principle, payment for those services.”

48. Where a lump sum price is charged, or a single price is paid, as consideration for the supply of multiple services or goods with different VAT status, the lump sum price will simply be apportioned across the item or services (see e.g. *Marks and Spencer plc v HMRC* [2019] UKUT 182 (TCC), [107] in respect of goods and *Field Fisher Waterhouse LLP v Revenue and Customs Commissioners* C-391/11, [2013] STC 136 [27] in respect of services). The appropriate apportionment can depend on events occurring after any contract has been concluded, when payment has already been made and when the supply of services is already underway (as in *Revenue & Customs Commissioners v KE Entertainments Ltd* [2020] UKSC 28). In none of these cases is there a “stipulation” of the price in Mr Mantle’s sense, although it is clear in all cases that payment is required in return for services to be rendered or goods to be supplied.
49. Mr Mantle suggested that it was not permissible where the consideration was paid by someone other than the recipient of the services (see [53] below) to apportion a single price between different elements of the goods or services being provided in return for that price. The court was not referred to any authority which supported a distinction of this kind between the more usual case where the service recipient pays consideration to the service provider, and when a third party does so. I am not persuaded that there is any such distinction. To adopt an observation made as to why third party consideration falls within the VAT regime in the first place, “were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the economic reality test” (*Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21, [57]).

Payment of a flat or annual fee for a number of services

50. As will be apparent from the preceding paragraph, the fact that the payment said to constitute consideration for services takes the form of a flat rate or annual fee rather than payment for individualised services provided on a specific occasion does not of itself prevent the payment constituting consideration. In Case C-182/17 *Nagyszénás Településszolgáltatási Nonprofit Kft v Appeals division of the National Tax and Customs Authority, Hungary*, judgment of 22 February 2018: In that case:

- i) A company (“NTN”) had contracted with a municipal authority to carry out a variety of tasks, including management of housing and other property, management of local public roads, quarantine, the control of vermin and mosquitoes, maintenance of parks, public spaces and other green areas, management of knackers’ yards and their services, and the upkeep of the local market.
- ii) NTN was paid a flat annual fee but required to keep records of the work done. If certain tasks were not completed within the required period, NTN had to reimburse the municipality part of the fee it had been paid.
- iii) NTN argued that it had been entrusted with the performance of public tasks through the use of financial resources provided by the municipality and that the contract did not constitute a contract for the provision of services for PVD purposes.
- iv) The third question for the CJEU was whether the amount paid by the municipality to NTN for performing the tasks constituted consideration.
- v) In addressing that question, at [37]-[38], the Court noted that:

“The fact that that compensation was determined, as the case may be, not on the basis of individualised services but at a flat rate and annually, so as to cover the operating costs of that company, would not in itself be such as to affect the direct link between the supply of services made and the consideration received (judgment of 29 October 2015, *Saudaçor*, C-174/14, EU:C:2015:733, paragraph 36).

The direct nature of that link could not be called into question by the fact, assuming it were to be established, that the contract at issue contained clauses allowing, in certain circumstances, the amount of compensation to be adjusted; nor by the fact that that amount was fixed at a level lower than the open market value, provided that the amount of compensation was determined in advance on the basis of well-established criteria which ensured that it was sufficient to cover the operating costs of NTN.”

Identifying the services provided in return for the consideration

51. Determining whether the necessary direct link is established between the payment alleged to constitute consideration and the services provided requires the court to identify what the service being provided is. In Case C-174/00 *Kennemer Golf and Country Club v Staatssecretaris van Financiën* [2002] QB 1252, a golf club derived

most of its income from membership fees paid for the use of its facilities. One of the issues which arose (“the second question”) was whether those payments constituted consideration for services for the purpose of Article 2(1) of the PVD in respect of members who did not use the club’s facilities. That issue arose because of the greater difficulty, had the actual use of the facilities been the relevant service, in establishing the necessary direct link between the annual subscription and the services received by any individual subscriber.

52. At [40], the CJEU answered that question as follows:

“As the Commission argues, the fact that in the case before the national court the annual membership fee is a fixed sum which cannot be related to each personal use of the golf course does not alter the fact that there is reciprocal performance between the members of a sports association such as that concerned in the main proceedings and the association itself. The services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There is therefore a direct link between the annual membership fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides.”

Consideration provided by someone other than the recipient of the service

53. The consideration for a supply may be provided by someone other than the recipient of the supply – a “three-party scenario” comprising consideration provider, service provider and service recipient. Thus in *Dixons Retail plc v Revenue and Customs Commissioners* Case C-494/12, judgment of 21 November 2013, [35]-[36] the CJEU held:

“The fact that the purchaser has paid the price agreed not directly to the supplier but through the card issuer and the method of payment used in the relations between the purchaser and the supplier cannot change the taxable amount. It is not a requirement of the Sixth VAT Directive and Directive 2006/112 that, for a supply of goods or services to be effected ‘for consideration’, the consideration for the supply must be obtained directly from the person to whom the goods or services are supplied. Under article 11A(1)(a) of the Sixth VAT Directive and article 73 of Directive 2006/112, the payment of the consideration for a supply of goods may be made not only by the purchaser but also by a third party, in this instance the card issuer ...

Consequently, the fact that payment of the price of the goods supplied by Dixons within the framework of the transactions at issue in the main proceedings was made by third parties, in the case in point AmEx and Streamline, cannot lead to the conclusion that that payment does not constitute the consideration obtained by Dixons for the supply of those goods.”

54. In *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21, [57], Lord Neuberger observed:

“When the Court of Justice speaks of ‘reciprocal performance’ it is looking at the matter from perspective of the supplier of the services and it requires that under the legal arrangement the supplier receives remuneration for the service which it has performed. It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration; it suffices that the arrangement is for a third party to provide the consideration. Were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the economic reality test.”

55. Where the third party makes a payment for the supply of services by the payee to a third party, the fact that the consideration comes from someone other than the recipient of the services does not prevent there being a direct link between the payment and the service for PVD purposes.
56. However, the required link will not be present in every case in which a third party pays money to someone who provides services to someone else. In particular, the payer may make a payment to such a recipient on the basis that the money will be used by the payee for its general purposes, rather than being provided in return for a supply of services to the paying party (a two-party scenario) or someone else (a three-party scenario). This was the position in Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] 2 C.M.L.R. 394, in which a trade body which promoted the production and marketing of fruit was paid fees by growers, calculated by reference to their productive capacity. The issue arose of whether this constituted a taxable supply of services for consideration, which in turn depended on whether there was a direct link between the fees paid and the exercise by the council of its functions ([13]). One of the reasons why the CJEU found that no direct link was established was that the services provided by the council related to the common interests of the growers, rather than those of any individual member ([14]). At p.403 of the report, the Advocate-General, Sir Gordon Slynn, noted that the payment to the council was only indirectly for the benefit, if any, received by particular growers. Their obligation was to pay towards the council’s expenses of improving the industry; it was not to pay for what was individually received, and on that basis, the necessary reciprocity or direct link could not be established.

Payments by state or public bodies

57. On occasions, the party from whom the consideration moves is a state or public body, making payments by way of grant or subsidy to encourage and facilitate particular activities by the recipient, either by way of provision to the state providing the funding (a two-party scenario) or to others (a three-party scenario). There is no issue in principle with a payment from a public body, even where made pursuant to statute, to advance a particular purpose or policy, constituting the consideration for the supply by the recipient of services for PVD purposes (e.g. Case C-184/00 *Office des Produits Wallons ASBL v Belgium* [2003] STC 1100, [14]).
58. However, it is necessary in this context to distinguish between payments made in consideration for the supply of services, and payments made to a recipient which are

conditional on the recipient carrying on a certain activity, but which cannot be said to constitute all or part of the consideration for supplies made in the carrying on of that activity. As Advocate General Kokott observed in her opinion in *Dyrektor Krajowej Informacji Skarbowej v PSA* (Case C-615/23) (“PSA”), opinion of 13 February 2025, at [2], “the line between those two situations is not always easy to draw”, referring to the need to distinguish “a subsidy for a supply from a general subsidy independent of a supply.”

59. This issue arose in a domestic VAT context in *South African Tourist Board v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 0280 (TCC) (Rose J and Judge Roger Berner). The South African Tourist Board (“SATB”) is a statutory body established by domestic legislation to promote South African tourism. It had two sources of funding so far as relevant to the issue before the UT:

- i) Funding from the South African government. There was a performance agreement between the SATB and the government which made the transfer of that funding conditional on certain requirements being met, including meeting certain performance criteria.
- ii) There were also voluntary levies on the sale of hotel accommodation and rental cars to tourists which were collected from tourists by those service providers who chose to do so, and paid to TBCSA, an organised body of business in tourism and related businesses. TBCSA then paid the levies to SATB under a memorandum of understanding (“MOU”).

60. So far as the government funding was concerned, at [55] the UT referred to the distinction “between the supply of services ‘for consideration’ on the one hand and a situation where Government funding is provided to a body in order for it to perform its function but where the services are not provided to the funder in return for that consideration on the other hand.” The UT held that the case before them fell on the latter side of that divide, finding at [56] that the link between the payments made and the targets in the performance agreement was “not one of mutual exchange of supply and consideration for that supply”. The UT expanded on this reasoning at [59]-[60]:

“There is a difference between agreeing the value of something for the purpose of providing the appropriate level of funding to enable that thing to be carried out, and agreeing the value of a service for the purpose of paying for that service. The mere act of agreeing a value is not therefore decisive of the required mutuality. In this case the negotiation and agreement as to value was a function of the oversight of the arrangements by a funder, and not to provide a monetary exchange for a service provided.

The fact that the South African Government received a benefit from the activities of SATB is relevant, but again not decisive. Although the Government received something of value to it, that value was received as an incidental outcome of the ability of SATB to perform its statutory duties by virtue of the funding it had received. There was no relevant reciprocity and accordingly no direct link between the payment and the value received by the Government.”

61. So far as the TBCSA levies were concerned, the MOU provided for certain benefits to be available to those who collected the levies. At [100], the UT held that the MOU

“demonstrates a reciprocity, in terms of services supplied by SATB to TBSCA and TOMSA, that is lacking in the Performance Agreement.”

62. Similar issues can arise in three-party scenarios, as in *PSA*. In that case, the plaintiff was a public transport operator who received a subsidy from a local authority because the sale of tickets was not sufficient to cover the costs of its service provision. In her opinion to the court, Advocate-General Kokott noted that the case could be analysed as a two-party case (with the local authority benefiting from its subsidy) or a three-party case (the transport company providing services to passengers in consideration of the payment of the subsidy by the local authority) ([35]):
- i) In relation to the former approach, she accepted that there was a benefit to the local authority from the provision of public services transport in the area for which it is responsible, but said that (i) the subsidy was not linked to specific obligations for the benefit of the subsidy provider, but only granted ex post as compensation for any losses incurred; (ii) it was the subsidy recipient who determined what services were offered; and (iii) the subsidy was assessed by reference to a flat rate based on the vehicle-kilometres made available to the general public by the recipient of the subsidy, without the number of specific users of the transport services being relevant. This meant that an individual action of the recipient of the subsidy did not “give rise to a specific and identifiable payment by the subsidy provider”. In these circumstances, she was of the view that the required direct link was absent.
 - ii) In relation to the latter approach, she observed that there was no specific relationship between the subsidy paid and a particular supply, merely a general link to the (loss-making) activity. The subsidy could not affect the price of the individual transport services because it was granted ex post and did not depend on actual use of the transport services. At [52] (a paragraph which appears under the “two-party” heading but as Mr Mantle accepted, was more appropriate to the “three-party” analysis), she referred to the absence of any relationship between the subsidy provider and the passengers, who benefit from those services and at [54] to the absence of any specific relationship or a direct link to a particular supply because it was granted ex post and did not depend on actual use. At [56], she distinguished *Rayon d’Or* as a case where “both the supply of services and the recipient, as well as the amount, were ‘determined in advance on the basis of well-established criteria’.”
63. In Case C-615/23, judgment of 8 May 2025, the CJEU treated the case as involving a three-party scenario ([22]). The Court rejected the contention that the subsidy received constituted part of the consideration for the service provided to passengers. It will be necessary to return to this decision when considering the treatment of *Rayon d’Or* in *CIC/UT/2020* below. At [39], picking up the points made at [52] and [56] of the Advocate General’s opinion, the Court held that a direct link was not established because “collective public transport services benefit not clearly identifiable individuals, but all potential passengers” and “the compensation is calculated without taking into account the identity and number of users of the service supplied”.

The overall approach

64. The authorities referred to above identify a number of factors which are likely to be relevant in the assessment of whether the requisite direct link between the consideration and the services is established on the facts of a particular case. Thus where the services are of a *Kennemer* type, a direct link may be found between that service and the consideration even if it would be more challenging to establish such a link between the consideration paid and those services actually provided (rather than simply being made available). The fact the services to which the payment relates are provided for the benefit of a large and indeterminate group (e.g. potential users of public transport) or the interests of a group as whole (e.g. fruit growers), rather than individual recipients of services, will also be relevant.
65. However, it is important not to elevate any one of these factors into a threshold or determinative requirement. As Rose J and Judge Berner noted in *South African Tourist Board v The Commissioners for Her Majesty's Revenue and Customs* at [40]:

“*Apple and Pear* demonstrates that in any particular case there will be likely to be a range of factors to consider and that no one factor is conclusive. Some may point in one direction, some in another.”

At [48], Rose J and Judge Berner referred to the exercise as involving “a question of analysis of the entire circumstances of the case, weighing the various competing factors.”

Ground 1

66. Against that background, I can turn to Ground 1 of the appeal: whether the UT in *CIC UT 2020* erred in law in its interpretation of *Rayon d’Or* and in concluding that it was bound by virtue of *Rayon d’Or* to allow the appeal. Although this issue generated considerable citation of authority and argument, it became apparent in the course of argument that this was not the key issue on the appeal, but more of a staging post in its ultimate resolution.

The decision in Rayon d’Or

67. Article L.174-7 of the (French) Code de la Sécurité Sociale provided that the expenses of medical care given to insured persons and recipients of social assistance in scheduled homes and facilities was to be “borne by health insurance schemes or covered by social assistance, in the manner laid down by regulation, using the lump-sum formulae where appropriate”.
68. Article L 313-12 of the Code de l’Action Sociale et des Familles provided that where residential care homes for the elderly (“RCHEs”) had signed a multi-year annual agreement with the relevant state authority, they were to receive a global lump sum payment in respect of the care which they provided which was defined in Article R-314-158. It comprised a daily rate for accommodation, a daily rate for dependency and a daily rate for care. The detailed rules for calculating the “healthcare lump sum” took account of the number of residents hosted by each home and their dependency level, and of historical coefficients which were determined at national level and updated each year on the basis of the average expenses of all RCHEs.

69. There was an issue before us as to whether the dispute before the CJEU embraced all three daily rates provided for by Article R-314.18, or simply the daily rate for care. While the decision could be clearer, in my view the better interpretation is that the case was not concerned with the accommodation rate (which would not be susceptible to a *Kennemer*-type analysis). The reference in [17] to R.314-161 appears to be limited to the rate for healthcare, and [18] refers to “the detailed rules for the healthcare lump sum”. I accept that the level of dependency factor feeds into the healthcare rate ([18]), but the issue before the court – a payment in respect of the provision of healthcare – necessarily contemplated the possibility that the actual level of care provided to a resident might vary between residents, not simply by reason of their level of dependency, but because of fortune (good or ill).
70. It is also clear that the case involved the payment of a flat rate produced by a formula for all of the supplies to residents during the period covered by the lump sum, rather than consideration individually negotiated in respect of the services provided by RCHE to each resident and/or at particular points of time.
71. On those facts, Rayon d’Or argued that there was no direct link between the services provided by an RCHE to an individual resident and the lump sum payment received by that RCHE from an insurance fund. It submitted (see [22]) that the services were not defined in advance or personalised, the price was not made known to the residents, and the amount of subsidy received by an RCHE did not coincide with the actual cost of the healthcare provided to each resident.
72. The tax authority submitted that the fact that “pricing is established on the basis of healthcare needs” did not prevent the services being “services effected for consideration”, and argued that there was a “direct and immediate link between the disbursement of the ‘healthcare lump sum’ and the healthcare services provided to recipients”, because “the service does not necessarily have to be personalised but may simply have the potential to be personalised” ([23]).
73. It is apparent from both of those paragraphs that one of the points taken by Rayon d’Or was that the pricing was not by reference to actual services provided to residents (because residents with a particular dependency need not in fact require a particular level of healthcare) and the tax authority’s response was that the availability of healthcare to meet a patient’s personalised needs as required was itself the service.
74. At [36]-[37], the CJEU held as follows:

“It is clear from the Court's case-law that where, as in the main proceedings, the supply of services in question is characterised, *inter alia*, by the permanent availability of the service provider to supply, at the appropriate time, the healthcare services required by the residents, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalised supply of healthcare at a specific time carried out at the request of a resident (see, to that effect, *Kennemer Golf* EU:C:2002:200, paragraph 40).

Accordingly, the fact, in the main proceedings, that the healthcare provided to residents is neither defined in advance nor personalised and that the payment is made in the form of a lump sum is also not such as to affect the direct link between

the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria.”

75. The decision in *Rayon d’Or* is not as clear as it might be on the issue of what the CJEU was treating as the service being provided to residents in return for the lump sum paid. There are numerous paragraphs describing the service as “the healthcare services provided” or “rendered” ([21]-[23], [28], [37], [38] and, significantly, in the *dispositif*), rather than making healthcare available as required. Had the decision in the case turned exclusively on the “permanent availability” classification, it might have been expected that the court would consistently have used language describing the services which reflected that classification.
76. What is clear is that, in considering *Rayon d’Or*, it is necessary to have regard to both [36] and [37] of the judgment. While paragraph [36] refers to “permanent availability” and *Kennemer*, in my view [37] has a wider scope, addressing the facts that the healthcare provided was not defined in advance or personalised, and a single lump sum payment was made in respect of supplies to all the residents of the RCHes. These facts were held not to prevent the payments received constituting consideration for the services provided to residents, where the amount paid was determined “in advance on the basis of well-established criteria.”
77. In arguing that the case was only of limited scope and significance, Mr Mantle pointed to the absence of an Advocate-General’s opinion in *Rayon d’Or*, and in this connection referred to Article 20.1 of the Statute of the Court of Justice of the European Union which provides:

“Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General.”

I accept that point, but nonetheless *Rayon d’Or* is of obvious relevance for what it reveals as to the CJEU’s view of the effect of the established law.

CJEU consideration of Rayon d’Or before CIC UT 2020

78. We were referred in the appeal to two cases in which the decision in *Rayon d’Or* was considered by CJEU cases prior to the UT decision in *CIC UT 2020*.
79. The first, to which the UT was not referred, is *Asparuhovo Lake Investment Company OOD v Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Varna*, (Case C-463/14), 3 September 2015 (“*ALIC*”). Having identified the question for the Court at [36] as being:

“whether the fixed payment made under a subscription contract for the supply of consulting services ... constitutes the consideration for the supply of services agreed, including the commitment to be permanently available to the customer and also to refrain from entering into contracts with its competitors, and whether there is a direct link between the service supplied and the consideration received”

the CJEU referred to *Rayon d’Or* and stated at [38]:

“Where the supply of services in question is characterised, inter alia, by the permanent availability of the service provider in order to supply, at the appropriate time, the services required by the customer, it is not necessary, in order to find that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalised supply of services at a specific time carried out at the request of a customer. In each of the cases which gave rise to those judgments, there was a supply of taxable services, to which the fixed sum related, irrespective of the number of services provided and received in each case, namely the number of rounds of golf played or the amount of care provided.”

80. The second, to which the UT was referred, is Case C-174/14 *Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública* [2016] STC 681 (“*Saudaçor*”). *Saudaçor* is a body created by a legislative decree of the health service of the Azores region (the “RAA”), which transformed what had formerly been the Institute of Financial Management of the RAA into a limited company with exclusively public capital. The legislative decree creating *Saudaçor* formed it to provide planning and management services for the RAA. Those services were provided under framework agreements with the government of the RAA, which defined the services to be provided and the compensation to be paid by the RAA to *Saudaçor*. The national court found that *Saudaçor* was providing services for consideration to RAA for PVD purposes (the case was treated as involving a two-party scenario), rather than being a public body receiving a budgetary transfer from another public body.
81. *Saudaçor* did not involve an agreement to make facilities available to the RAA *Kennemer*-style, but a case in which there was a “permanent and continuous” supply of management services by an entity entrusted with the management of the regional health care system, in return for a flat fee paid in monthly instalments (Advocate General’s opinion, footnote 28). That fee could be revised when a change of circumstances showed it to be “manifestly insufficient” (*ibid*, [19]).
82. *Saudaçor* was not a case in which the service supplied to the RAA was the availability of facilities, nor the right to receive services as and when requested by the RAA: *Saudaçor* had taken over the management function of the healthcare system from the RAA. Nonetheless, Advocate General Jääskinen, in his opinion of 25 June 2015 at [53], referred to *Rayon d’Or* and *Kennemer* when stating:
- “Finally, it is clear from the Court’s case-law that where the supply of services in question is characterised, in particular, by the permanent availability of the service provider to supply, at the appropriate time, the services required, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a particular supply of services at a specific time.”
83. The words “in particular” make it clear that “permanent availability of the service” is not the only instance, in the Advocate General’s view, “where it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a particular supply of services at a specific time.” Just as *Rayon d’Or* involved more than making facilities available for use as in *Kennemer*, so *Saudaçor* involved more than services being available on request to the recipient as in *Rayon d’Or*. All three cases, however, involved the

payment of a flat fee in consideration of something more than the receipt of a single service or particular services at a particular point or points in time.

84. The CJEU agreed that Saudaçoř was providing services for consideration, this issue being largely determined by the terms of its agreements with the RAA. At [35], the CJEU placed particular emphasis on the provision in the contract that the payments were made “as consideration” for the services received. The CJEU addressed the argument that the sums received by Saudaçoř did not constitute consideration for the services it provided because it received a flat-rate annual payment to cover its operating costs rather than payment by reference to individualised services, stating (at [36]-[38]):

“In the light of the permanent and continuous nature of the planning and management services provided by Saudaçoř, the fact that that compensation is determined not on the basis of individualised services but on a flat-rate and annual basis to cover the operating costs of that company is not in itself such as to affect the direct link between the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria (see, to that effect, judgment in *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraphs 36 and 37).

The existence of that direct link also does not appear to be called into question by the fact that the programme agreements concluded between Saudaçoř and the RAA contain clauses which stipulate that the amount of compensation payable to Saudaçoř may be adjusted where, because of a change of circumstances, that amount is manifestly insufficient to allow for the performance of those agreements.

In so far as those clauses seek to determine in advance the level of that compensation on the basis of well-established criteria which ensure that that level is sufficient to cover the operating costs of Saudaçoř, it may be held that those clauses are designed to adapt the amount of the flat-rate consideration for the services provided on a continuous and permanent basis by that company...”

85. In the Court’s analysis in *Saudaçoř*, the significance of *Rayon d’Or* to the case before it does not appear to have been that the classification of the relevant supply in *Rayon d’Or* was the permanent availability of a certain services as and when required, but the fact that consideration could take the form of a lump sum payment for “the permanent and continuous nature of the planning and continuous nature of the planning and management services provided” provided the amount paid “is determined in advance on the basis of well-established criteria.”

The analysis of Rayon d’Or in CIC UT 2020

86. In *CIC UT 2020*, CIC relied heavily on *Rayon d’Or* to establish that a lump sum payment calculated by reference to a formula can nonetheless constitute consideration for the supply of services ([38], [39]). HMRC sought to distinguish *Rayon d’Or* on various grounds, including that it involved *Kennemer* supplies ([39]) and was “limited to its particular facts” ([53]). CIC challenged this characterisation, relying on *Saudaçoř* ([53]).

87. At [70], the UT referred to “repeated reference” in *Rayon d’Or* to the fact that “the healthcare lump sum was paid in respect of the care provided to the residents of the care home” (referring to [15], [16], [18], [28], [32], [33] and [35]) before concluding:

“Thus, it is clear that the Court was not approaching the RCHes' supplies as some sort of right of access to healthcare, which might be called a *Kennemer* supply. On the facts of *Rayon D’Or*, the services in question were healthcare services supplied to the individual residents in due course, and the issue was whether the healthcare lump sum was directly linked with those services.”

88. At [71], the UT continued:

“We do not understand the reference at [36] of *Rayon d’Or* to services which are ‘permanently available’, to be a characterisation of the RCHes' supplies as *Kennemer* supplies, as distinct from any other type of supply for VAT purposes; rather, we understand those words to describe the services at issue in *Rayon d’Or*, namely services provided year on year by the RCHes to their residents, whoever they may be from time to time, on a rolling basis. The Court's conclusion was that the healthcare lump sum, which was not personalised to any specific supply of healthcare to any particular resident, was still consideration for VAT purposes. *Kennemer* supported that conclusion, because *Kennemer* shows that reciprocity can still exist even though the payment in question ‘cannot be related to each personal use ...’ (to quote from *Kennemer* [40], cited at [30] of *Rayon d’Or*).”

89. At [73], the UT stated that “*Rayon d’Or*, properly understood, is not a case involving a *Kennemer* supply at all”, referring to the citation of *Rayon d’Or* in *Saudaçor* “which plainly did not involve a *Kennemer* supply.” Having concluded that *Rayon d’Or* could not be distinguished and was analogous on the facts of this case, the UT concluded at [74] that their analysis must follow that of the CJEU which was sufficient to dispose of the appeal.

Subsequent CJEU consideration of Rayon d’Or

90. We were referred to three cases decided after *CIC UT 2020* in which the CJEU considered *Rayon d’Or*.
91. The first is *Balgarska*, referred to at [46(ii)] above, which concerned the status of a state subsidy of a free-to-air television channel. When expressing the conclusion that the subsidy did not constitute consideration for services for PVD purposes, Advocate General Szpunar pointed to the absence of any legal relationship between a public sector broadcaster receiving a subsidy and the state under which there would be reciprocal performance (i.e. treating the case as a two-party scenario). At [29] he distinguished *Rayon d’Or* as follows:

“The solution adopted by the Court in the *Le Rayon d’Or* case cannot be applied to a public service broadcaster financed by a subsidy from the State budget, since that case concerned services provided to specific recipients in return for which the service provider received remuneration which, although in the form of a lump sum and paid by a person other than the recipient of the services, constituted consideration.”

92. The CJEU addressed *Rayon d'Or* at [36]-[37]. At [36], the Court held that “in that judgment, the Court held that a direct link existed between the supply of services provided by those establishments to their residents and the consideration received, namely the ‘healthcare lump sum’, so that such a lump sum payment constituted consideration for the supply of care services effected for consideration by one of those establishments to its residents and, as a result, fell within the scope of VAT” and that “the fact that the direct beneficiary of the services in question is not the national sickness insurance fund which pays the lump sum but the person insured under it, is not such as to break the direct link.” At [37], the Court stated:

“In the present case, there is no relationship between the State, which pays a subsidy from its budget in order to finance audiovisual media services, and the viewers, who benefit from those services, which would be analogous to that between a sickness fund and its insured. As has been noted in paragraph 33 of the present judgment, those services do not benefit persons who are likely to be clearly identified, but all potential viewers. In addition, the amount of the subsidy in question is determined by reference to a flat rate per programme hour, and without taking into account the identity or the number of users of the service provided,”

93. The second CJEU decision to which we were referred is *EQ*, which as noted at [47] above concerned awards of remuneration made by the court to a lawyer providing guardian services to a vulnerable person. *Rayon d'Or* is not referred to by Advocate General Pitruzella, but at [42], the Court cites *Rayon d'Or* as supporting the proposition that:

“the fact that payment for the supply of services in question is made in the form of a lump sum is not such as to affect the direct link between the supply of services made and the consideration received.”

94. The third is *PSA*, to which I have already referred. In that case, the referring court had specifically raised the issue of “whether the existence of such a direct link may be inferred from the fact that the services provided by the supplier are characterised by their continuity and the permanent availability of that supplier to provide them.”

95. In her opinion, Advocate General Kokott did not refer to the “permanent availability” aspect of *Rayon d'Or* but distinguished it as follows at [56]:

“The Court rightly regarded that ‘compensation’ as payment of a consideration (in so far as the patients were still also required to pay a contribution, it would be a price-support payment), since both the supply of services and the recipient, as well as the amount, were ‘determined in advance on the basis of well-established criteria’.”

In short, she felt that there was a much clearer identification of the recipients of the services in *Rayon d'Or* than the potential users of subsidised bus services.

96. The CJEU addressed *Rayon d'Or* at [35]-[39]:

“The case which gave rise to that judgment concerned the taxable nature of a ‘healthcare lump sum’ which a national sickness insurance fund paid to

residential care homes for the elderly for the provision of medical and paramedical services to their residents and the calculation of which took account, inter alia, of the number of residents hosted in each establishment and their dependency level. In the same judgment, the Court held that there was a direct link between the supply of services by such an establishment to its residents and the consideration received, namely that ‘healthcare lump sum’, with the result that such a lump sum payment constituted consideration for the healthcare services provided for consideration by that establishment to its residents and, on that basis, fell within the scope of VAT.

...

In addition, the Court has held that, where the supply of services in question is characterised, inter alia, by the permanent availability of the service provider to supply, at the appropriate time, the healthcare services required by the residents, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a personalised supply of healthcare at a specific time carried out at the request of a resident ...

It must be held that the situation at issue in the main proceedings and that giving rise to the case which resulted in the judgment of 27 March 2014, *Le Rayon d’Or* ... are not comparable.

As the Advocate General observed in points 52 and 56 of her Opinion, there was, in that case, a direct link between the healthcare services provided to the residents of the residential care home for the elderly and the financial consideration paid to that establishment, determined on the basis of the care received and the number of residents concerned. In the present case, collective public transport services benefit not clearly identifiable individuals, but all potential passengers. In addition, the compensation is calculated without taking into account the identity and number of users of the service supplied.”

97. It can be seen that the CJEU distinguished *Rayon d’Or* both on the basis that it was a “permanent availability” case, and because there was a sufficient identification of the recipients of the subsidised services which was wholly absent from the case before them.

The arguments on ground 1 of the appeal

98. Mr Mantle for HMRC submitted that the UT had erred in *CIC UT 2020* and *CIC UT 2024* in deciding that *Rayon d’Or* did not concern a *Kennemer* supply and in stating that it was immaterial whether or not it did so. In support of that conclusion, HMRC relied on the treatment of *Rayon d’Or* in *Saudaçor*, *ALIC* and *PSA*.
99. Mr Firth KC for CIC disputed that the services in issue in *Rayon d’Or* were of the *Kennemer* type, and submitted that the CJEU’s decision was not dependent on that characterisation. Whatever the position regarding the correct characterisation of the services in *Rayon d’Or*, he submitted that the material facts in *Rayon d’Or* were sufficiently analogous to those before the court for the decision to provide strong

support for CIC's case, and that the UT in *CIC UT 2020* had been right to reach that conclusion.

Analysis and conclusion

100. As I have stated, the supplies in issue in *Rayon d'Or* went beyond the simple making of facilities available in the manner of the golf club in *Kennemer*, involving not simply a right on resident's part to use certain facilities, but a right to the provision of healthcare services when needed. To this extent, Mr Mantle was correct to accept that *Rayon d'Or* went further than the facts of the *Kennemer* decision. However, at [36] the CJEU did refer to the service being provided as the "permanent availability" of healthcare, and identified that as one factor of relevance to the issue of whether there was a direct link between the funds received by RCHes from the insurance fund, and the services provided to their residents.
101. To that extent, in my determination the UT went too far when concluding at *CIC UT 2020*, [73] that *Rayon d'Or* was "not a case involving a *Kennemer* supply at all" (at least in the extended sense of *Kennemer* to which I have referred):
 - i) One of the factors which might have been said to count against the existence of a direct link in *Rayon D'Or* was that the payment made by the insurance fund did not vary according to the level of care in fact received by each care home resident. That that point was raised is clear from [22] of the *Rayon d'Or* judgment. One of the tax authority's answers to that point was that the healthcare was made available to all residents, and capable of being personalised at the point of delivery ([23]).
 - ii) When referring to "permanent availability" at [36], the CJEU was, in my determination, placing reliance on the fact that the service provided was the availability of healthcare to residents, to be provided when and to the extent required, and the Court was relying on the reasoning in *Kennemer* in that context.
 - iii) Further, that *Rayon d'Or* involved a *Kennemer*-type supply was accepted by the CJEU in *ALIC* at [38] and *PSA*, at [35] and [39], although it is right to note that the former was not cited to the UT and the latter decided subsequent to *CIC 2020 UT*.
 - iv) The UT's treatment at *CIC UT 2020*, [71] of the reference in *Rayon d'Or*, [36] to services being "permanently available" as meaning "services provided year on year by the RCHes to their residents, whoever they may be from time to time, on a rolling basis" is not readily reconcilable with the fact that the proposition concerning "permanent availability" is said in *Rayon d'Or* to be derived from "the Court's case law" and specifically from [40] of *Kennemer*. In that paragraph, the CJEU in *Kennemer* uses the word "permanent" to describe the benefit received in return for the membership fee ("making available to its members, on a permanent basis").
 - v) The UT's view that the CJEU in *Rayon d'Or* referred to *Kennemer* because *Kennemer* "shows that reciprocity can still exist even though the payment in question 'cannot be related to each personal use ...'" is correct as far as it goes.

However, the CJEU in *Kennemer* justified that conclusion on the basis that “the services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request.” That the CJEU in *Rayon d’Or* had that justification in mind is clear from its reference to “permanently available”.

102. I would also respectfully disagree with the UT’s statement at [74] that the analysis of the CJEU in *Rayon d’Or* was sufficient to dispose of CIC’s appeal. In addition to the CJEU’s view that *Rayon d’Or* involved a *Kennemer*-type supply (at least in the extended sense to which I have referred), there were other potential points of distinction between *Rayon d’Or* and the position of CIC, to which Mr Mantle pointed:
- i) The existence of the legal relationship of insurer and insured between the insurance fund paying the RCHEs and the residents receiving care (a point subsequently emphasised by the Court in *Balgarska*).
 - ii) That the amounts paid were directly referable to the provision of services to an identifiable group, namely the residents of the RCHEs (a point emphasised in *Balgarska* by Advocate General Szpunar at [29] and by the Court at [37] and in *PSA* by Advocate General Kokott at [56] and by the Court at [39]).
103. However, in my view the UT was clearly right to conclude that the decision in *Rayon d’Or* was not wholly dependent on the CJEU’s view that a *Kennemer*-type supply was in issue, and the UT was also right to conclude that the decision provided considerable support for CIC’s appeal:
- i) As I have stated, the terminology used by the CJEU in describing the services provided in consideration for the payments received in *Rayon d’Or* is scarcely redolent of the “permanent availability” classification being the determining factor in the case.
 - ii) The UT was right, in my view, to point to *Saudaçor* as a case which did not involve a “permanent availability” service in the *Kennemer*-sense, but which treated *Rayon d’Or* and *Kennemer* as supporting the statement that consideration for PVD purposes could involve a flat rate payment for services provided on a permanent and continuous basis. The subsequent decision of the CJEU in *EQ* is to similar effect.
 - iii) *Rayon d’Or* did not involve a payment in respect of services provided to a fixed group of recipients identified at the date the funding was agreed, but funding calculated by reference to the resident population of an RCHE at a particular date which would change to some extent over the course of the year or indeed the multi-year duration of the contract (e.g. through deaths, residents moving out and residents moving in). This would involve not simply some change in the identity of those receiving healthcare, but a change in the dependency level of residents, and indeed the dependency level of a particular resident might change during the year. It is clear from the CJEU’s decision that the use of a formula in which the number and dependency of the resident population at a particular time served as a proxy for the healthcare made available to residents during the life of the

funding agreement did not preclude the existence of a direct link between the payments from the insurance funds and the services provided to residents.

104. For these reasons, I accept HMRC’s submission that the *Rayon d’Or* did not, as the UT concluded, determine the appeal in CIC’s favour, there being points of distinction between the position before the CJEU in *Rayon d’Or* and the facts of this case. However, I reject HMRC’s wider submission that *Rayon d’Or* provides no support to CIC’s case on the appeal.

Ground 2

The UT’s alternative reasoning

105. The UT in *CIC 2020 UT* went on to consider the merits of CIC’s appeal even if, contrary to their conclusion, the reasoning of the CJEU in *Rayon d’Or* was not determinative of the appeal.
106. At [76] and following, the UT attached significance to four features of the funding agreements between the Funding Agencies and CIC:
- i) Funding was restricted to courses from an approved list, with the funding being provided for the provision of those courses ([77]).
 - ii) The amount paid was determined pursuant to a formula with a “per student” starting point, the number of students being taken from last year’s figures as a “proxy”, with adjustments broadly related to the different types of course ([78]). As the UT put it, “the formula was therefore highly specific to CIC’s outputs – to the number of students, the type of students, the number of courses and the type of courses”.
 - iii) CIC would have to pay back any part of the grant funding not used for supplying courses under the “clawback arrangements”: pro-rata at the year-end for the SFA funded courses and with a retention applied the following year for any shortfall the previous year in EFA’s case ([79]).
 - iv) CIC submitted data to the Funding Agencies on a “per student” basis each month, showing what the funding was being spent on ([80]).
107. The UT considered that, taken together, these features support the existence of “a direct link between the grants coming into CIC and the courses provided to CIC’s students for free”, and that link was established even though “the funding was not specific to any particular course or courses, it did not reflect the specific costs of any particular course, nor did it identify the particular students who would take those courses” ([81]).
108. Finally, in an important paragraph, at [82] the UT stated:
- “We stand back and test our conclusions against the wider canvass. We note that some students did not benefit from grant funding but were required to pay, in whole (for example international students) or in part (as could be the case on SFA funded courses). The experience for these students was identical to that for the students who attended ‘free’ courses fully funded by the grants. To conclude that all students were in receipt of supplies by CIC, the consideration for those

supplies coming from different sources, meets with common sense. If the law drove us to conclude that CIC made supplies only to the extent that a student actually paid for the services, but that otherwise the courses were not supplied for VAT purposes at all – as Mr Mantle suggested was the case – we would of course have to live with that, and with the consequence that within the same classroom CIC could be making business and non-business supplies. But that would be a strained analysis of these straightforward facts. Our conclusion has the advantage of simplicity.”

The arguments on appeal

109. HMRC submitted as follows:

- i) The UT in *CIC UT 2020* had adopted an over-extended view of the “direct link” test and mis-evaluated the significance of the four features of the contractual arrangements when applying that test.
- ii) The UT had failed to appreciate the need, in order to establish the required direct link, for a relationship between the grant paid and the specific benefit provided to an individual student.
- iii) The link between the funding received from the Funding Agencies and the services supplied to each student was “too general and unspecific” to satisfy the “direct link” test.
- iv) There was a tension between the UT’s approach in *CIC UT 2020* and the decision in *South African Tourist Board*.

110. CIC submitted:

- i) The direct link between the payment and services requires reciprocity between the two, one being provided “for” the other.
- ii) It is clear from the Funding Agreements that the funding is provided by the Funding Agencies in return for the provision of learning programmes by CIC to the students.
- iii) The domestic and CJEU authorities make it clear that the absence of a specific price for each supply by CIC of a course to each eligible student does not prevent the relevant reciprocity arising.

Analysis and conclusion

111. In my view, Mr Mantle succinctly summarised the question for the court as being whether the Funding Agencies were funding certain activities of CIC on the basis that certain conditions would be met, or paying for supplies of education by CIC to eligible students. Advocate General Kokott presented the issue for decision in similar terms in her opinion in *PSA*, [1] when referring to:

“the fundamental question of how the subsidisation of a taxable person by a local authority acting in the public interest ... is to be treated for VAT purposes. If the subsidy forms part of the consideration for the supply by the taxable person to the

subsidy provider or its customers, the taxable person must pay VAT on the subsidy (or the subsidy must be increased accordingly). If, on the other hand, the subsidy is not part of the consideration for a supply (for the subsidy provider or the customers), but a general subsidy for the taxable person, there is no taxable transaction and no VAT is incurred.”

112. While answering that question requires the court to undertake the multi-factorial analysis referred to by the UT in *South African Tourist Board* case, as the UT recognised, the appropriate starting point is the terms of the Funding Agreements themselves ([51] and see also *Revenue and Customs Commissioners v Airtours Holiday Transport Ltd* [2016] UKSC 21, [47]).
113. In my view, the terms of both Funding Agreements strongly support the view that the Funding Agencies are paying the funds in return for the provision of services by CIC to eligible students in the form of approved courses, rather than funding CIC generally on condition it provide such courses. I have set out the relevant provisions of the Funding Agreements at [18]-[27] above.
114. So far as EFA funding is concerned:
- i) Clause 4.1 is particularly significant (recording a state of affairs which was treated as strongly supportive of reciprocity in both *Rayon d’Or*, [33] and *Saudaçor*, [35]).
 - ii) It is clear from clauses 2.1 and 3.4 that CIC is being paid to provide services, and from clauses 9.1 and the definitions of “Learner” and “Student” that CIC’s obligation is to provide those services to students.
 - iii) The calculation of funding by reference, inter alia, to “lagged” student numbers reflects the nature of the Funding Agreements, “lagged” numbers providing an administratively convenient proxy for funding which is provided in advance of enrolment, allowing CIC to take the necessary steps to provide eligible courses at a point when the number and identity of students taking each course cannot be known.
 - iv) That “proxy” role is apparent from those provisions which allow for some financial adjustment as between CIC and the EFA in the event that the lagged student numbers ceases to represent a reasonable proxy for courses provided (albeit this does not involve an exact ex-post matching of funding and course provision). As the Field Guide records, the services delivered by CIC is “measured” by counting the number of students.
115. So far as SFA funding is concerned:
- i) Clause 1.1 of the Financial Memorandum makes it clear that funding is paid “for learning provision” by CIC.
 - ii) The definition of “learner” and other provisions make it clear that the Financial Memorandum requires CIC to deliver the provision to students.
 - iii) Once again, the calculation of funding by reference, inter alia, to “lagged” student numbers reflects the nature of the Funding Agreements.

- iv) Once again, there are provisions providing for some financial adjustment as between CIC and the SFA in the event that the lagged student numbers ceases to represent a reasonable proxy for courses provided, including “in-year” adjustment.
116. That characterisation is also supported by the “Receipts” issued by CIC as summarised at [29]-[31] above. All students are provided with such a receipt, reflecting the fact that all are in receipt of services (viz course provision) for which CIC would ordinarily be entitled to charge. The difference between students who are, and are not, eligible to benefit from funding provided by the Secretary of State is reflected in the terms of the receipts provided, as is the status of those students eligible for funding only in respect of part of the services received. Those differences in treatment are very difficult to rationalise with an economic arrangement in which the Funding Agencies are not paying for the provision of services to students who are eligible, but providing general funding for some aspects of CIC’s activities. The characterisation which the fact and terms of the receipts reflects is not undermined by the fact that the fee set out does not accurately mirror the funding received. The fact remains that the effect of funding is that CIC does not charge an eligible student the course fee it would otherwise charge, even if the funding received is less (or more) than the course fee. That is essentially the point the UT made at *CIC UT 2020*, [82].
117. Indeed, a notable difference between this case, and the *Apple and Pears*, *Balgarska* and *South African Tourist Board* cases, is that CIC is providing the very same services to non-eligible students as it supplies to eligible students, but because the services provided to non-eligible students do not benefit from the Funding Agreements, those students have to pay for them.
118. HMRC relied on a number of factors which it said point away from the position as suggested by the contractual starting point, and which are said to preclude the existence of a direct link between the funds provided by the Funding Agencies, and the courses provided by CIC to eligible students.
119. First, there is the statutory context in which the funding is provided. Like the UT in *CIC UT 2020*, I accept that is a relevant factor because it makes a “funding on conditions” characterisation viable in a way in which it would not ordinarily be in a wholly private context. However, Mr Mantle accepted that s.14 of the Education Act 2002 is broad enough to allow the Funding Agencies to fund the services provided by CIC to eligible students or to fund CIC itself. I agree with the UT in *CIC UT 2020* at [75] that the statutory context is neutral as to the correct characterisation in this case.
120. Second, it is said that the CIC enjoyed considerable autonomy in deciding what courses to offer, which students were admitted to which courses and how many students were admitted overall. HMRC referred in this regard to clause 6.2 of the SFA’s Financial Memorandum. However, for both the EFA and the SFA, funding was only available for courses which led to approved qualifications ([22]), and while CIC undoubtedly enjoyed a level of autonomy in relation to which courses of the qualifying kind it offered, and how many places, the funding formula sought to reflect those choices when determining the amount to be paid. It is also clear that the EFA had at least some power to control student numbers ([18(vii)] above), and the SFA some power to specify its requirements for courses ([24(vi)] above).

121. As to the number of students:

- i) As the UT explained in *CIC UT 2020*, [24(1)], for EFA funding, while the initial calculation was done by reference to the previous year's figures (taken from the December figure for the previous year), there was some provision for an adjustment where subsequent figures suggested a "significant increase or decrease". In addition, there was a "retention factor" applied to the funding to provide for students who would not attend their course to the anticipated end ([24(3)]).
- ii) If CIC did not provide courses of a sufficient number to meet the assumptions in the EFA funding formula, a retention was applied the following year to any shortfall (*CIC UT 2020*, [79]). HMRC submitted that any such following year adjustment was made in respect of supplies to a different body of students. However, such an adjustment effectively involved the application by the Funding Agencies to present year funding of a credit arising from the prior year under-provision by CIC. In any event, the existence of an adjustment mechanism operating by reference to number of courses in fact provided, even one which did not operate "in-year", reflects the substance of the EFA funding arrangement, which was funding broadly calculated by reference to the supply of courses to the number of students receiving them.
- iii) For SFA funding, CIC was required to produce a figure by "projecting forward" from its current role and "assumptions on likely retention rates using historical trends", with variations being possible during the year by which "in-year over-performance or under-performance can be reflected in increased or decreased allocations" (*CIC UT 2020*, [29]). If CIC did not provide courses of a sufficient number to meet the assumptions in the SFA funding formula, the funding was clawed back pro rata at the year-end ([79]).

122. As to the type of courses and the number of students on each course, the funding formulae sought to reflect these factors:

- i) So far as EFA funding was concerned, there was the so-called "programme cost weighting". It is apparent from *CIC UT 2020*, [24] that it was calculated for any given year's funding by reference to the mix of courses for the previous year. This involved a proxy for the year for which funding was being provided.
- ii) On the findings in *CIC UT 2020*, [24], the funding was calculated on a basis which took a starting point of a particular figure premised on a full-time course involving a certain number of hours of tuition, which was then adjusted by reference to bands reflecting the planned hours for different type of courses and student numbers for the previous year in each band. There does not appear to be any "clawback" or similar mechanism if CIC adopted a cheaper mix of courses, nor an ability to claim more funding that year if the mix was more expensive. However, the funding provision was calculated on a basis which sought, in a proxy fashion, to reflect the course mix.
- iii) SFA funding was also only available for eligible courses and funding could be recovered if the funding conditions were not complied with (clause 6.2) and there was a "Maximum Value" for each learning programme (clause 7.2).

123. In short, therefore, when providing funding in advance of the academic year in which the funded courses were to be delivered (with all of the administrative and planning benefits that would entail), the funding mechanisms sought to tailor the level of the funding to the types of course which CIC provided and the number of students to whom they were provided.
124. HMRC argued that the degree of autonomy enjoyed by CIC in this case was much more extensive than the RCHEs in *Rayon d'Or*. I accept that the RCHEs had considerably less autonomy as to the healthcare it provided to residents (particularly if the healthcare provision is treated as a *Kennemer*-type supply). However, the CJEU did not explore what control each RCHE had as to who was admitted as a resident, when existing residents were required to leave and the level of occupancy of an RCHE at any one time. It seems reasonable to suppose that the RCHEs will have enjoyed some autonomy in these respects. Further, in contrast to the present case, there is no suggestion in the report of the case (whatever the position may in fact have been) that funding could be clawed-back or a credit obtained against a subsequent year's funding if occupancy levels fell below the assumed level or the actual levels of dependency proved less demanding than assumed in the funding calculation.
125. Third, HMRC submit that the identity of the individual students who were to be provided with courses funded by the Funding Agencies was not known at the point of funding, in contrast to the residents of the RCHEs in *Rayon d'Or*. However, there is no uncertainty as to the identity of the students who actually enrol on qualifying courses, and their identities were made known to the Funding Agencies. As the UT found in *CIC 2020 UT*, [22]:
- “As a condition of EFA and SFA funding, CIC is required to upload the ILR for each student on a monthly basis to a national Data Service Hub. There are in excess of 200 fields of data for each student.”
126. To the extent that it is said that the identity of the students who would receive funded courses was not known when the funding amount was calculated, this is also true of the identity of residents when the annual or multi-year lump sum was paid in *Rayon d'Or* (see [103(iii)] above). In each case, however, there were criteria which defined those who would benefit from the funding: in the case of CIC, students accepted for eligible courses, and in the case of *Rayon d'Or*, insured patients admitted to the RHCE.
127. Fourth, the fact that the number and type of courses (and hence the services) in fact provided by CIC in any relevant year in return for the funding received, only become certain after the funding is provided. However, the supplies made by CIC in return for the consideration received are clear at the point of supply. It is no bar to the application of the PVD that the amount of the consideration paid for services is not ascertained when the services are provided but is capable of being ascertained (for example *EQ* and *KE Entertainments*). I am not persuaded that a different result follows where the price is fixed by reference to an estimate of the services to be provided, but, despite the best efforts of the parties, the actual service provision is different from that estimate. The amount received for each supply in fact made is capable of being ascertained.
128. Fifth, it is said that there was no legal relationship between the Funding Agencies and eligible students akin to the legal relationship between the insurance fund and the residents in *Rayon d'Or*. However, when a third party pays for a supplier to supply

goods or services to the recipient, there is no legal requirement for a legal relationship between the payer and the recipient in order for a direct link between the payment and the provision of services to be established, as Mr Mantle accepted.

129. In this case, there is no contract between the Funding Agencies and CIC's students, but that is not, in my assessment, sufficient to break the link between the funding and the services received. The funding was provided pursuant to the Secretary of State for Education's power under s.14 of the Education Act 2002 to "give, or make arrangements for the giving of, financial assistance to any person in connection with ... the provision, or proposed provision, in the United Kingdom or elsewhere, of education or of educational services" and "enabling any person to undertake any course of education, or any course of higher education provided by an institution within the further education sector". One of the purposes of the statutory power in issue, therefore, was to benefit those undertaking relevant courses of education, and, to that extent, there was a degree of legal proximity between them of a kind which supports the existence of a direct link between the funding the Funding Agencies were providing and the courses eligible students were receiving.
130. Finally, Mr Mantle pointed to the fact that there were elements of the funding provided to CIC, namely the "Disadvantage Funding" which formed part of the EFA's funding, which bore no link to the number of courses CIC provided. However, I accept Mr Firth KC's submission that it is not necessary for CIC to establish that every element making up the funding was provided in consideration of the supply of courses to eligible students. It is sufficient that some part (as it happens, the major part) was so provided. There would be no difficulty in identifying and allocating that part of the funding paid in consideration for the supply of courses to eligible students.

Conclusion

131. For these reasons, I would reject Ground 2 of HMRC's Notice of Appeal and dismiss the appeal.

Lord Justice Arnold

132. I agree.

Lady Justice Asplin

133. I also agree that the appeal should be dismissed for all of the reasons set out by Lord Justice Foxton.