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UT (Tax & Chancery) Case Number: **UT-2021-000019**

Upper Tribunal
(Tax and Chancery Chamber)

The Royal Courts of Justice
Chichester Street
Belfast

Hearing dates: 10 and 11 May 2022
Judgment given on: 19 July 2022

Before

THE HONOURABLE MADAM JUSTICE McBRIDE
JUDGE JONATHAN CANNAN

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

and

MID-ULSTER DISTRICT COUNCIL

Respondents

Representation:

For the Appellant: Raymond Hill BL, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

For the Respondents: Melanie Hall QC and Harry Gillow BL, instructed by DLA Piper UK LLP

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("the FTT") released on 17 October 2020 ([2020] UKFTT 434 (TC)) ("the Decision"). The FTT allowed the appeal of Mid-Ulster District Council ("the Council") against HMRC's determination that VAT was chargeable by the Council on its supplies of sports and leisure facilities.

2. The issue in this appeal is whether the Council is a taxable person when making those supplies or whether it is not to be regarded as a taxable person by virtue of Article 13 of the Principal VAT Directive 2006/112/EC ("the PVD").

3. There is a dispute between HMRC and local authorities across the United Kingdom concerning the VAT liability of charges paid by members of the public for access to sports and leisure facilities provided by these authorities. The Council submitted voluntary disclosures in 2010 and 2011 claiming repayment of VAT totalling £518,691 allegedly overpaid in its VAT accounting periods 12/06 to 03/11. The claims were rejected by HMRC in a decision dated 7 October 2011. That decision was upheld following a formal internal review on 28 September 2012. The Council appealed to the FTT.

4. The FTT directed by way of case management that a single lead case be identified in each of the three UK territorial jurisdictions in England and Wales, Scotland and Northern Ireland. The nominated lead case for Northern Ireland is Magherafelt District Council. That council merged with two other local councils in 2015 and together they were renamed Mid-Ulster District Council. The nominated lead case for England and Wales is Chelmsford City Council and the nominated lead case for Scotland is Midlothian Council.

5. Given the importance of the issues to be determined, in each lead case the FTT exceptionally consisted of the same three judges qualified in each of the three jurisdictions. Judge Kempster was the presiding member of the panel, together with Judge Rankin and Judge Anne Scott.

6. HMRC originally refused the Council's claim for repayment on the basis that the admission charges should bear VAT at the standard rate. It appears from [44] of the Decision that at some stage prior to the hearing before the FTT, HMRC accepted that entrance fees to sports centres were exempt. However, the issue as to whether local authorities are to be treated as non-taxable persons by virtue of Article 13 remains relevant to the amount of the repayment.

Relevant legal provisions

7. We were referred to Articles 2, 9 and 13 of the PVD. Articles 2 and 9 define the supplies which are within the scope of VAT:

> "2(1) The following transactions shall be subject to VAT: …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; …"

> "9(1) 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of

tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity…"

8. In this appeal we are principally concerned with Article 13.1 PVD which provides:

"1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible."

9. Article 13.1 was implemented in UK domestic law by section 41A Value Added Tax Act 1994. The parties' submissions focussed on Article 13.1 and we shall do the same. It is not necessary for us to set out the domestic provisions. The sub-paragraphs of Article 13.1 are not separately numbered. For the sake of convenience and clarity we shall refer to them as Article 13(1), (2) and (3) respectively.

10. It is convenient to say at this stage that the question of whether public bodies provide goods and services "as public authorities" for the purposes of Article 13(1) PVD (and its predecessor in Article 4(5) of the Sixth Directive) has been considered extensively in the case-law of the European Court of Justice and the Court of Justice of the European Union ("the CJEU"). In Joined Cases C-231/87 and C-12/88 *Ufficio distretualle delle imposte dirette di Fiorenzuola d'Arda v Carpaneto Piacentino* [1989] ECR 3233 ("Carpaneto"), the CJEU said at [15] and [16]:

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

16. It follows that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities 'as public authorities' within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting 'as public authorities'. It is for the national court to classify the activity at issue in the light of that criterion."

11. It is now well-established that the question of whether a public authority is acting as a public authority for the purposes of Article 13(1) depends on whether it is engaged in activities pursuant to a special legal regime. On this appeal it is not disputed that the Council was providing its sports and leisure services pursuant to a special legal regime, and was therefore acting as a public authority.

12. The provisions which the FTT found established a special legal regime in the present case are section 75 of the Northern Ireland Act 1998 ("The Northern Ireland Act") and Articles 10 of the Recreation and Youth Service (Northern Ireland) Order 1986 ("The 1986 Order").

13. Section 75 Northern Ireland Act 1998 provides, so far as relevant:

"75(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men and women generally;

(c) between persons with a disability and persons without; and

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group…"

14. Article 10 of the 1986 Order 1986 ("Article 10") provides:

10(1) Each district council shall secure the provision for its area of adequate facilities for recreational, social, physical and cultural activities and for that purpose may, either alone or together with another district council or any other person—

(a) establish, maintain and manage any such facilities;

(b) organise any such activities;

(c) assist, by financial contributions or otherwise, any person to establish, maintain and manage any such facilities or to organise any such activities;

(d) provide, or assist by financial contribution or otherwise in the provision of, leaders for such activities; and

(e) defray or contribute towards the expenses of any persons taking part in any such activities.

(2) A district council shall, in carrying out its functions under paragraph (1), have regard to the facilities provided by other district councils or by other persons.

(3) A district council may, with the approval of the Department and the Department of the Environment, provide a facility such as is referred to in paragraph (1) for the whole of Northern Ireland or for an area or areas outside its own area.

(4) A district council may make bye-laws for all or any of the following purposes—

(a) regulating the use and management of any lands or buildings provided by it for any of the purposes mentioned in paragraph (1);

(b) regulating the days and times of, and charges for, admission to such lands and buildings;

(c) the preservation of order and prevention of nuisance in such lands and buildings;

and, without prejudice to section 93 of the Local Government Act (Northern Ireland) 1972, such bye-laws may authorise persons employed by the district council and members of the Royal Ulster Constabulary after due warning to remove or exclude from any place with respect to which any such bye-laws are for

the time being in force a person who commits, or who is reasonably suspected of committing, in that place an offence against any such bye-law or against section 4 of the Vagrancy Act 1824.

(5) A district council may acquire land otherwise than by agreement for the purposes of this Article."

Decision of the FTT

15. The three principal issues in the Council's appeal before the FTT were:

(1) Whether the sports and leisure activities provided by the Council were economic activities within the scope of VAT pursuant to Articles 2 and 9(1) of the PVD?

(2) Whether the Council was acting as a public authority in accordance with Article 13(1) PVD in providing the services?

(3) If the Council was in principle acting as a public authority, whether its treatment as a non-taxable person would lead to significant distortions of competition within the meaning of Article 13(2)?

16. In the Decision, the FTT held:

(1) The sports and leisure activities provided by the Council were economic activities and were within the scope of VAT pursuant to Articles 2 and 9(1) of the PVD.

(2) The Council provided those services as a public authority acting under a special legal regime, namely the Northern Ireland Act and the 1986 Order. Accordingly, the Council's activities fell within Article 13(1) and, subject to Article 13(2), the Council would be a non-taxable person in respect of those activities.

(3) Treating the Council as a non-taxable person would not lead to significant distortions of competition. The FTT held that no private operator could meet the demanding requirements of the special legal regime imposed upon the Council by the Northern Ireland Act and Article 10. Accordingly, the FTT found that there was no possibility of a private operator engaging in comparable activities. There was therefore no actual or potential competition. Accordingly, Article 13(2) was not engaged and the Council was a non-taxable person in respect of those activities.

17. The Council has not appealed the FTT's finding that its provision of sports and leisure services were economic activities. HMRC has not appealed the FTT's finding that in providing the sports and leisure services the Council was acting as a public authority.

18. This appeal relates only to the third issue, namely whether treating the Council as a non-taxable person would lead to significant distortions of competition.

The FTT's findings of fact

19. The FTT heard evidence from Mr Stephen Reid, a local government Chief Executive and from Mr John Tohill, the Director of Finance of the Council. The evidence before the FTT is set out at paragraphs 18 and 19 of the FTT decision and at paragraph 63 the FTT accepted that evidence as its findings of fact. The findings made by the FTT are not the subject of appeal or dispute.

20. The FTT heard evidence that in the relevant period the council provided facilities which included two leisure centres, a golf course, pitches for soccer, Gaelic football, rugby and hockey, an athletics track and tennis courts. The Council was cognisant of the cultural preference of the local area in

which pitches were located and therefore operated a policy of facility duplication in relation to the provision of playing pitches. The following findings of the FTT are particularly relevant in the context of this appeal.

> "18(6) Equality is an extremely important issue in Northern Ireland. There is a legal duty (Fair Employment and Treatment (Northern Ireland) Order 1998) to promote equality and prevent discrimination on grounds of religious belief or political opinion. Local authorities have a duty under s 75 NI Act to have due regard to the need to promote equality of opportunity when carrying out their functions. Local authorities are required to carry out equality impact assessments, and produce equality schemes and associated plans; they must subject their policies, including pricing policies, to an assessment to ensure the policies do not place certain groups or individuals at a disadvantage.
>
> (7) Northern Ireland has experienced political and social unrest for generations and has been deeply affected by "The Troubles", a period of unrest and instability conventionally dated to the period from the late 1960s to 1998. One effect was to split communities resulting in residents being unable and unwilling to venture into the "other side" even to avail of public services. Local authorities have had to deal with segregation, political turmoil, inequalities, deprivation and social exclusion. These problems led to a major reorganisation of local government services in 1973, with a large range of traditional local authority services being removed from local councils. Significantly, the provision of social, physical and cultural activities was retained by local authorities - and the statutory obligation for the provision of these services was made specific in the Recreation and Youth Services (Northern Ireland) Order 1973 - emphasising the importance placed on the role of local authorities in delivering the objective to use leisure and cultural services to enhance integration and attack all forms of social deprivation."

> "19(14) Northern Ireland, and particularly its rural areas, consists of diverse and often conflicting groups of communities. The Council's population was culturally diverse (64% Catholic, 35% Protestant, 1% other) with an equally diverse interest in leisure and recreational activities. Those interests tend to be heavily influenced by the residents' community background so that the main sporting interests were Gaelic football, soccer and rugby. The Council found itself providing a wide range of leisure and recreational facilities catering for the interests of its population - both mainstream and minority. The Council was broadly successful in presenting all its facilities as neutral spaces that could be used by everyone; however, it operated in the real world which dictated that (aside from the major facilities) most of its investment in playing pitches in particular tended to have cognisance of the cultural preferences of the local area in which the pitches were located. Consequently, the Council operated a longstanding policy of facility duplication, particularly in the provision of playing pitches, which in a more normal environment might have been capable of being shared by greater proportions of the resident population. Many of the pitches were perceived by the communities in which they were located as being exclusive to them or at least to the sporting code in which they participated. Many individuals associated with certain activities had deliberately cultivated a negative attitude towards activities the other community was perceived to participate in. Historically, public sector sports and leisure provision throughout Northern Ireland was perceived to have favoured activities rooted in a "Protestant/Unionist" culture - consequently, through the formation of the Gaelic Athletic Association ("**GAA**"), many "Catholic/Nationalist" communities became relatively self-sufficient in facilities and activities by forming local clubs on a parish basis which over time secured land and provided their own playing fields. The GAA constitution prevents its facilities being used for activities other than GAA activities - and Unionists would not use such facilities on ideological grounds. The Council had a heavy investment in soccer pitches but low (although heavily used) provision of Gaelic football pitches; there was a constant demand for equality of provision of the latter relative to the investment in the former…. Further, it was recognised that provision of accessible, quality leisure and recreational facilities which were attractive to local communities would assist in diverting disaffected (mainly) young people away from less socially desirable activities, and contribute to improvement of health…

(15) In 2015 Mr Tohill had an informal telephone conversation about potential leisure and recreational service delivery models with the director of operations at a private provider. The view expressed was that as a commercial operator the company would close all the existing facilities and build a single new leisure centre close to the maximum centre of population (ie Cookstown or Dungannon); that might increase throughput and might become profitable, even to the point of recovering capital costs of construction; there was no discussion of what level of charges would be required to make this possible. The model proposed would not satisfy the Council's requirement to provide adequate facilities; as a rural area the public transport infrastructure could not offer anything approximating a reasonable means of enabling residents accessing a single facility, and one centre would not provide adequate facilities for the area.

(16) The Council was committed to discharging its Article 10 obligations by providing adequate facilities, being functionally appropriate, safe, accessible, affordable, clean and available, taking into account the need to ensure equality of provision. Decisions were never motivated purely by the desire to generate income…

(17) Private sector provision of leisure and recreation facilities in the Council's district was limited to a very small number of individuals - typically personal trainers with access to limited basic equipment, operating part-time from domestic premises or small units on short term leases. There was no private sector provision of swimming, racket sports, or pitches (grass or AstroTurf). Providers tended to "come and go" in the marketplace, and there was uncertainty whether adequate insurance was maintained. The Council was actively involved in drawing down grant funding from UK and EU sources totalling several million pounds towards developing leisure and recreational services; that was not available to private operators and, without it, the private providers did not have the necessary resources. Religious, cultural and political differences between the two main communities would make it very difficult or impossible to provide shared facilities throughout the rural area of the district. Consequently, an alternative provider would be likely to find itself having to duplicate provision of facilities - for example, provision of pitches. Private providers would be likely to have a very different view from the Council on concessionary charges, given their financial objectives."

21. The FTT also found:

(1) The Council was required to provide adequate recreational, social, physical and cultural facilities for its area pursuant to Article 10 of the 1986 Order.

(2) All the Council's leisure and recreational services were provided by it subject to its Article 10 obligation.

(3) When providing those facilities, the Council was subject to section 75 of the Northern Ireland Act which required Northern Ireland public authorities to have due regard when carrying out their functions to the need to promote equality of opportunity between various defined groups of persons.

(4) The duties imposed by the legal regime affected the Council's provision of its sporting and recreational services, in that:

a) It set charges so as to maintain or increase footfall rather than to maximise revenue;

b) Decisions on capital expenditure were "mainly influenced by non-monetary costs and benefits, such as the expected health, well-being and safety benefits for users and tax payers".

Decision of the FTT on distortion of competition

22. The FTT found that the Council was engaged in its sports and leisure activities as a public authority. In finding that the Council engaged in those activities pursuant to a special legal regime the FTT held as follows:

> "99. …The Article 10 regime is hedged around by a number of constraints: the statutory equality duties (s 75 NI Act) and the onerous consequences for provision of facilities, including the need for cohesion of diverse communities; the need to set charges by reference to affordability and accessibility, and the consequent deficit against costs of provision; and the inability (prior to April 2015) for the Council to conduct activities by way of a trade. Any private sector business providing leisure and recreational services in the Council's area - even ones indistinguishable to the consumer from the Council's facilities - would be doing so not under the Article 10 regime but instead under the general legal regime applicable to all facilities operators. Accordingly, the legal conditions under which the Council is providing services are different, because of its function as a public authority, from the legal conditions under which its private sector counterparts are providing perhaps indistinguishable services. Thus the Council's provision of the facilities is being engaged in under a special legal regime applicable to a body governed by public law."

23. We have noted above that HMRC does not appeal against that conclusion. The FTT then went on to consider whether there was significant distortion of competition within Article 13(2). At paragraph 100 of its decision the FTT noted that both parties acknowledged that if consideration of the distortion of competition issue arose, then it may be necessary for the Tribunal to hear further evidence and submissions on the issue. The FTT however concluded that it was able to determine this issue without any supplementary submissions or evidence based upon their analysis of the case law and the evidence which had already been produced.

24. After setting out extracts from the relevant case law the FTT held at paragraph 104(2) as follows:

> "Our evaluation must be by reference to "the activity in question, as such." That means the activity which, absent the second paragraph of Article 13, would result in the council being a non-taxable person – ie the provision of leisure and recreational services pursuant to the special legal regime in Article 10. Of course, that is a regime which applies only to the council and not to private operators, but the activity being scrutinised must be concordant with the special legal regime, otherwise the evaluation would be comparing different activities."

25. The FTT's reference to "the activity in question, as such" comes from the CJEU in C-288/07 *HMRC v Isle of Wight Council* [2008] STC 2964 where it stated at paragraph 53:

> "53. … the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by private law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular."

26. The FTT further held at paragraph 107:

> "Here the activities in question are the facilities provided by the council within the constraints which hedge around (as Nugee J put it Durham PTA) its obligation under Article 10; those constraints include the equality duties under section 75 (NI) Act. … We conclude from the evidence before us that there is no non-neglible alternative provision of the activities in question; only local authorities are in a position to provide facilities that meet the demanding requirements for community of equality."

27. In effect the FTT held that the word "activities" in Article 13(2) is to be interpreted as meaning not just the provision of sports and leisure facilities per se, but rather the provision of those activities in a way which is concordant with the special legal regime which applied to the Council. In this case, that the special legal regime incorporated the duties set out in section 75 of the Northern Ireland Act

and in Article 10. Applying that approach the FTT held that there was no significant distortion of competition as only the Council was in a position to provide facilities which met the demanding requirements of the special legal regime and, in particular, the requirement for equality.

Application for permission to appeal

28. HMRC applied for permission to appeal the Decision. The grounds of appeal are essentially that the FTT applied the wrong legal test when it evaluated whether there were private operators who provide or potentially could provide sports and leisure facilities. In particular, the FTT wrongly considered whether private operators could provide the services subject to the same requirements of community, equality and integration to which the Council was subject. HMRC contend that the FTT should have evaluated simply whether there was actual or potential competition between the Council, which had to design its services with both the benefit and burden of a special legal regime, and private operators who were able to design their services unconstrained by that special legal regime.

29. The FTT granted HMRC permission to appeal on those grounds in a decision dated 12 January 2021.

Representation

30. Mrs Melanie Hall QC and Mr Harry Gillow BL appeared on behalf of the Council. Mr Raymond Hill BL appeared on behalf of HMRC. We are grateful to all counsel for their detailed, concise and well-researched and marshalled skeleton arguments and oral submissions which greatly assisted us.

Consideration

31. The FTT held that Article 13(2) was not engaged. Article 13(2) provides, by way of exception to Article 13 (1), that public authorities acting under a special legal regime:

> "… when they engage in *such activities* or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition."
>
> (emphasis added)

32. The FTT held that there was no competition between the Council and private operators because the activities provided by each were not similar and therefore were not in competition. The FTT reached that conclusion because it interpreted the phrase "such activities" as meaning "the provision of activities which are concordant with the special legal regime."

33. When the FTT applied that approach to the evidence, it found that there was no non-negligible alternative provision of sports and leisure activities. Private operators were not in a position to provide facilities which met the demanding requirements of community equality and the requirements of Article 10 which governed the Council's provision of sports and leisure activities.

34. HMRC submit that in determining whether activities are similar and therefore in competition, the phrase "such activities" should be interpreted as referring to the intrinsic characteristics, subject matter and nature of the activities, viewed from the "eye of the consumer." Accordingly, the legal regime under which the activities are provided is irrelevant unless it has a bearing on the consumer's perspective of the similarity of the activities.

35. If the FTT applied the wrong test to the definition of activities, HMRC submit that the case should be remitted so that the FTT can hear further evidence and submissions on whether the services provided by private operators in Northern Ireland are comparable or potentially comparable from a consumer perspective and whether treating the Council as non-taxable would lead to a non-negligible distortion of competition. HMRC accept that if we find the FTT correctly interpreted the phrase "such activities" then they do not challenge the finding of the FTT that no private operator would or could provide the sports and leisure facilities subject to the same legal regime as the Council.

Key question for determination

36. The key question for determination therefore is how the phrase "such activities" in Article 13(2) of the PVD is to be interpreted. We were referred to a number of CJEU authorities in which the interpretation of Article 13(2) has been considered. None of these authorities however directly addresses the meaning of the phrase "such activities". Nonetheless, we consider that assistance can be gleaned from the case law and the principles to be applied to the interpretation of Article 13(2).

37. During the period covered by the Council's voluntary disclosure, between 2006 and 2011 the UK was a member of the EU. All the CJEU decisions to which we were referred were before the UK left the EU and are therefore binding on this Tribunal.

38. The leading case on the interpretation of Article 13(2) is the decision of the Grand Chamber in *Isle of White*, which concerned a local authority providing off-street parking. Private operators provided a similar service. The local authority claimed repayment of VAT on the basis it provided the services under a special legal regime and should be treated as non-taxable. HMRC refused to make the repayment on the basis that treating the local authorities as non-taxable would lead to significant distortions of competition. The VAT and Duties Tribunal allowed the appeal and HMRC appealed to the High Court.

39. The High Court referred various questions to the CJEU for a preliminary ruling on the correct interpretation of various aspects of Article 13(2). The High Court did not ask the CJEU to rule on the meaning of "such activities". In its ruling the CJEU set out a number of principles of construction in relation to Article 13(2) which we consider are of assistance in interpreting the phrase "such activities".

40. First, the CJEU held that in construing the terms of Article 13(2) it is necessary to take into account the scheme and purpose of the VAT Directive and the place of Article 13 in the common system of VAT (see paragraph 25).

41. It is a general rule of the common system of VAT, deriving from Articles 2 and 9 of the PVD, that any activity of an economic nature is subject to VAT. Article 13(1) is a derogation from this general rule because economic activities carried out by a public authority acting under a special legal regime are exempt from VAT. However, Article 13(2) restores the general rule in circumstances where treating the public authority as a non-taxable person would lead to significant distortions of competition. Article 13(3) also restores the general rule by reference to a number of activities listed in Annex 1 which "shall be regarded as taxable", provided that those activities are not carried out on such a small scale as to be negligible. There are a wide range of activities covered by Annex 1, from warehousing to the supply of utilities such as electricity.

42. Second, the CJEU held that Article 13(2) and (3) are to be interpreted as a whole. This is because they pursue the same objective – namely the treatment of public bodies governed by public law as taxable persons in relation to certain activities, even when they are acting as public authorities. Those

provisions share the same logic in that they are intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons thus restoring the general rule that any activity of an economic nature is, in principle, to be subject to VAT (see paragraphs 38 and 39).

43. Third, the CJEU held that the provisions of Article 13 are to be interpreted having regard to the principle of legal certainty and in particular the principle of fiscal neutrality (see paragraph 41). This means that Article 13 must be interpreted in such a way that "the least possible damage is done to that principle" (see paragraph 44). Accordingly, Article 13(1) being a derogation from the principle of fiscal neutrality, must be interpreted strictly (paragraph 60) and Article 13(2), which is intended to ensure compliance with the principle of fiscal neutrality (paragraph 43), must not be construed narrowly (paragraph 60).

44. The CJEU held at paragraph 63 that Article 13(2) encompasses both actual and potential competition and then stated:

> "64. However, the purely theoretical possibility of a private operator entering the relevant market, which is not borne out by any matter of fact, or by any objective evidence or by any analysis of the market, cannot be assimilated to the existence of potential competition. To make such an assimilation, that possibility must be real, and not purely hypothetical."

45. It is clear from *Isle of Wight* that "such activities" in Article 13(2) must be interpreted having regard to:

(1) The principle of fiscal neutrality; and

(2) The structure of Article 13.

46. All parties agreed that this is the correct approach save that Mrs Hall, on behalf of the Council, submitted that the principle of fiscal neutrality does not apply when what she called "the proviso" is engaged. Subject to that, she accepted that the principle of fiscal neutrality is relevant in construing Article 13(2).

The proviso

47. Mrs Hall submitted that Article 13(2) is only engaged in circumstances where the court has already determined a preliminary question, namely that the possibility of a private operator entering the market was real and not purely hypothetical. She described this as "the proviso" which she submitted involved a gateway to the application of Article 13(2). In support of the existence of a proviso or gateway, Mrs Hall relied on the dicta in *Isle of Wight* at paragraph 64, quoted above, and similar dicta which appears in case C-344/15 *National Roads Authority v The Revenue Commissioners* at paragraphs 41 and 50.

48. We do not consider that there is a proviso or a gateway finding which is required before Article 13(2) is engaged. The question of whether there is a possibility of competition being real or purely hypothetical forms part of the exercise to be conducted under Article 13(2) where the tribunal must decide whether there is potential competition. In deciding whether there is potential competition the tribunal must not take into consideration competition which is purely hypothetical. This exercise is the very essence of what Article 13(2) requires, namely assessing whether there is actual or potential competition. Accordingly, we consider that Article 13(2) is engaged in this case. In determining whether there is actual or potential competition we must consider the activities to which that competition relates. The principle of fiscal neutrality will inform that determination.

Fiscal neutrality

49. Mrs Hall drew our attention to the fact that the principle of fiscal neutrality applies in various guises (see the observations of Lindsay J in *Revenue & Customs Commissioners v Weald Leasing* [2008] EWHC 30 (Ch) at paragraph 31). For example, it is sometimes used to refer to the system of suppliers deducting input tax credits so that the tax is borne by the ultimate consumer. It is also used in the context of exempt supplies, where input tax attributable to those supplies cannot be recovered. In those contexts, Mrs Hall submitted that the perspective of the typical consumer has no part to play. That submission foreshadowed her later submission that the perspective of a typical consumer has no part to play in determining in this case whether there was actual or potential competition between the Council and private operators.

50. In another context, "according to settled case law, the principle of fiscal neutrality, precludes treating similar goods and supplies of services, which are thus in competition with each other differently for VAT purposes" – see C259/10 and C260/10 *Rank Group Plc v HMRC* [2012] STC 23 at paragraph 32. It is fiscal neutrality in this context which is relied upon by HMRC in submitting that the FTT was wrong to define the activities by reference to the special legal regime and therefore find that there was no possibility of competition.

51. Article 13(1) is a derogation from the general rule that all economic activities are subject to VAT. Article 13(2) then restores the general rule. The jurisprudence has consistently pointed out that the purpose of Article 13(2) is to guarantee fiscal neutrality – see for example *Carpaneto* at paragraph 22.

52. Further, all the authorities are consistent in providing that Article 13(2) is to be interpreted in a way which does the least damage to the principle of fiscal neutrality. Consequently, Article 13(2) must be construed in a way that is not too narrow, otherwise its purpose of restoring the general rule and in guaranteeing fiscal neutrality would be frustrated.

53. All these propositions however, rather beg the question what does fiscal neutrality require in identifying the activities for the purpose of considering whether there is distortion of competition within Article 13(2)?

54. Mrs Hall submitted that the activities in the present case must be characterised by reference to the special legal regime pursuant to which the Council engages in the activities. In this case, she submitted that the special legal regime which required the Council to comply with equality obligations and its obligations under Article 10, had such a profound impact on the delivery, scope and nature of the activities that it was impossible to define the activities shorn of the legal regime. In her submission, comparing the provision of the Council's sports and leisure facilities which had to comply with their equality and other obligations under Article 10, with the sports and leisure facilities provided by private operators who did not have to comply with the special legal regime, was not comparing like with like. In support of this proposition she relied on a number of authorities, in particular *National Roads Authority, EC v Netherlands* [2000] ECR 1-6417, *Landesanstalt fur Landwirtschaft v Franz Gotz* [2007] ECR 1-11295 and *R(On the Application of Durham Company Ltd (Trading as Max Recycle)) v Revenue and Customs Commissioners* [2018] UKUT 188 TCC). She accepted that in cases where the special legal regime did not have a profound impact on the scope, delivery and nature of the activities then the factual question which a Tribunal has to determine about whether private operators and public authorities are in competition was more dependent on whether they provided the same granular activities. In all cases however, it was a fact specific inquiry to be carried out by the national courts and in all cases the legal regime has to be taken into account where it affects the scope, nature and delivery of the services provided.

55. Mrs Hall further submitted that this definition of activities complied with the principle of fiscal neutrality, which only requires activities which are similar and therefore in competition with each other to be subject to the same VAT treatment. As the activities engaged in by the Council were, on her definition, very different to what private operators engaged in the treatment of the Council as a non-taxable person would not offend the principle of fiscal neutrality.

56. Mr Hill submitted that the cases relied on by the Council do not establish the proposition contended for by Mrs Hall. In all those cases the private operators were unable, even on the basis of their own private legal regime, to engage in the activities which were engaged in by the public authorities. Accordingly, in all those cases there was no possibility of private operators competing. Consequently, the CJEU did not have to grapple with the question how the phrase 'such activities' was to be interpreted in situations where a private operator could, under its own private law regime, engage in similar granular activities to those engaged in by the public authority. HMRC contended that there are authorities which have held expressly that the principle of fiscal neutrality in the context of competition requires the similarity of goods and services to be assessed from the perspective of the consumer, where the legal regime under which the goods or services are provided is irrelevant, save in exceptional cases where the legal regime affects the similarity of the goods or services in the eyes of the consumer. Mr Hill relied on the authorities of *Rank Group Plc* and Joined Cases C-454/12 and C-455/12 *Pro Med Logistik v Finanzamt Dresden-Süd* ECLI:EU:C:2014:111 as authorities in support of his submission that fiscal neutrality requires activities to be assessed from the perspective of the consumer and therefore the legal regime is, in all but exceptional cases, an irrelevant consideration.

57. The central dispute on this appeal essentially depends on whether the activities being compared are defined from the perspective of the provider, taking into account the special legal regime, or from the perspective of the consumer. To determine which is the correct approach it is necessary to carefully scrutinise the various authorities relied on by the parties.

58. In *National Roads Authority (NRA)*, the Irish tribunal requested a preliminary ruling regarding the interpretation of Article 13(2) and the treatment of the NRA as a non-taxable person. In Ireland most toll roads are constructed and operated by private operators under public-private partnership agreements concluded with NRA. VAT was charged on tolls on all eight toll roads operated by private operators but was not charged on the two toll roads operated by NRA.

59. The CJEU recorded the referring tribunal's observation that the toll roads operated by private operators and those operated by the NRA were so far apart they served different needs from the point of view of the consumer and they were not therefore in competition (paragraph 23). It was further observed by the referring tribunal that there was no real possibility of a private operator entering the market of providing toll roads which competed with the two NRA toll roads. This was because NRA would have to adopt a toll scheme, make by-laws for the road and enter into an agreement with the private operator authorising it to collect the tolls (paragraph 25). In addition, private operators would face insurmountable difficulties, not least the near impossibility of acquiring the land required to build such toll roads in the absence of having compulsory vesting powers (paragraph 26). The Irish revenue authorities had failed to show that there was a realistic possibility of a private sector operator entering the market (paragraph 27).

60. The question referred was as follows:

> "35. …whether the second subparagraph of Article 13(1) of the VAT Directive must be interpreted as meaning that, in a situation such as that in the main proceedings, a body governed by public law which carries on an activity consisting in providing access to a road on payment of a toll must be regarded as

competing with private operators who collect tolls on other toll roads pursuant to an agreement with the public law body concerned under national statutory provisions."

61. The CJEU described the aim of Article 13(2) as follows:

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

62. The CJEU found that making road infrastructure available on payment of a toll was carried out exclusively by NRA and only it had power to prepare a plan for establishing a toll scheme for access to toll roads (paragraph 45). Private operators could only enter the market of making road infrastructure available on payment of a toll if the NRA authorised them to do so (paragraph 46). The activity of making road infrastructure available on payment of a toll is carried out exclusively by the NRA (paragraph 48). It was common ground that there was no real possibility of a private operator entering the market by constructing a road (paragraph 49). At paragraph 50 the CJEU concluded:

"50. … the NRA engages in its activity of making road infrastructure available on payment of a toll within the legal scheme peculiar to it. Consequently, … that activity cannot be regarded as being carried on in competition with that carried on by private operators … there is no potential competition either, insofar as the possibility of private operators carrying on the activity in question on the same conditions as the NRA is purely hypothetical. Accordingly, the second sub-paragraph of Article 13(1) of the VAT Directive is not applicable …"

63. Mrs Hall submitted that *NRA* was directly analogous to the position of the Council in this case. She submitted that although the NRA and private operators engaged in essentially the same granular activity of collecting tolls in exchange for using a road, the CJEU rejected this narrow definition of the activity in favour of a broader definition which took into account the wider statutory regime under which the NRA operated. She submitted that the Council was similarly obliged under its special legal regime to provide sports and leisure facilities in a way which complied with Article 10 and the equality obligations. The FTT was therefore correct to define the activities broadly and by reference to the special legal regime rather than by reference to the subject matter of the activities.

64. We do not accept that *NRA* is authority for that proposition. In *NRA* no private operator could ever compete with the public authority. This was because under their own private law regime, private operators could never build a toll road to compete with the NRA toll roads. They could not acquire the land as they had no vesting powers. Further, they could only enter the market of making roads available on payment of a toll if the NRA authorised them to do so. There was no question of a private operator being able to compete with the two toll roads operated by NRA. The CJEU did not have to address the question, in circumstances where a private operator and a public authority could, or did, provide the same granular activities, of how the activities are to be defined. In particular, whether they are to be defined solely by reference to the nature of the activity or including reference to the legal context pursuant to which the public authority engages in the activity.

65. We also note that in *NRA* the referring tribunal had applied the consumer perspective test to competition (see paragraph 23). It observed that the NRA and private operators were not in competition as the toll roads provided by private operators and those provided by the public authority were sufficiently far apart from each other that they served different needs from the point of view of the consumer. This approach was not questioned by the CJEU.

66. The next authority to be considered is *EC v Netherlands*. In this case the Commission complained that the Netherlands had infringed Article 13 by exempting from VAT supplies of staff by government bodies to "Euroregions". Those supplies took place in the sociocultural, health and education sectors on a reciprocal basis which enabled establishments active in those areas to help each other in relation to staffing requirements and as a means of attracting and retaining high quality staff and ensuring the quality of health, welfare and educational services (paragraph 57).

67. The government of the Netherlands made a number of submissions to the Court which are set out at paragraphs 71-74 of the judgment. It argued at paragraph 73 that its supply of staff was "subject to legal conditions that do not apply to private economic operators" and was not intended to meet a staffing requirement but was a means for authorities in Euroregions to cooperate and for staff to acquire knowledge and experience at another body which they could then put to use at their own institutions. It further alleged at paragraph 74 that "recruiting new staff via placement agencies is not an option that would meet [the need]" to recruit experienced staff for the euro regions.

68. The Court found at paragraph 86 that under the relevant legal regime the supply of staff by the government was "subject to specific conditions" intended to promote occupational mobility and concluded at paragraph 93:

> "…the kingdom of the Netherlands has given a detailed and reasoned explanation of how the supply of staff to Euroregions and in the context of promoting occupational mobility, governed by the 2007 decree, cannot be regarded as being pursued in competition with the placement activities engaged in by private operators. Specifically…the specific nature of the requirements which the supply in question is to meet, using private operators to recruit staff is not a viable option. The Commission neither denied nor attempted to deny those representations."

69. Accordingly, the complaint was rejected by the court.

70. Mrs Hall submitted that this case is another example where the CJEU in defining the activities took the special legal regime into account.

71. We do not consider that *EC v Netherlands* does provide such an example. In *EC v Netherlands*, public authorities in the Netherlands essentially seconded experienced staff to public authorities in the Euroregions. The CJEU accepted the Netherlands' submission (as the Commission did not deny it) that private agencies simply could not engage in that activity because the staff were not being made available to meet a demand for staff, but to enable those staff to acquire knowledge and experience that they could then put to use in their own institutions. Accordingly, there was no competition between the public authorities and private operators. We do not consider that the Court was deciding that the legal regime was relevant to the definition of the activities in addressing whether there was competition. Rather, it was deciding that the activity of seconding staff was not something a private operator could do under any circumstances, whether under the special legal regime or its own legal regime. The Court therefore did not have to decide how the activities were to be defined. It simply did not have to address that question and the case is of no relevance to the question before this tribunal where the evidence is that private operators can and do provide activities such as golf, tennis and gyms.

72. Mrs Hall relied on *Gotz* as another example where the regulatory environment was held to have such a profound impact on the delivery, scope and nature of the services provided that the CJEU defined the activities by reference to the regulatory environment.

73. In *Gotz* there was a dispute between a Bavarian farmer and the Landesanstalt, a regional body responsible for food. The Landesanstalt operated a centralised system for the sale and purchase of

milk quotas with the aim of reducing surpluses of milk. The system was operated pursuant to regulations described as the "ZAV". Mr Gotz was a producer who wished to purchase a quota. He made a successful bid and the Landesanstalt issued an invoice without VAT. Mr Gotz wanted an invoice which included VAT but the Landesanstalt objected on the basis that it was engaged in activities as a public authority. The Munich Finance Court referred various questions to the ECJ. In so far as relevant, the questions referred concerned firstly, the geographic market in respect of which significant distortions of competition were to be considered in the case of public and private milk quota sales points. Secondly, whether only competition in respect of normal cases of transfers of milk quota was to be considered, or whether exceptional cases such as transfers on "succession, marriage or on the transfer of a holding" were to be considered.

74. In relation to these two issues, the CJEU held at paragraphs 44 and 45 as follows:

> "44. It is apparent from the information provided by the national court that, where the transfer is a regulated transfer effected for consideration, within the meaning of Paragraph 8 of the ZAV, it can be carried out only by a public or private milk-quota sales point. … The fact remains that, within a given transfer area, the transfer of delivery reference quantities cannot be carried out by private operators liable to VAT. It is apparent, furthermore, from Paragraph 8(3) of the ZAV that delivery reference quantities may be transferred only within the transfer areas. There is therefore no competition situation, for the purposes of Article 4(5) of the Sixth Directive, within a given transfer area and it is thus the transfer area that constitutes the relevant geographic market for the purpose of establishing whether there are significant distortions of competition.
>
> 45. As regards the other cases of transfer listed in Paragraph 8 (1) of the ZAV, which take place without the use of milk quota sales points, it must be pointed out, as was stated at the hearing, that these take place in very specific circumstances …a succession, a marriage or a transfer of a holding., which do not correspond to commercial situations, but derive from legal facts which result in transfers of delivery reference quantities only incidentally. There is thus no possibility of competition… "

75. The findings in *Gotz* are not entirely clear, but it appears that the Court considered that private operators could not compete by setting up a rival milk quota system sales point pursuant to a private law regime using normal civil powers. Therefore, the question about how the activities are defined when both private operators and public authorities can engage in the activity is simply not answered.

76. For these reasons, we do not consider that *NRA, EC v Netherlands* or *Gotz* assist in interpreting the phrase 'such activities' in Article 13(2). They are clearly distinguishable from the present case in which private operators can provide sports and leisure facilities under a private law regime. The evidence of Mr Tohill confirmed that a private operator would be able to build a leisure centre and there was evidence that private operators did offer at least some of the facilities offered by the council.

77. Mrs Hall also relied on dicta of Nugee J (as he then was) in *Durham Company Ltd*. This was a decision in which he refused permission to appeal a decision of Warren J sitting in the Upper Tribunal. Warren J had decided that local authorities who are waste collection authorities collecting commercial waste may be doing so under a special legal regime, in which case they would be engaged in the activity as public authorities. Whether they were or not would depend on the facts. He said at para [13]:

> "I do however, for my part, think that Warren J was entirely right and that there is no real prospect of challenging the analysis he adopted which is that if local authorities are operating under section 45, then

that is a special legal regime which is applicable to them in their capacity as public authorities exercising public duties and which is different from the legal regime which applies to private sector businesses such as the claimant even though, from the point of view of the consumer, the services provided may be indistinguishable. That is because, as Warren J sets out, the section 45 power is hedged around by a number of constraints."

78. Mrs Hall submitted that this was authority that the court should not define the activities by reference to the perspective of the consumer. We disagree with that submission. In *Durham Company Ltd*, Nugee J was considering the question whether there was a special legal regime and whether the local authorities were engaged in activities as a public authority. He was not considering how the activities are to be defined in the context of Article 13(2).

79. HMRC relied on *Rank* and *Pro Med* as authorities in which it was held that the principle of fiscal neutrality requires the similarity of activities to be judged from the perspective of the consumer. Neither of these cases were cited to the FTT, although we make no criticism of the parties for that omission.

80. In short, *Rank* was concerned with the different VAT treatment of different types of mechanised cash bingo and slot machines, which were operated under different legal regimes. It was accepted that the different types of machine were identical from the consumer's point of view. The Commissioners maintained that the different VAT treatment did not involve any breach of the principle of fiscal neutrality because there was no evidence that the different treatment affected competition between the machines. The CJEU held that treating two supplies differently for the purposes of VAT where the services were identical or similar from the point of view of the consumer and met the same needs of the consumer was sufficient to establish an infringement of the principle of fiscal neutrality. It was not necessary to establish in addition the existence of actual competition (see paragraphs 32 to 36). The CJEU went on to consider the significance of the different legal regimes pursuant to which the machines were operated :

"43. In order to determine whether two supplies of services are similar within the meaning of the case law cited in that paragraph, account must be taken of the point of view of a typical consumer …

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

46. It is also clear from the case law of the court of justice that, in assessing whether games of chance or gaming machines are similar, the identity of the operators of the games and the legal form by means of which they exercise their activities are, as a rule, irrelevant …

49. It follows that the differences in the legal systems relied on by the referring courts are of no relevance to the assessment of the comparability of the games concerned.

50. That outcome is not called into question by the fact that, in certain exceptional cases, the court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue … may create a distinction in the eyes of the consumer …"

81. In *Pro Med*, the CJEU had to determine whether the principle of fiscal neutrality precluded two types of local passenger transport, namely transport by taxi and transport by mini-cab from being treated differently for VAT purposes. The court set out the well-established case law that the principle

of fiscal neutrality precludes treating supplies of similar goods or services differently for the purposes of VAT. It confirmed the approach taken in *Rank* and stated as follows at paragraphs 53 and 54:

> "[53] In order to determine whether two supplies of services are similar within the meaning of that case law, account must primarily be taken of the point of view of a typical consumer, avoiding artificial distinctions based on insignificant differences (see the *Rank Group* para [43]) and the case law cited.
>
> [54] Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see the *Rank Group* paragraph [44] in the case law cited)."

82. The Court accepted that in certain exceptional cases differences in the regulatory framework may create a distinction in the eyes of the consumer and it held at paragraphs 58 and 59 as follows:

> "58. In the present case, the referring court has stated that minicab operators can respond only to bookings for transport which are received at their place of business or at the home of the operator, whereas taxi operators are authorised to respond on request…
>
> 59. Such differences at the level of the statutory requirements to which the two types of transport concerned are subject, where they are proved - this being a matter which is for the referring court to ascertain - are liable to create in the eyes of the average user, a difference between those two types of transport, each of them being likely to address separate needs of the user and consequently, to have a decisive influence on his decision to opt for one or the other of those types of transport with the result that the principle of fiscal neutrality does not preclude them from being treated differently for tax purposes."

83. Mrs Hall submitted that *Rank* was simply an example of a case where the legal regime did not affect the scope, nature and delivery of the activities and was therefore an example of a case where the special legal regime did not so infuse the activity as to render it different to the activities engaged in by private operators. Accordingly, it did not undermine but supported her contention that it is for the national courts to undertake a fact finding exercise in relation to whether Article 13(2) is engaged.

84. We do not accept this submission. The court in *Rank* noted the differences in the regulatory frameworks for the different types of machines. In particular, it noted the differences in the locations, opening times and the atmosphere in which the different machines were provided. However, in deciding whether the legal regime was relevant to the assessment of the similarity of the activities, and therefore to competition, the court empathically stated at paragraph 49 that the "differences in the legal systems … are of no relevance to the assessment of … comparability". We consider that *Rank* is an authority which expressly establishes that in considering the principle of fiscal neutrality in the context of competition, the legal regime is irrelevant to that consideration, save in exceptional circumstances where the differences in the regulatory framework or the legal regime governing the supply may create a distinction in the eyes of the consumer.

85. The decision in *Rank* was then specifically endorsed in *Pro Med*, which is an example of an exceptional case.

86. The test proposed by Mrs Hall is to consider whether the activities are so infused by the special legal regime that the activities and the legal regime are indistinguishable. In our judgment, the case law does not support such a test. The relevance of the special legal regime for the purposes of Article 13(2) is whether it creates a distinction in the services being supplied in the eyes of consumers.

87. In the context of Article 13(2), we consider that in considering distortion of competition, the principle of fiscal neutrality requires the activities to be defined from the perspective of the consumer and not from the perspective of the provider. This approach accords with the purpose of Article 13(2) which is to guarantee fiscal neutrality and to ensure that private operators are not placed at a disadvantage because of the non-taxable status of a public authority.

Structure of Article 13

88. We consider that this interpretation accords with the structure of Article 13. Article 13 only applies when a public authority engages in activities as a public authority under a special legal regime. The subject matter and purpose of the activities are not the focus of enquiry at this stage. The existence of a special legal regime is the central focus in Article 13(1), rather than the nature of the activities.

89. Article 13(2) is an exception to Article 13(1). It is designed to prevent private operators from being disadvantaged where public and private operators are engaged in the same activities. By its nature therefore, Article 13(2) only applies where public authorities have been found to engage in "such activities" pursuant to a special legal regime. To define the activities in Article 13(2) by reference to the special legal regime would in our view unduly restrict the application of the exception in Article 13(2), contrary to the established principles described by the CJEU in *Isle of Wight* at paragraph 60:

> "60. It is important to record, as is clear from paragraph 30 of the present judgment, that the treatment of bodies governed by public law as non-taxable persons under the first subparagraph of Article 4(5) of the Sixth Directive constitutes a derogation from the general rule that any activity of an economic nature be subjected to VAT, and that this provision must, therefore, be interpreted strictly. But the second subparagraph of Article 4(5) restores that general rule in order to avoid such treatment of those bodies leading to significant distortions of competition. The latter provision cannot therefore be construed narrowly."

90. The Council's interpretation and that of the FTT results in a construction which in our judgment is too narrow and inconsistent with the purpose of the provision, which is to restore the general rule that any activity of an economic nature should be subject to VAT consistent with the principle of fiscal neutrality.

91. Further, as we have noted the CJEU in *Isle of Wight* stated that Article 13(2) and (3) share the same objective and logic. We consider that the focus in Article 13(3) is on the nature of the activity irrespective of the legal regime. For example, Annex 1 refers to the supply of electricity. It is accepted that commercial operators and public authorities provide electricity under very different legal frameworks. We do not consider that they would only be in competition when a private operator supplies electricity concordant with the special legal regime under which the public authority supplies electricity. To hold otherwise would drive a coach and horses through the objective and logic of Article 13 when viewed as a whole. The same objective and logic must apply to Article 13(2). In our view, this means that the focus must be on the nature and characteristics of the activities rather than the legal regime pursuant to which they are supplied.

92. Accordingly, we conclude that in considering distortion of competition the FTT wrongly defined the activities of the Council by reference to the special legal regime. We therefore allow the appeal.

Remittal

93. We do not consider that we are in a position to re-make the decision ourselves. In particular there is no evidence as to the supply of sports and leisure facilities across the whole of Northern Ireland,

which the parties agree is the relevant geographical area in which to consider distortion of competition. It may also be that different factors are relevant to that assessment in relation to individual sporting and leisure activities. Presently there is no evidence in that regard. The FTT acknowledged that it was only able to dispense with further evidence and a further hearing in relation to those matters because it construed Article 13(2) as it did. We have found that construction involves an error of law. The further hearing must now therefore take place before the FTT.

94. The appeal is therefore remitted to the same FTT which heard the appeal, in so far as that is possible. We understand that Judge Kempster is shortly retiring. We leave it as a matter for the President of the FTT to consider how the panel should be constituted if Judge Kempster is not available.

Conclusion

95. In the circumstances, we allow the appeal and remit the matter to the FTT on the basis set out above.

SIGNED ON ORIGINAL

MADAM JUSTICE McBRIDE

JUDGE JONATHAN CANNAN

RELEASE DATE: 20 July 2022