[2018] UKFTT 129 (TC)

TC06385

Appeal number: TC/2016/00963

VALUE ADDED TAX – whether digital versions of "The Times", "The Sunday Times", "The Sun" and "The Sun on Sunday" zero rated as "newspapers" within Item 2 Group 3 Schedule 8 Value Added Tax Act 1994 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEWS CORP UK & IRELAND LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at the Royal Courts of Justice, Strand, London on 4-7 December 2017 with written submissions on evidence dated 20 December 2017

Jonathan Peacock QC and Edward Brown, instructed by Deloitte LLP, for the Appellant

Nigel Pleming QC instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, News Corp UK & Ireland Limited ("News UK" or "the appellant"), appeals against decisions of the respondents ("HMRC") dated 18 March 2015 and 28 April 2017 ("the Decisions"). The appellant is the representative member of a VAT group that publishes, principally, *The Times*, *The Sunday Times*, *The Sun* and *The Sun on Sunday* (together "the titles").

2. Essentially, the main issue in this appeal is whether the daily digital versions of the titles are "newspapers" within the meaning of Item 2 Group 3 of Schedule 8 Value Added Tax Act 1994 ("VATA") ("Item 2") and are therefore zero-rated for VAT purposes.

3. The appellant argues that the digital editions of the titles are "newspapers" on the basis that they are the digital equivalent of the daily editions produced on ordinary newspaper printing paper ("newsprint"). HMRC argues that they do not fall within the definition of "newspapers" which is confined to newsprint newspapers

4. Secondly, even if the digital editions of the above titles are not "newspapers", the appellant contends that the principle of fiscal neutrality nevertheless requires zero-rating on the basis that, viewed from the perspective of the customer, they satisfy the same customer needs as conventional printed editions. HMRC argues the digital editions are not similar to the newsprint editions and, in any event, the principle of fiscal neutrality could not be used to expand the borders of zero rating from their 1991 limits.

5. The appeal relates to the periods September 2010 – June 2014 and 28 January 2013 – 4 December 2016. The appeals in respect of these two periods were consolidated by directions of this Tribunal of 29 August 2017.

The evidence

6. I was supplied with Apple iPad and iPhone devices containing digital editions of the titles for sample dates, viz Friday 2 December, Saturday 3 December and Sunday 4 December 2016. I was also supplied with newsprint editions of the titles for the same dates. In addition, there were three hearing bundles.

7. For the appellant, the following witnesses gave evidence and were cross-examined:

(1) Mr John Witherow, Editor of *The Times* and former Editor of *The Sunday Times*;

(2) Mr Chris Duncan, Managing Director of Times Newspapers Limited; and

(3) Mr Alan Hunter, Head of Digital, *The Times* and *The Sunday Times*.

8. For HMRC the following HMRC officers gave evidence and were cross-examined:

(1) Mr Mark Flanagan – an officer on HMRC's Large Business Tax team that has specific responsibility for the appellant; and

(2) Mr Andrew Higgins – an officer in HMRC's Large Businesses in the Media Sector.

9. We were also given a tour of *The Times* newsroom by the deputy editor of *The Times*.

The legislation

10. Between October 1940 and 1973 the UK had an indirect tax, levied on the wholesale price of goods, called Purchase Tax. Newspapers and books were exempt from Purchase Tax. On 1 January 1973 the UK joined the European Economic Community and, with effect from 1 April 1973, Purchase Tax was replaced by VAT.

11. Newspapers and books continued to be subject to an exemption from tax known as zero rating. Zero rating continues to be authorised by (what is now) Article 110 of the Principal VAT Directive ("PVD") 2006/112/EC. In fact, the PVD does not refer to zero-rating but, rather, refers to "exemptions with deductibility". Article 110 provides:

> "Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.
>
> The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer."

12. In section 30 Value Added Tax Act 1994, ("VATA") the UK has taken advantage of Article 110 by zero rating the supply of those goods or services which fall within Schedule 8 VATA.

13. Group 3 of Schedule 8 of VATA 1994 zero rates, amongst other things, "newspapers" (Item 2). Group 3 is sandwiched between the zero rating provision of Group 2 "Sewerage services and water" and Group 4 "Talking books for the blind and [disabled] and wireless sets for the blind". Group 3 provides as follows:

> "Group 3—Books, etc
>
> Item No
>
> 1 Books, booklets, brochures, pamphlets and leaflets.
>
> 2 Newspapers, journals and periodicals.
>
> 3 Children's picture books and painting books.

4 Music (printed, duplicated or manuscript).

5 Maps, charts and topographical plans.

6 Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for.

Notes

(1) Items 1 to 6—

(a) do not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes; but

(b) include the supply of the services described in paragraph 1(1) of Schedule 4 in respect of goods comprised in the items.

(2) Items 1 to 6 do not include goods in circumstances where—

(a) the supply of the goods is connected with a supply of services, and

(b) those connected supplies are made by different suppliers.

(3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier—

(a) they would have been treated as a single supply of services, and

(b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."

14. Schedule 4 paragraph 1 (1), referred to in Note (1) (b) above, under the heading "Matters to be treated as supply of goods or services", provides as follows:

"1(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer—

(a) of any undivided share of the property, or

(b) of the possession of goods,

is a supply of services."

15. Paragraph 9 Schedule 4A VATA, added by the Finance Act 2009 with effect from 1 January 2010, relates to special rules in respect of the place of supply of services and provides as follows:

"Electronically-supplied services

9—

(1) Where—

(a) a supply of services consisting of the provision of electronically supplied services to a relevant business person would otherwise be treated as made in the United Kingdom, and

(b) the services are to any extent effectively used and enjoyed in a country which is not a member State,

the supply is to be treated to that extent as made in that country.

(2) Where—

(a) a supply of services consisting of the provision of electronically supplied services to a relevant business person would otherwise be treated as made in a country which is not a member State, and

(b) the services are to any extent effectively used and enjoyed in the United Kingdom,

the supply is to be treated to that extent as made in the United Kingdom.

(3) Examples of what are electronically supplied services for the purposes of this Schedule include—

(a) website supply, web-hosting and distance maintenance of programmes and equipment,

(b) the supply of software and the updating of software,

(c) the supply of images, text and information, and the making available of databases,

(d) the supply of music, films and games (including games of chance and gambling games),

(e) the supply of political, cultural, artistic, sporting, scientific, educational or entertainment broadcasts (including broadcasts of events), and

(f) the supply of distance teaching.

(4) But where the supplier of a service and the supplier's customer communicate via electronic mail, this does not of itself mean that the service provided is an electronically supplied service for the purposes of this Schedule."

16. Group 4 Schedule 8 VATA deals with talking books for the blind:

"1. The supply to the Royal National Institute for the Blind, the National Listening Library or other similar charities of—

(a) magnetic tape specially adapted for the recording and reproduction of speech for the blind or severely handicapped;

(b) apparatus designed or specially adapted for the making on a magnetic tape, by way of the transfer of recorded speech from another magnetic tape, of a recording described in paragraph (f) below;

(c) apparatus designed or specially adapted for transfer to magnetic tapes of a recording made by apparatus described in paragraph (b) above;

(d) apparatus for re-winding magnetic tape described in paragraph (f) below;

(e) apparatus designed or specially adapted for the reproduction from recorded magnetic tape of speech for the blind or severely handicapped

which is not available for use otherwise than by the blind or severely handicapped;

(f) magnetic tape upon which has been recorded speech for the blind or severely handicapped, such recording being suitable for reproduction only in the apparatus mentioned in paragraph (e) above;

(g) apparatus solely for the making on a magnetic tape of a sound recording which is for use by the blind or severely handicapped;

(h) parts and accessories (other than a magnetic tape for use with apparatus described in paragraph (g) above) for goods comprised in paragraphs (a) to (g) above;

(i) the supply of a service of repair or maintenance of any goods comprised in paragraphs (a) to (h) above.

2. The supply to a charity of—

(a) wireless receiving sets; or

(b) apparatus solely for the making and reproduction of a sound recording on a magnetic tape permanently contained in a cassette,

being goods solely for gratuitous loan to the blind.

Note: The supply mentioned in items 1 and 2 includes the letting on hire of goods comprised in the items."

17. The social policy required by Article 110 which lay behind the UK's decision to zero rate newspapers and books etc was the promotion of literacy, the dissemination of knowledge and democratic accountability by having informed public debate and I was taken to extracts in *Hansard* from October 1984 which made this point good. In fact, the purpose of the zero rating of newspapers and books was not controversial in the hearing before me.

The facts

"The Times" and "The Sunday Times" and the preparation of content

18. Most of the evidence in this appeal related to the digital editions of *The Times* and *The Sunday Times*. The appeal also concerns the subscriptions to *The Sun* digital editions (including *The Sun on Sunday*) and the "Classic App" edition of *The Sun* is addressed separately below. The volume of subscriptions for the digital editions of *The Sun* and *The Sun on Sunday* was much lower than for the other titles.

19. *The Times* is one of the world's most well-known and respected newspapers. It was first published on 1 January 1785 under the name *The Daily Universal Register* and was renamed *The Times* three years later. *The Sunday Times* was first published in 1821 originally under the name of *The New Observer*. It was renamed *The Sunday Times* on 22 October 1822. For most of their history, until 1967, they operated as separate newspapers under separate ownership. Since 1967, they have both been under the same ownership.

20. *The Times* and *The Sunday Times* function independently from each other editorially. They have separate editorial staff and each has its own dedicated space within head office. They frequently take different editorial lines. They do, however, share management, printing and marketing resources.

21. Over the years, both newspapers have evolved to take account of readers' demands. For example, in 2004 *The Times* converted from a broadsheet to a tabloid format because it was considered necessary to innovate and cater for the needs of younger readers and for commuters who found a tabloid version more convenient.

22. *The Times* has always been produced in daily editions so that an entirely new paper is produced every 24 hours over six days. The newspaper goes to press at around 10 pm (the first print edition of the day) and the digital edition becomes available for subscribers to download from approximately 5 am onwards (after the second and, where applicable, third print editions have been produced). Two editions (and occasionally three editions) of *The Times* are published from Monday to Friday and, in respect of *The Times* on Saturday and *The Sunday Times*, there are usually three editions printed. The second and third newsprint editions of *The Times* have a more limited circulation and the third edition relies mainly on "casual" sales. Generally, the changes in content between the editions are relatively small. Some stories might change or might be reorganised.

23. Only one print edition per day is issued in Scotland.

24. On Christmas Day, only the digital editions of *The Times* and *The Sunday Times* are produced. No print edition is released because most shops are closed.

The content-gathering process for the digital editions of The Times and The Sunday Times.

25. As Mr Witherow explained, the work of the journalists is centred on editions. The journalists filter the news from a variety of different sources and select stories for publication. The editorial team then select those stories which they consider would be of interest to their readers. They select approximately 200 articles every night (approximately 100,000 words) for the first edition. Sometimes a story which appears for the first time in the second edition may be put into the first edition of the following day e.g. a theatre review. Otherwise, it would be necessary for a reader to buy the second edition to see changes between the first and second editions.

26. Mr Witherow explained that with digital editions (and I understood him to mean the website and smartphone editions) it was possible to produce editions at 9 am, midday and at 5 pm. It was not possible to do this with the newsprint edition. Approximately 50 stories per day are published only digitally and, generally, those stories subsequently go into the print edition.

27. As regards the process of news-gathering and journalism, there is no internal distinction between the newsprint and digital editions. This was evident, as regards *The Times*, from our visit to *The Times* newsroom: the content was produced by a

single newsroom under a single editor. The website and tablet editors sit within the newsroom team and are part of the journalistic process. Thus, the manner in which the newsprint and digital editions are compiled is identical until the point at which the content is laid out for transposition onto the physical or digital medium (as the case may be).

28. There is, therefore, essentially no difference in the journalistic content or news teams for the newsprint and digital editions. The content for both the print and the digital editions is in each case produced by one set of reporters, one set of section editors, one set of picture researchers and designers, and one set of sub-editors, overseen by a single editor. When commissioning and publishing the articles to constitute the core edition, *The Times* and *The Sunday Times* do not distinguish between a "print story" and a "digital story". The written copy is produced by the individual desks, reporting to section editors who in turn report to the editor.

29. All editions of the newspaper use the same content management system ("CMS") called "Methode", a system used by many newspapers around the world. This CMS allows content to be centrally edited, customised and delivered to all platforms of the newspaper (print, e-reader, tablet, smartphone and website).

30. The production of written copy is, as I have said, the same for the print and digital editions. Stories are commissioned by specialist desks or produced by individual journalists. Freelance reporters also regularly approached these specialist desks to offer stories or features, which may then be acquired. In addition, there are regular columns (e.g. "On this day" or "Birthdays", which are produced on standing commissions and are filed by a journalist every day).

31. Each desk is responsible for delivering its own section content by the deadline. Each section editor knows how much content is required for their section and is responsible for ensuring that the content is produced. In relation to *The Times*, section editors (or deputy editors) meet in conference with the Editor twice a day to discuss the content of the newspaper. No distinction is made at the news conference between potential stories for the digital editions and for the print editions. As regards *The Sunday Times*, conferences are held on Tuesday and Thursday, with the twice-daily pattern being adopted on Friday and Saturday.

32. First drafts of articles produced by journalists are reviewed by the relevant section editor.

33. Once the content has been produced and edited by the relevant section editor, it is sent to the production team and the edition is first prepared for the print edition. Initially, this involves a sub- editor reviewing the article to check that it is in house style, check the facts and ensure that the article fits in its intended slot in the print page. The sub-editor then writes a headline for the article and also writes captions where necessary.

34. A senior sub-editor then re-reads a story, approving the headlines, captions and other page "furniture". Each story is then reviewed by senior editors and approved for

publication once it has been viewed in context with the rest of the stories on the page. Once the stage has been completed the story is ready to go to press. This version of the story will also be retained for digital publication, subject to changes for later editions which are then incorporated into the digital editions.

35. When finalised, the newsprint editions are distributed to the printing presses over the Internet, whereupon they are physically printed for distribution. The digital editions are distributed to servers for download to devices over the Internet.

36. Once the print edition has been sent to the printing press, a team of senior editors will review the pages of the first edition on screen and suggest changes based on their view of the whole paper and after reviewing the first editions of the rival newspapers. After this is being done, a number of stories may need to be "re-subbed" depending on whether they change position in the paper, are consequently longer or shorter than in the first edition, or need a change of emphasis in the reporting. Any such changes are then reflected in the digital editions.

37. As already mentioned, *The Times* and *The Sunday Times* usually produce two and, sometimes, three editions each night. *The Times* is first sent to press at 10 pm with the second edition following at 12:15 am. *The Sunday Times* is first sent to press at 8 pm with a second edition following at 10 pm. A third edition may follow depending on whether there is late news that merits a further edition. At weekends, the press time for the first edition of *The Times* is 8:30 pm, 10:30 pm for the second edition and 11:15 am for the third edition. There could be any number of updates or changes made to subsequent print editions, ranging from corrections to completely new articles.

38. The website and smartphone editions are the only editions which are updated prior to the next edition cycle (at 9 am, midday and 5 pm). The newsprint edition is not updated until the following night. Unless there is an exceptional event (e.g. a General Election), the tablet edition is not updated after distribution during the night.

39. Once an article is approved for printing it is "snapped off" in the CMS. This means that a version is created for publication in the digital editions, at which point it is edited by the digital sub-editing teams, as I shall shortly describe.

The digital editions of the The Times and The Sunday Times

40. The digital editions of *The Times* and *The Sunday Times*, so far as relevant to this appeal, comprise a number of different forms, as follows:

(1) The **"e-reader edition"** is an exact facsimile of the newsprint edition and can be downloaded on a daily basis onto a tablet computer or viewed on a personal computer.

(2) The "**tablet edition",** which can be downloaded on a daily basis onto a tablet computer and then read off-line.

(3) The "**smartphone edition"** which can be downloaded on a daily basis onto a smartphone and then read off-line.

(4) The **website edition**, which can be viewed at *www.thetimes.co.uk* on any Internet browser.

41. There is also a further digital edition, the Kindle edition, which is a facsimile of the print edition downloaded to and then read on the Kindle device and sold through Amazon, the manufacturer of the Kindle. I was informed that the Kindle edition is not relevant to this appeal as VAT is accounted for by a different taxpayer, Amazon, as an undisclosed principal.

42. The appellant considered that its two principal products were the newsprint edition and the tablet edition. The other editions (i.e. the website, smartphone and e-reader editions) were considered to be "complementary" products within the principal subscription packages.

43. Mr Hunter considered that the fundamental units of all the digital editions were the articles and that at least 95% of those articles were exactly the same as they appeared in the newsprint editions. The digital editions, as we shall see, contained some additional content (e.g. interactive content and videos), but the articles remained fundamentally the same.

44. In this context, I was shown, as an example, an article relating to the England football manager, Gareth Southgate, as it appeared in the newsprint editions, the e-reader edition, the tablet edition, the smartphone edition and the website edition. With some relatively minor variations, the articles were essentially the same.

45. I now turn to the development of the different digital editions.

The "e-reader" and "tablet" digital editions

46. News UK started to develop "paid for" digital editions in July 2009, when it commenced a project to consider options how best to monetise its digital content, other than by way of advertising revenue. The reason for this was that whilst digital advertising revenue was increasing, it was not making up for the decreasing revenues from print advertising. A general decline in advertising revenues had been a feature of the media sector for many years, caused particularly by increased competition from Internet-based companies.

47. News UK considered that it was important to ensure that its newspapers were available in digital formats. Increasing revenues through sales was important because, if the trend of decreasing print sales that the appellant was experiencing was maintained, it would have become increasingly difficult to maintain the standards of journalism that the appellant's readers expected.

48. Prior to the introduction of the tablet edition in May 2010, News UK worked on developing what became referred to as an "e-reader" version of *The Times* and *The Sunday Times*. This consisted of a PDF version of the newspaper which was an exact

facsimile of the newsprint edition and could be downloaded to a device to be read offline. The format allowed for the layout of the document to be the same irrespective of the device upon which it was being used. The "e-reader" version is accessed either via a link on the website or via a specific "e-reader" app available on desktop computers, tablets and smartphones, which also allows it to be read off-line. Although the "e-reader" edition was to be eclipsed by the development and launch of the tablet edition, the project was completed and the e-reader was made available to subscribers. The e-reader edition is published at 12 am and is a PDF version of the second edition of the newsprint version.

49. Mr Hunter accepted, in cross-examination, that the e-reader edition of *The Times* was no different from facsimile versions of other newspapers available through a website called "Pressreader".

50. The development of the digital tablet edition was prompted by the launch of the Apple iPad in May 2010. The Apple CEO, the late Mr Steve Jobs, gave a personal demonstration of the Apple iPad to the News Corporation CEO, Mr Rupert Murdoch, in early 2010 before its launch. Mr Murdoch, saw the potential for the iPad to deliver a digital edition of the printed newspaper, which would replicate the content and layout of the printed edition, be portable and feel similar to the physical edition.

51. News UK therefore took a commercial decision to develop a tablet version of *The Times* and *The Sunday Times* for release on the iPad. The development of the tablet edition required substantial investment. It was important to News UK that the tablet edition had the "look and feel" of the print edition. The tablet edition had to be as easy to use as the print edition and would replicate the feeling of reading the newsprint editions as closely as possible in terms of its content and how it was used. News UK therefore employed a large number of graphic designers and technical consultants to ensure that the tablet edition was as close a replica of the digital edition as possible. In particular, it was decided not to provide a rolling news service, but rather, to provide the same edition-based product as the newsprint editions of *The Times* and *The Sunday Times*.

52. The tablet editions of *The Times* and *The Sunday Times* were originally only available on Apple iPads, but since 2011 have been available on iOS and Android tablet computers sold in the UK. The newsprint edition and the tablet edition are News UK's main products in relation to *The Times* and *The Sunday Times*. Mr Duncan referred to them as the "hero" products.

53. In order to replicate the "feel" of reading the print editions, the tablet edition had the following features. It would:

(1) be read by swiping from right to left, in the same way that the pages of a newsprint newspaper are turned;

(2) mirror the newsprint edition in terms of the way the sections are covered and the presentation of articles, photos and quotes;

(3) be "edition-based" in that News UK would release a single edition every day that could be read from start to finish;

(4) show, with the same prominence, the same distinguishing features of *The Times* newsprint edition, such as the well-known masthead.

54. News UK only released and introduced new sections in the tablet edition (e.g. such as magazine supplements) when they could precisely replicate the look and feel of the print edition equivalents. One of the essential objectives was to ensure that in converting from a print to a digital format the digital version did not lose any of the features that made *The Times* and *The Sunday Times* attractive to use and distinctive as compared to other newspaper offerings and digital news services such as the BBC news website, Huffington Post etc.

55. News UK launched *The Sunday Times* tablet edition on 12 December 2010, approximately 6 months after the launch of *The Times* tablet edition. The delay was caused by the fact that *The Sunday Times* was a significantly larger newspaper and had a substantially greater proportion of magazine content than *The Times*. The layout of magazine content is more complex than the layout of a news page and, as a result, it was more difficult to convert the content in a way which allowed the style and layout of the printed edition to be replicated in the tablet edition. Although the delay was likely to lead to a loss of revenue, it was of important to News UK that the style, content and layout of the printed edition of *The Sunday Times* be replicated in the tablet edition.

56. As already indicated, the "e-reader" versions of *The Times* and *The Sunday Times* were overtaken by the tablet edition, which proved to be more popular with readers. This was because the tablet edition was a superior digital product, particularly in terms of the way that content could be navigated. Thus, in the "e-reader" version, there is no ability to skip between sections as is the case for the tablet and print editions. Nonetheless, there has always been a proportion of subscribers that continue to use the "e-reader". For example, there were about 19,000 users per month in October 2015, although Mr Duncan described that figure as "falling away".

57. As far as practicable, all of the newsprint sections and supplements are now released in tablet editions. The tablet edition replicated the tactile nature of print newspapers – customers could still "hold" *The Times* and *The Sunday Times*. Similarly, the tablet edition could be read off-line and was "delivered" at a specific time of day. As it replicates the content of the print edition, the tablet edition also has a clearly defined start and end and, like the newsprint edition, can be read from "cover to cover"; readers can flick to their favourite sections – reading the news section in the morning and moving to lifestyle articles and puzzles later in the day (reflecting the typical reading pattern of customers).

58. The tablet editions are delivered over the Internet through an app which connects to a server and downloads the content onto the reader's device, thereby delivering the edition to the reader at a single point in time. This then enables the tablet edition to be read offline throughout the day. Once the customer has downloaded the app and paid for access to the digital editions, he or she is sent a

username and password which they are then asked to type into the app. The daily tablet edition of *The Times* and *The Sunday Times* can then be accessed by opening the app.

59. Each daily tablet edition is available for readers to download from about 5 am. Once downloaded, the tablet edition:

(1) can be read either online or off-line (i.e. it is not necessary to have an Internet connection once an edition is downloaded, unless the reader wants to access some of the content which is hosted on the Internet); and

(2) is stored on the tablet for 7 or 30 days depending on the user's settings.

60. As regards the operation of the tablet edition, it contains three separate "buttons" (which appear as tabs that the reader can press at the bottom of the screen). These have the following functions:

(1) "Contents": this allows the reader to see the individual articles in each section of the newspaper and to select them in order to read them. It appears in a "carousel" format. In other words, the reader can create a sliding effect in which the pages in front and behind remain visible.

(2) "Editions": this allows the reader to select which edition of the *The Times* and *The Sunday Times* he or she wishes to read. Each edition will remain, as already noted, on the device until deleted by the reader or automatically deleted after 7 to 30 days in order to make space for new editions. This tab also allows readers to select which section within the edition he or she wishes to read. For example, during Monday to Friday, the reader can choose to read the main section of *The Times* and *Times2* (a weekday supplement to *The Times*). This function also allows each of the sections of *The Sunday Times* to be selected.

(3) "My Articles". This is a feature in the tablet edition which allows the reader to select an article to save. This enables the reader to keep the article on the device and it will not be deleted unless the reader deletes the individual article. This is intended to replicate a reader cutting out and saving stories from the newsprint edition.

61. Readers can decide whether to read the articles in either landscape or portrait orientation. It is also possible to change the size of the text and to enlarge photographs.

62. The tablet edition can be set for "hourly updates". This enables each tablet to "call back" to the servers to see if a new edition is ready. It is possible to set this update option for one hour or four hours. Mr Hunter explained that this was a technical rather than an editorial setting. It simply allowed the reader to get the latest tablet edition. It did not mean that a new edition would be available every hour.

63. Each tablet edition contains, save for certain exceptions, all the content in the newsprint edition, which is presented in the same way. Further, save for some additional features, which it is not technologically possible to distribute in newsprint, and a certain amount of "additional content" that does not fit in the newsprint edition,

the tablet edition contains the same content as that which is published in newsprint. I have examined the Friday, Saturday and Sunday sample editions (written and digital) made available to me (2, 3 and 4 December 2016) ("the sample editions"). The additional content comprises certain features which, in my view, largely supplement or complement the main newspaper content. Otherwise the editions are essentially the same.

64. This additional content was made available in order to entice customers to subscribe to the digital editions and comprises the following:

(1) News and feature videos. There are typically four or five short news or feature videos in each digital edition;

(2) Sports videos. This includes footage of certain sporting events which accompany the match or event report in respect of which News UK has the digital rights;

(3) Interactive puzzles, charts and graphics. The graphics are features which are ancillary to news stories and which are used to illustrate the story.

(4) Links to podcasts. Podcasts are spoken word files which are available to download.

(5) Some different or additional photographs.

(6) Scottish editions. The Scottish digital edition contains the Scottish-focused articles contained in the newsprint edition distributed in Scotland (and, previously, this was the same in respect of Ireland).

65. These additional features are relatively little used by subscribers. For example, the news videos are viewed for 4 to 9 minutes per month per reader across the tablet, smartphone and website editions. The sports videos are, on average, viewed for between 1 to 4 minutes per month per reader. By contrast, the average time that "digital only" customers (i.e. customers without access to the newsprint edition) spent accessing the digital editions of *The Times* and *Sunday Times* in 2015 was around 422 minutes per month (based on usage data which showed that "tablet without print" users spent approximately 72 million minutes per month in total accessing the digital editions and an approximate total number of subscribers of 170,000).

66. Thus, for example, in April 2015, for print subscribers who had access to the tablet, smartphone and website editions, of their total "dwell time" on these digital editions, 1.27% of that time was spent accessing *The Times Sports App*. The corresponding figure for April 2016 was 0.8% and this seemed representative of a decline in time spent accessing this app. For subscribers to the tablet edition (but without access to the newsprint edition) the corresponding figures for April 2015 were 1.31% and for April 2016 were 1.05%.

67. The time figures relating to access to the online puzzles were as follows. For subscribers (print with tablet) for April 2015 the percentage was 1.51% and for tablet subscribers (without print) the percentage was 1.25%. The corresponding figures for April 2016 were 3.53% and 2.58%.

68. The percentage of time spent accessing the online archive was minimal.

69. In a report sponsored by Oxford University and Reuters Institute in 2016 entitled "The Future of Online News Video" the authors concluded that website users remained resistant to online video news with only 2.5% of average visit time spent on video pages in a range of 30 online news sites. 97.5% of time was still spent with text.

70. I should note that Mr Nigel Pleming QC, appearing for HMRC, challenged the correctness of these video usage statistics when cross-examining Mr Hunter. HMRC did not, however, put forward any other evidence to contradict the usage statistics put forward by News UK which I have just summarised. On this basis, therefore, I accept News UK's usage statistics which showed relatively little use of the video material by readers and I consider that this was supported, at least to some extent, by the Oxford University and Reuters Institute report.

71. In cross-examination Mr Hunter accepted that, in the sample editions, there were 48 videos spread over three editions, augmenting approximately 800 written articles. Typically each weekday edition of *The Times* there would be approximately 10 videos augmenting approximately 200 written articles.

72. In the tablet edition (and, as I understood it, the other digital editions except for the smartphone edition), it was possible to search for additional articles using a search function. This feature was obviously not available in relation to newsprint editions.

73. As regards the process of producing the tablet edition, the tablet sub-editing team has two permanent employees – the Tablet Editor and a Deputy Tablet Editor – and 8 to 11 sub-editors who are drawn from the same pool of sub-editors as those who sub-edit the print edition. All of the sub-editors work across all print and digital platforms, with the emphasis, on any given day, depending on their shift patterns. The Tablet Editor and Deputy Tablet Editor are both journalists and they are part of the journalism team. The tablet sub-editing team undertake the same training as a print editing team, apply the same approach and have the same ethos when creating the tablet edition.

74. The Tablet Editor oversees the production of the tablet edition. His responsibilities include: determining the order and layout of the tablet edition; ensuring that the tablet's production deadline of 2 am is met; determining which articles, if any, should contain interactive features; and choosing the pictures that will appear within the article.

75. Mr Hunter's unchallenged evidence was that the key aim of the tablet sub-editing team was to ensure that the tablet edition remained faithful to the editorial principles and house style of the equivalent print edition. The Tablet Editor's primary reference point when producing the tablet edition was the latest draft of the print edition that was available. The Tablet Editor was able to see the layout and format of the most recent draft print edition using the Methode software. However, the tablet edition, which is finalised for circulation at 2 am, will seek to be faithful to the final print edition of the same day.

76. Once the tablet edition is finalised, it will typically not be updated unless legal issues arise or glaring mistakes that can be rectified are identified. Such updating is a rare occurrence for *The Times* but happens more frequently on *The Sunday Times*, which is a much larger newspaper. On Sundays, the corrections are usually grouped together in a republishing of the app at around midday.

77. It is rare that the tablet edition will be updated to include new stories. This only occurs where there are particularly exceptional news stories (e.g. when David Cameron resigned unexpectedly on the morning of Friday, 24 June 2016 following the Brexit referendum). Even in what Mr Hunter described as the "exceptional" news year of 2016 (the Brexit referendum and the US Presidential election), these tablet updates occurred less than half a dozen times.

78. When preparing the tablet edition, the Tablet Editor and his team will typically work using two computer screens that are linked to one another: one showing the templates of the print edition and the other showing the templates of the tablet edition. This allows them to consult the print edition regularly and the CMS's functionality means that the tablet edition can be assembled by dragging across content from the print templates into the tablet templates.

79. The tablet edition's templates are designed to ensure that the screen size of the tablet is used to best effect. This can mean that headlines need to be rewritten to meet the different lengths accorded to them in the template being used however, the main content of the article – the text – will rarely be rewritten for the tablet and the Tablet Editor and his staff aimed is as far as possible to use the same pictures, captions and headlines that appeared in the print edition.

80. In terms of what Mr Hunter described as the "running order", the Tablet Editor and his staff sought to follow that of the print edition where possible. There are accepted conventions as regards the arrangement of stories in the print edition. For example, the stories on the odd-numbered pages, towards the front of the edition, are usually more important than those on the corresponding even-numbered pages in a double-page spread. The third page of *The Times* is usually reserved for a more personality-based "news feature", rather than a collection of news articles. These conventions have been developed over many decades.

81. The Tablet Editor is aware of these conventions as he determines the running order of stories for the tablet edition. The key considerations for the tablet are the smaller page size and the fact that only one page can be viewed at a time. For example, the tablet edition cannot easily accommodate a double-page spread because of template constraints. Similarly, the Tablet Editor may consider that a story that leads on, say, page seven in the print edition is more important than the story at the bottom of page four of that edition. The Tablet Editor may therefore place the page seven story ahead of the page four story in the tablet's running order to give it greater prominence.

82. The tablet edition has a clear start point, i.e. the "front page" (containing the date and the "masthead"), the same font is used as for the newsprint edition, and the stories are arranged in the same type of columns as the newsprint edition.

The website edition

83. The background to the website edition is that *The Times* and *The Sunday Times* were first made available online, on a website, in November 1996. It was not until 30 June 2010 that News UK introduced a paywall, requiring readers to pay for a subscription to access the online edition. The paywall has remained in place at all times material to this appeal. Before 30 June 2010, readers did not have to pay to access the website and accordingly there was no supply within the scope of VAT.

84. The website editions, like the newsprint editions, are published on an "edition" basis. They are published as a completely new edition overnight with, since 30 March 2016, limited updates at fixed times, 9am, midday and 5pm (Monday to Friday) and midday and 6pm on Saturday and Sunday. The editions will state "9 am update" or "midday update" as the case may be. Prior to 30 March 2016, the website edition was also updated to a limited extent, but this was not done at fixed intervals (see below). Mr Witherow's evidence was that if it were possible to publish a newsprint edition at 9 am, midday and 5 pm News UK might do so, but it was not commercially feasible.

85. The website is navigated by clicking through content in the usual way with links to previous and next articles.

86. The features of the website edition are very similar to those of the smartphone edition and I set out those features in more detail when I discuss the smartphone edition.

The smartphone edition

87. The smartphone edition is accessed via the Internet, but it is not accessed via a traditional website. The content and presentation of the smartphone edition matches that of the website, but it is accessed and read via a bespoke app which can be downloaded onto a smartphone. Mr Jonathan Peacock QC, appearing for News UK, described the smartphone edition as essentially a 'small screen' version of the website edition (as opposed to the tablet edition), which is downloaded onto a smartphone. From my own examination of the exhibits I am satisfied that this description is, for all material purposes, accurate.

88. From the date of the introduction of the smartphone edition in June 2010, it has automatically obtained content via a feed from the website, meaning that articles appear in the same position and in the same format in both the website and smartphone editions.

89. The website and smartphone editions were relaunched on 30 March 2016, after News UK had undertaken customer research and engaged third-party design consultants. The research, undertaken by IDEO, demonstrated that readers had made

it clear that: "Access to *The Times* and *The Sunday Times* is more important than the device." In other words, readers considered the content more important than the medium by which it was conveyed. Moreover, readers wanted that day's articles delivered once a day and in a consistent reading order. In addition, the research indicated that: "People don't care what device they're reading on, as long as it feels like *The Times*."

90. As a result of this research and design process, the website and smartphone editions became more closely aligned with the print and tablet editions in terms of layout and design. Specifically, with effect from 30 March 2016, the website and smartphone editions adopted a full edition-based model, whereby a first edition was released at midnight (mirroring as closely as possible the print edition) with limited updates at 9 am, midday and 5 pm (midday and 6 pm on weekends). These updates were described by Mr Hunter as one of the main differences between the website and smartphone editions and the newsprint and tablet editions. Mr Witherow accepted that, before 2016, there was a "rolling news" element to the web and smartphone editions.

91. Mr Pleming referred Mr Duncan, in cross-examination, to a document placed on the news section of News UK's website dated 30 March 2016 which announced that *The Times* and *The Sunday Times* were launching new website and smartphone apps and were moving to an edition-based digital publishing model. The document stated:

> "*The Times* and *The Sunday Times* announced the launch of a new combined website and to upgrade of smartphone apps that will follow an edition-based publishing model for the first time.
>
> One core edition will be produced each day, on all platforms with updates to the edition published at 9 am, noon and 5 pm on the website and smartphone apps. On weekends the edition updates will be at noon and 6 pm.
>
> The move from rolling news to an edition-based model is based on intensive customer research, which showed that readers come to The *Times* and *The Sunday Times* at set points of the day and read us primarily for the accuracy of our reporting and the originality of our analysis and comment."

92. It appeared, however, that this document was aimed at investors rather than ordinary readers/subscribers.

93. Mr Duncan's evidence, however, was that the website and smartphone editions, prior to 30 March 2016, primarily contained what he described as "overnight print content" and would make relatively minor updates to stories during the day. There was, therefore, more "rolling news" before 30 March 2016 than afterwards but Mr Duncan considered that the website and smartphone editions were by no means competing with "rolling news" sites which updated news throughout the day "with a kind of velocity that I don't think we ever achieved." He described those two editions as subscription sites with occasional updates. He did not accept Mr Pleming's description of the smartphone and website editions (pre-30 March 2016) as "rolling-ish news".

94. In relation to the smartphone and website editions, the stories are arranged in broadly the same order as in the print and tablet editions. Nonetheless, there are some differences in how these editions are prepared by the editorial team. This is because the layout of the smartphone and website editions are presented altogether on a vertically scrolling page, rather than page-by-page with horizontal page turning or swiping, as in the print or the tablet editions. A variation in presentation on the homepage of the website and section pages on the smartphone edition means that stories with better images are given more prominence, at the discretion of the editing team. This means that the running order can be different from print – but the priorities set by the editor remain the guiding principle.

95. As with the tablet edition, headlines are also sometimes changed to reflect different layouts. Headlines can also be changed on the website edition for the purposes of search engine optimisation. This takes account of the algorithms that govern the Google search engine and others like it. In particular, they reward spelling out the details of exactly what is in the article so that more keywords are recognised. Thus, for example, a headline on the website edition may be longer than on other editions in order to push the article up the search rankings. This practice recognises that while the route to the website editions of many readers is through the homepage, other readers will come in, as Mr Hunter put it, "sideways" by seeing an article on social media platforms such as Twitter or Facebook.

96. The content of the website and smartphone editions published at midnight are typically identical in content to the first print editions (then updated for the second edition).

97. As regards these updates, as a general rule, on Mondays to Fridays:

(1) the 9 am update would add about 10 new articles;

(2) the midday update would add about 20 new articles; and

(3) the 5 pm edition would add about 30 news stories.

98. Mr Hunter noted that these numbers were subject to considerable variation depending on the news agenda.

99. From News UK's research, it transpired that 90% of readers only read stories from the overnight edition on the website and smartphone versions. In other words, only 10% of readers read the updated stories at 9 am, midday and 5 pm.

100. The stories for these updates often acted as a "first draft" of the stories that would appear in the next day's print and tablet editions. New or updated stories were marked with a "New" or "Updated" icon on the website and smartphone editions. Stories from the overnight edition were typically not dropped in favour of new stories but were instead moved down the running order, if appropriate.

101. Since 30 March 2016, the smartphone and website editions have been organised according to the same sections (News, Comment, World, Business and Sport etc.) as

the tablet and print editions of the newspapers. Before 30 March 2016 the arrangement was different.

102. As with the tablet edition, the smartphone edition can be read either online or off-line once the edition is downloaded, unless the reader wishes to access the relatively small amount of video content which is hosted on the Internet.

103. Readers navigate the smartphone app by tapping on the articles or sections they want to read. Once reading a particular article, readers can swipe to the left or to the right to read other articles in that section.

104. News UK has sought to keep the website and smartphone editions in keeping with the print edition of *The Times* and *The Sunday Times*. Thus, the masthead, core sections, manner in which the articles are presented (i.e. headlines, captions, photos etc) on the smartphone and website editions are the same as in the print edition. Similarly, the website and smartphone editions have, at least since March 2016, had a clear "start" or front-page and a finite amount of material so that the customer can "finish" the edition.

105. The smartphone and website editions, like the tablet edition, contain additional features which are not found in the newsprint edition. These features are more fully described in relation to the tablet edition and are very similar to those in the website and smartphone editions. Once again, these additional features are relatively lightly used. The additional features comprise:

(1) News and feature videos;

(2) sports videos;

(3) interactive puzzles;

(4) access to Scottish and Irish sections; and

(5) the ability to store articles in a "My articles" section and to share articles via social media.

106. The average time spent viewing the news and feature videos and the sports videos is described above in relation to the tablet edition.

107. I should note, for completeness, that the website edition (but not the smartphone edition) also contains a search function which enables users to search for content across the current edition and previous editions. The website edition also contains a number of links at the bottom of the page to additional online written content published by *The Times* or *The Sunday Times*.

Digital editions of The Times and The Sunday Times: "rolling news"?

108. There was some debate before me as to whether the website and smartphone editions were equivalent to a "rolling news" service similar to other websites. This debate was prompted by the view, shared by both parties, that a characteristic of a "newspaper" was that it was produced in periodical editions.

109. News UK argued that those editions were not and had never been a "rolling news" website. The website and smartphone editions were, News UK argued, different from "rolling news" websites, such as those offered by the BBC or competitors such as *The Guardian*. The typical feature of a "rolling news" website is that it is updated throughout the day, often minute by minute and does not have a formal "*start and end*" point.

110. I accept News UK's argument that the website and smartphone editions (and indeed the other digital editions) were not "rolling news" websites. The evidence of Mr Witherow was clear. He said that News UK had done research into what readers wanted and ascertained that they wanted *The Times* to step back and to assess the news and to deliver it at certain times of the day. They could get rolling news from the BBC if they wanted it and many did exactly that, but they still subscribed to *The Times*.

111. Mr Witherow further stated that the objective of *The Times* and *Sunday Times* was to deliver what he described as "curated" news. In other words his editorial team stepped back and waited until they were sure that they understood a particular story fully before putting it into one of their editions. Mr Witherow indicated that he considered that *The Times* was more "selective" or "choosy" than some other newspapers. With a rolling news service stories and rumours are, Mr Witherow commented, put up onto the website as fast as possible, with the danger that the published material contained errors (and, in some cases, false stories), with the result that mistakes had to be corrected subsequently.

112. For example, Mr Witherow cited the events of the previous evening (4 December 2017), during our visit to the newsroom of *The Times*, when stories were emerging about the Prime Minister's Brexit negotiations in Brussels. There were, said Mr Witherow, a large volume of rumours emerging about why the Prime Minister had been unable to conclude a deal and a number of websites had published them with the result that readers had been confused. In other words, the rolling news websites put up their version of the news as fast as possible and then correct it if it is wrong. That was different from the approach of *The Times* and *Sunday Times*. The editorial team would wait until they were sure that they had got the story right.

113. Mr Flanagan, an HMRC officer, asserted that prior to 30 March 2016, News UK's website and smartphone use versions were advertised by News UK as operating a "24/7 rolling news service". Mr Flanagan was, however, unable to exhibit to his witness statement this "advertisement". Moreover, Mr Flanagan's assertion appeared to be based on a misunderstanding of a paragraph in Mr Duncan's witness statement.

114. As regards the position prior to 30 March 2016, I prefer the evidence of Mr Duncan that the website and smartphone editions, primarily contained what he described as "overnight print content" and would make relatively minor updates to stories during the day. Mr Duncan specifically rejected Mr Pleming's characterisation of those editions, prior to 30 March 2016, as "rolling-ish" news sites. Mr Duncan's evidence seemed more specific and based on first-hand knowledge of the content of

the website and smartphone editions prior to 30 March 2016 than the evidence of Mr Flanagan.

115. In my view, *The Times* and *Sunday Times* website edition (and the other digital editions) were edition-based publications and that this was true, as regards the website and smartphone editions prior to 30 March 2016. The digital editions were not rolling news sites for the reasons given by Mr Witherow. This conclusion was also supported by the evidence of Mr Duncan, who stated that that readers were prepared to pay for a digital newspaper containing an edited summary of the previous day's news, but were less inclined to pay for access to websites (such as the BBC or *Daily Mail* online) that simply provided rolling news updates. This reflected the differing markets for the provision of news in the UK.

116. News UK were, Mr Duncan said, the only news organisation in the UK which produced a daily print edition and a website, smartphone and tablet edition each of which were designed to look like a newspaper. HMRC did not accept this proposition and a considerable portion of Mr Higgins' evidence was devoted to seeking to demonstrate that it was incorrect. His evidence covered *The Financial Times*, *The Guardian*, *The Daily Telegraph* and other suppliers of digital media.

117. I am bound to say, however, it seemed to me that this issue was, at best, of peripheral relevance and was indeed largely irrelevant. Whether the digital versions of the titles were "newspapers" for zero rating purposes, in my judgment, does not turn on the characteristics of other publications – and any similarities or dissimilarities – but the objective characteristics of the digital versions of the titles themselves and the views of the readers.

Marketing and advertising

118. At first, the pricing of subscriptions for digital editions of *The Times* and *The Sunday Times* was kept relatively low (£2 per week) to encourage readers to subscribe. This resulted in rapid growth to 100,000 subscribers within 12 months but with some evidence of, what Mr Duncan described as, "cannibalisation" of the newsprint business.

119. From September 2012, the principal subscription packages were referred to as the "classic pack" comprising the newsprint, website and smartphone (but not the tablet) editions and a "digital pack" comprising the tablet, website and smartphone editions (and both of which included access to the e-reader edition). From February 2014, these were equally priced (at £6 per week). This reflected a decision by News UK's management that the print and tablet editions should be priced at the same level on the basis of the value of *The Times* and *The Sunday Times* was the content and that what customers were buying was the same. The "ultimate" pack contained both the newsprint and tablet editions together with the website and smartphone editions and was priced at £8 per week. As a result of these price increases, News UK focused its marketing on the quality of the journalism and considered that it was the newsgathering and curating skills of the two newspapers for which its customers were

paying. In other words, News UK's focus was on the quality of the journalism rather than the medium by which the news was delivered.

120. The consumption of digital news had increased dramatically over the past seven years. The trend showed that the news market had changed in recent years with a shift from print to digital (certainly in terms of the overall body of news consumed).

121. News UK's own forecasts showed a link between a reduction in casual (i.e. non-subscription) newsprint sales, particularly from February 2014, and increasing digital sales.

122. News UK's marketing approach for both print and digital subscriptions was the same. Mr Duncan explained that the marketing strategy focused on:

(1) the strength of the content and journalism;

(2) price (particularly discounts e.g. "three months' for the price of one") and free gift promotions (e.g. most recently, a coffee machine); and

(3) exclusive offers and events through "*Times+*".

123. The main focus was to increase subscriptions for either newsprint or digital editions. News UK promotes the benefits that subscription offers, beyond the reduced cost against the purchase of the daily edition, and has found it necessary to invest in incentives and benefits to overcome "customer inertia". The various incentive offers, such as free National Trust membership or coffee machines, are made available to newsprint and digital subscribers.

124. Since the introduction of the pay wall in 2010 for *The Times* and *The Sunday Times*, all tablet advertising has been sold by News UK in conjunction with print advertising.

125. In the early days, when there were a limited number of readers of the tablet edition, News UK did not charge extra to place advertisements, sold for the print edition, into the tablet edition. There was a period from early 2011 to summer 2012 when News UK sold digital only advertisements along with print "crossover" advertisements. From around 2012, News UK has included its tablet edition readers in its readership figures which, in turn, had an effect on the price it would charge for advertisements.

126. Since 2014, News UK's strategy has been to "One sell", which later became known as "Access one". This meant that in order to advertise within the tablet edition, customers would also have to buy a print and tablet advertising package.

127. The advertising content of the tablet and print editions is either identical or at least very similar. Customers do not consider the tablet edition proposition to be any different from the print edition of *The Times* and *The Sunday Times*. The principal difference is that it is possible to have "*dynamic*" advertisements in the tablet edition (i.e. with video content and active links to websites) which are not possible in the newsprint editions. However, many of News UK's top advertising customers place

homogeneous adverts across both print and tablet editions. Most (i.e. 66.4%) of the advertising content is placed in both the print and tablet editions. Furthermore, the pricing of advertising across the print and digital publications was the same, with the prices being driven by the number of subscribers (print and digital combined).

128. Advertisements are also priced on a 'per edition' or 'per week' basis. This is in contrast to how advertisements in other online news services operate, which is generally on a price "per view" of the particular page on which the advertisement is based.

Readership behaviour and views

129. I have already referred to the research undertaken by News UK in relation to the smartphone edition (e.g. the IDEO research).

130. In addition, News UK commissioned research which indicated that the majority of readers navigated the tablet edition in a linear fashion i.e. moving from one article to the next within a section. In particular, when finishing an article, the research showed that 85% of readers went on to the next article in the addition in a way which mirrored the behaviour of readers of the print editions.

131. Mr Hunter's evidence included a month's worth of customer reviews in respect of the tablet edition which were representative of the views of readers and demonstrated the way in which readers consumed news across News UK's various platforms. Mr Hunter's unchallenged evidence was that these comments demonstrated that readers valued the content of *The Times and Sunday Times* and illustrated how readers had adapted and converted to reading those titles in digital form as opposed to the print editions. For example, one comment was:

> "Before using the rather excellent Times app as my morning news fix, I was rather concerned that I would not like the "feel" of something that was not a traditional newspaper. That concern lasted all of about five pages, and I have been a convert ever since. I use both iPhone and iPad apps and both are excellent. Sadly, the iPad is useless as kindling for fire lighting."

132. Another comment was:

> "I love the quality of the journalism. The range of articles throughout the various sections of the newspaper means that I always learn something new when reading The Times. The ability to access all this without walking to the shops in the rain is wonderful."

133. Having reviewed these comments, it was clear that most readers enjoyed the convenience and flexibility of being able to read *The Times* on their digital devices and my impression was that they considered the content to be either the same or very similar to the newsprint editions for which many had previously subscribed.

134. Furthermore, research commissioned in October 2016 by Times Newspapers Limited in relation to tablet, smartphone and website editions showed that the peak

time of day at which readers access each digital edition was first thing in the morning i.e. at broadly the same time that most readers read the print edition.

The Sun Classic App digital edition

135. Although most of the evidence in this appeal related to, *The Times* and *The Sunday Times* the appeal also concerns the subscriptions to *The Sun* digital editions (including *The Sun on Sunday*); these are, however, significantly lower in volume.

136. Until 1 August 2013, *The Sun* operated a free website and a smartphone app which gave access to *The Sun* website. From that date, these two offerings were sold alongside a tablet edition of *The Sun* known as *The Sun Classic App*. *The Sun Classic App* was developed in June 2010 at around the same time as the tablet edition of *The Times* and *The Sunday Times*.

137. The production of *The Sun Classic App* required the development of bespoke tablet templates. *The Sun Classic App* consists of a digital replica of each print edition of *The Sun* each day. This is created by taking the final print edition, converting it to a PDF Format and adding in a basic contents page. *The Sun Classic App* has no additional features when compared with the print edition, save that the app allows customers to skip between sections using the contents page.

138. When it was launched in 2010 *The Sun Classic App* gave the choice of either a PDF replica edition or access to *The Sun* website through a portal in the app (the "i-edition"). Given the much heavier usage of the PDF edition (76% of readers), the i-edition was subsequently removed, although it was not made clear when this withdrawal occurred. *The Sun Classic App* has not materially changed since that time i.e. it has remained essentially a PDF version of the print edition and continues to be available to subscribers for £4.99 a month..

139. In May 2014, New UK launched *The Sun Interactive App*. It was included as part of the paywall bundle. The intention was that it would move to a templated approach to *The Sun* pages (which had a look and feel which did not directly replicate *The Sun* print edition) in order to be able to add digital features including video and interactivity. *The Sun Interactive App* was not successful and drew significantly fewer readers than *The Sun Classic App* and was cancelled in 2015.

140. To supplement these digital offerings, News UK created a bundle (in August 2013) that entitled a subscriber to access a new *Sun+ goals app* showing Premier league football goals and take advantage of certain perks such as free cinema tickets. This package was referred to as *The Sun* +. This package was not particularly successful and was ultimately withdrawn in November 2015.

141. During the period that *The Sun* + was available to customers, *The Sun* website edition and smartphones edition closely mirrored the content of *The Sun* print edition. Stories were also only released on *The Sun* website edition late at night so that stories were broken on the print and website editions at the same time. The website edition also followed the same structure as the print edition, with similar sections. The

content of the website was also very similar to that of the print edition, with many of the same articles with the same headlines being replicated on both editions each day. This approach stemmed from a "one team" culture – all journalists worked for both the print edition and website and smartphone editions of the paper with no internal delineation between journalists and the content for the newsprint and digital versions.

142. At this point, the smartphone app also mirrored the website content. Both the website and smartphone editions had additional stories added during the day, which would usually have made their way into the next day's print edition.

143. As already explained, *The Sun* + was not successful and was withdrawn. This was largely because *The Sun*'s key competitors (e.g. *The Mirror* and *Mail Online*) were providing very similar written content without charge on their websites and News UK came to recognise that *The Sun*'s customers were generally more interested in being provided with constantly updated online news and gossip rather a daily curated digital edition of *The Sun*.

144. *The Sun+*'s subscribers did not view the digital video content or the *Goals* + app as much as had been anticipated. News UK reconsidered its digital strategy and a decision was taken to remove *The Sun* website's paywall from 30 November 2015. From this date, News UK stopped offering customers the *The Sun* + package although it has continued to sell *The Classic App* on a stand-alone basis to customers.

145. HMRC pointed to a number of screenshots from *The Sun*'s website, advertising *The Sun* +, referring to "24/7" updates on the news. For example, a screenshot on 31 August 2013 refers to "Members only access to exclusive breaking news on thesun.co.uk" and "*The Sun* Mobile App, Keeping You Updated 24/7." On a screenshot dated 7 December 2013 referred to "*The Sun* smartphone app keeping you updated 24/7." A screenshot dated 30 May 2013 referred to "The Sun Mobile app keeping you updated 24/7" and "Exclusive access to breaking news, pics and videos." A screenshot dated 5 May 2015 stated "Keep updated 24/7" and "*The Sun* Mobile App Updated 24/7 with breaking news…."

146. I accept, however, the evidence of Mr Duncan that *The Sun+* closely mirrored the content of *The Sun* print edition. I have also concluded that *The Sun Classic App*, which was effectively a PDF version of the print edition, also likewise mirrored *The Sun*'s print edition.

Conclusions on the evidence

147. Mr Peacock submitted that the digital editions of the titles had similar characteristics to those of the newsprint editions.

148. Mr Peacock accepted that an essential characteristic of a "newspaper" was that it should be an edition-based publication. Mr Peacock submitted that the evidence established that this criterion was fulfilled as regards each digital edition of the titles.

149. Mr Peacock addressed the question of the additional content available on the website, smartphone and tablet editions. He submitted that additional content or functionality was not a necessary disqualification. At the very most it was a factor to be borne in mind when looking at all of the evidence in the round. Secondly, it was a perfectly normal use of language to refer to a publication as an "online newspaper" and that it followed that, when delivered in that form, the publication may have added functionality. That could not, Mr Peacock submitted, be an automatic bar to the publication being a newspaper. Thirdly, the evidence demonstrated that the additional content and functionality was overall not significant when seen through the eyes of a typical reader. The evidence was that readers valued edition-based curated news. In any event, in relation to the digital versions of the titles, broadcasts and short videos were designed to augment stories that appeared in those publications.

150. I accept Mr Peacock's basic submission that the digital editions of the titles (with one exception) had similar characteristics to those of the newsprint editions.

151. It was common ground that one of the characteristics of a "newspaper" was that it should be published in a periodical edition rather than, by contrast, being a "rolling news" service i.e. a news service where the news and other current affairs articles are updated on a continuous basis.

152. On the evidence, I have concluded that all the digital editions of the titles (with one exception) were essentially periodic edition-based publications (as I have already indicated) and that the content was, broadly, the same as between the print editions and the digital editions. Although the tablet, website and smartphone editions permitted updates, the evidence, in my view, established that those updates were relatively minor and in some cases were, in essence, broadly the equivalent of further editions of the newsprint version as regards content. Indeed, only 10% of readers read the updated stories on the website and smartphone editions, with 90% of subscribers reading only the overnight edition.

153. It is true that some pictures, headlines and the arrangement of articles differed between the tablet, website and smartphone editions on the one hand and the newsprint editions on the other. The e-reader version was, of course, an exact facsimile of the print newspaper. In my judgment, however, the comparison between the digital editions and the newsprint editions does not require that they be identical but broadly the same, particularly as regards content (see, in the context of fiscal neutrality, *Rank Group v HMRC* (Joined Cases C-259/10 and C-260/10) [2012] STC 23 at [43]-[44], which I discuss further below). I am satisfied on the evidence, considered as a whole, that content of the digital and newsprint editions was indeed fundamentally the same or very similar.

154. Mr Pleming submitted that the main difference between the digital editions of the titles and the newsprint editions was that the digital platform allowed News UK to provide to subscribers additional content which could not be provided in newsprint. In my view, this was plainly contradicted by the evidence of Mr Hunter who estimated that 95% of the content of the digital editions was the same as the newsprint editions

and by the fact that the additional content (particularly videos) was relatively little used.

155. I do not think that my conclusion as to the similarity of content as regards the digital and newsprint versions of the titles can be altered by the "additional content" contained on the tablet, website and smartphone editions. In my view, the "additional content", which was only very lightly used by subscribers, was a relatively minor aspect of those digital editions. Those digital editions were essentially, when the evidence was viewed in the round, the same as or very similar to the newsprint editions.

156. Moreover, it was clear from the evidence of Mr Witherow, Mr Hunter and Mr Duncan that the intention of News UK in relation to *The Times* and *The Sunday Times* was that the content and presentation of the digital editions should make the reader recognise that they were reading those titles, albeit via a different medium. More importantly, however, the evidence also established, in my view, that the readers also considered the digital editions to be fundamentally the same as the newsprint editions, albeit readers found that being able to read the *The Times* and *The Sunday Times* on their electronic devices was more convenient. In other words, readers were more concerned about the content than in the medium by which it was conveyed. This was particularly apparent from the readers' comments referred to in Mr Hunter's evidence. I am satisfied therefore that, from the point of view of the subscribers, it was the content rather than the medium of its delivery to which most value was attached, although subscribers also valued the additional convenience of the digital platform.

157. The fact that subscribers clearly valued the additional convenience afforded by the digital editions of the titles, cannot disqualify those editions from sharing similar characteristics with the newsprint editions. As I have said, the evidence demonstrated that the reader's main priority was the content of the titles rather than the medium.

158. Furthermore, as was apparent from Mr Hunter's evidence, readers tended to access the digital versions of *The Times* and *The Sunday Times* at the same time of day as readers would read the print editions, again suggesting a close similarity between digital and print editions from the point of view of the subscriber.

159. As I have pointed out, there was relatively little evidence in relation to *The Sun* and *The Sun on Sunday*. The *Sun Classic App* was a PDF version of the newsprint edition and I am prepared to accept that, given that the content was identical to the newsprint edition, that this was essentially similar in content to and shared the same characteristics as the newsprint editions. In relation to the *The Sun+*, I accept Mr Duncan's evidence that its contents closely mirrored that of the newsprint edition. On this basis, I am also prepared to accept that *The Sun+* had similar characteristics to the newsprint version. I am, however, less sanguine about *The Sun Interactive App*, which is the exception to which I alluded above. In relation to this publication I do not consider that the evidence has established that it was similar from the point of view of the readers to the newsprint editions. In short, News UK has failed to discharge the burden of proof in relation to *The Sun Interactive App*.

Submissions and discussion

Submissions on the interpretation of Item 2 Group 3 Schedule 8 VATA 1994

160. Mr Peacock submitted that Item 2 Group 3 of Schedule 8 of VATA 1994 should be interpreted purposively. The purpose of the provision was to promote literacy, the dissemination of information and democratic accountability.

161. There was, however, a further principle of statutory interpretation which formed an important part of Mr Peacock's case. This principle was that legislation once enacted had to be kept up-to-date with, *inter alia*, technological advances so that, in other words, a statutory provision is "always speaking". This was important in the present case because digital editions of newspapers did not exist in 1973.

162. Mr Peacock cited *Bennion on Statutory Interpretation* (*Bennion* 16th edition, 2013, at section 288) and the speech of Lord Wilberforce in *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800 ("*Royal College of Nursing"*) at 822. Mr Peacock also relied on *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 2 All ER 113 ("*Quintavalle"*) in the speech of Lord Steyn at [24]-[25] and that of Lord Bingham in at [9] and [10].

163. On the basis of these authorities, Mr Peacock submitted that it was necessary to identify the purpose of the relevant provision and then consider whether that new item, new technology or new state of affairs shared the same inherent characteristics as those supplies which were admitted to be covered by the wording, i.e. the old state of affairs. This was also the approach of Walton J in *Grant v Southwestern and County Properties Ltd* [1974] 2 All ER 465, [1975] Ch 185 in the case cited by Lord Bingham in *Quintavalle*.

164. Mr Peacock also referred to a decision of this Tribunal in *Harrier LLC v Revenue & Customs* [2011] UKFTT 725 (TC) (Judge Berner and Mr Templeman) ("*Harrier*") at [44] which involved the question whether photo books were "books or booklets" for the purposes of zero rating.

165. Mr Peacock accepted that the Tribunal in *Harrier* was concerned with technological advances in printing which was somewhat different from the present case. Nonetheless, even though Article 110 could be described as a "standstill" provision, Mr Peacock submitted that the "always speaking" doctrine still applied. The question was whether the goods or services in question fell within the relevant description used in Schedule 8. Thus, in Mr Peacock's submission, the correct approach was to identify the relevant purpose of the statutory provision and then test the supply in question by reference to its function and inherent characteristics. By that process it was possible to discern whether the term that Parliament used applied just as much to the new state of affairs produced by technological changes as it did to the old state of affairs.

166. In the present case, the purpose of zero rating newspapers was to disseminate knowledge and information, to aid literacy and to further the democratic process.

Those features, said Mr Peacock, were as true of the digital editions of the titles as they were of the print editions. Both the digital and print editions, Mr Peacock contended, shared the same inherent characteristics i.e. those of a newspaper and fulfilled the statutory purpose.

167. Next, Mr Peacock addressed HMRC's argument that there was a particular rule for interpreting exemptions from VAT. Exemptions (including zero rating) were a derogation, under Article 110, from the general rule that all supplies of goods and services should be subject to VAT. The rule relating to exemptions from VAT was that the exemptions should be construed strictly. Mr Peacock accepted this but argued that the full expression of that rule was not just that exemptions had to be construed strictly but also that they had to be construed in accordance with the purpose of the exemption. Mr Peacock referred to *HMRC v Axa UK plc* C-175/09 [2010] STC 2825 ("*Axa*") at [25]. Mr Peacock accepted that there was no distinction between exemption and zero rating for these purposes.

168. In deciding whether the word "newspapers" used in Group 3 of Schedule 8 VATA properly referred to both the print and digital editions of the titles, it was necessary not only to construe the word strictly, but also to give effect to its purpose. The UK was given the freedom by (what is now) Article 110 to set the ambit of zero rating. It was necessary to determine, Mr Peacock submitted, whether the word "newspapers" properly extended to a digital edition of the relevant newspapers (a matter of UK law) and whether that conclusion was consistent with EU law. The question, therefore, was whether the digital editions shared the same essential characteristics as the newsprint editions, which were undoubtedly "newspapers".

169. There was, said Mr Peacock, a dearth of authority on the question of what constituted a newspaper. He referred, however, to two Australian cases which were relevant. The first case was a decision of the Supreme Court of Victoria in *In re Bradshaw's Guide ex parte Stillwell* [1903] VLR 415 at 417 ("*Bradshaw's Guide case*"). The second decision, also of the Supreme Court of Victoria, was in *Downland Publications Ltd v Deputy Commissioner of Taxation* [1982] 216 ("*Downland*") at 220 and 224-5.

170. The themes to be derived from these Australian decisions, according to Mr Peacock's submission, were that in construing the expression "newspapers" it was important to reflect technological changes and that the definition should not be limited by matters of form or format. It was necessary, instead, to focus on the essential or inherent characteristics and that the publication should be judged by reference to its content. In the present appeal the fact that the news content was delivered and read by electronic means should not be conclusive and, indeed, should not be an influential factor at all. Mr Peacock noted that the term "digital newspapers" was commonly used and was, in fact, used in HMRC's skeleton argument.

171. Mr Pleming submitted that all the items in Group 3 of Schedule 8 VATA consisted of goods, not services. In other words, Item 2 applied only to newsprint newspapers. The supply of the digital editions of the titles constituted a supply of services. Group 3 of Schedule 8 did not apply to the supply of services. Treating these

digital editions as zero rated "newspapers" was contrary to the applicable UK legislation and would be an impermissible extension of zero rating contrary to the derogation requirements of Article 110 PVD. The newsprint and digital editions were not comparable and, even if they were, the principle of fiscal neutrality was not breached.

172. Mr Pleming referred to the decision of the CJEU in *Talacre Beach Caravan Sales Ltd v C & E Commissioners* C-251/05 [2006] STC 1671 ("*Talacre Beach*") in in which the Court considered the predecessor provision of Article 110 (Article 28(2)(a) of the Sixth VAT Directive), the provision permitting zero rating derogations from the general principle that all supplies of goods and services were subject to VAT. In that case the taxpayer supplied caravans (zero rated) and contents (standard rated) as a single supply. The taxpayer argued that the entire (single) supply should be zero rated. At [21]-[23] the Court said:

> "21. Therefore, an exemption with refund of the tax paid in respect of those items would extend the scope of the exemption laid down for the supply of the caravans themselves. That would mean that items specifically excluded from exemption by the national legislation would be exempted nevertheless pursuant to art 28(2)(a) of the Sixth Directive.
>
> 22. Clearly, such an interpretation of art 28(2)(a) of the Sixth Directive would run counter to that provision's wording and purpose, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation on 1 January 1991. As the Advocate General observed in paras 15 and 16 of her opinion, art 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period.
>
> 23. Furthermore, as the Court has pointed out on a number of occasions, the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly (see, to that effect, *Customs and Excise Comrs v Madgett and Baldwin* (*trading as Howden Court Hotel*) (Joined cases C-308/96 and C-94/97) [1998] STC 1189, [1998] ECR I-6229, para 34; *EC Commission v France* (Case C-384/01) [2003] ECR I-4395, para 28; *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, paras 15 and 16; and *Jyske Finans A/S v Skatteministeriet* (Case C-280/04) [2005] All ER (D) 133 (Dec), para 21). For that reason as well, the exemptions with refund of the tax paid referred to in art 28(2)(a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature."

173. Mr Pleming referred to the text of Group 3 Schedule 8 VATA. All the items, in his submission, related to tangible property. In particular, "music" in Item 4 related to "printed, duplicated or manuscript" music and not digital recordings of music. In addition, Item 6 "Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for" anticipated that the items falling within Items 1 to 5 could be covered or put in a case. This plainly indicated that Items 1 to 5 comprised goods rather than services.

174. In relation to Note (1)(b), Mr Pleming submitted that its meaning was clear. By reference to Schedule 4 paragraph 1(1), Note (1)(b) extended zero rating to supplies of services in circumstances where what was transferred was either an undivided share in property or the possession of goods. Thus, for example, if a library charged a fee to lend books, that service would be zero rated. What this provision did not do, in Mr Pleming's submission, was generally to provide that supplies of services fell within Group 3 Schedule 8.

175. Mr Pleming also submitted that Notes (2) and (3) indicated that Items 1 to 5 in Group 3 referred to goods not services. Notes (2) and (3) were anti-avoidance provisions intended to deal with arrangements such as that in *Telewest Communications plc and another v Customs and Excise Commissioners* [2005] STC 481 and *HMRC v BPP Holdings Limited* [2014] UKUT 496 (TCC) (described by Judge Bishopp at [1]-[3] – albeit a variation in that in BPP the services supplied were exempt rather than standard rated). Essentially, the scheme involved a (standard rated or exempt) supply of services by a company and (so the taxpayer argued in that case) a zero rated supply of books by an affiliated company but which was in a different VAT group. The idea was that there were two separately taxed supplies (one of which was intended to be zero rated), albeit that, if the same taxable person had supplied both the goods and the services, the combined supply would have constituted a single standard rated supply. This anti-avoidance provision addressed only the supply of goods – clear indication that Group 3 was concerned only with the supply of goods.

176. Mr Pleming submitted that his analysis involved three steps. First, the digital editions were electronically supplied services (paragraph 9 Schedule 4A VATA). Secondly, it was necessary to ask whether there was a difference between electronically supplied services, on the one hand, and printed matter such as books, newspapers and journals on the other. Mr Pleming argued that European legislation showed that there was a difference and that it would be odd if our domestic zero rating laws (admittedly a derogation) allowed electronically supplied services to form part of a limited list of goods contained in Group 3 Schedule 8. The third issue was that allowing electronically supplied digital services, such as the digital editions of the titles, would be an impermissible extension of the scope of zero rating.

177. Mr Pleming referred to *European Commission v Luxembourg* C-502/13 [2015] STC 1714 ("the *Luxembourg* case"), particularly at [35], [41] and [42]. Article 98 (1) and (2) of the PVD made provision for the application of reduced rates of VAT to categories of supplies set out in Annex III to the PVD. Point 6 of Annex III, as amended, included the supply of "books on all physical means of support". Article 98 (2) expressly provided that the reduced rates did not apply to "electronically supplied

services." The reduced rate was required to be not less than 5%. In Luxembourg, the supply of electronic books was subject to a reduced rate of VAT. From 1 January 2012, Luxembourg had given a wide interpretation to the term "books" and applied a rate of 3% to the supply of electronic books. The digital or electronic books at issue included books supplied, for a consideration, by download or web streaming, from a website so that they could be viewed on a computer, a smartphone, electronic book readers or other reading system.

178. The CJEU pointed out, first, that a reduced rate of VAT could apply only to supplies of goods and services covered by Annex III to the PVD. That Annex referred in particular to the 'supply of books ... on all physical means of support'. The Court concluded that the reduced rate of VAT was applicable to a transaction consisting of the supply of a book found on a physical medium. Whilst, in order to be able to read an electronic book, physical support (such as a computer) was required, such support was not included in the supply of electronic books, with the result that Annex III did not include the supply of such books within its scope.

179. Moreover, the Court held that the PVD excluded any possibility of a reduced VAT rate being applied to 'electronically supplied services'. The Court held that the supply of electronic books was a service. The Court rejected the argument that the supply of electronic books constituted a supply of goods (and not a supply of services). An electronic book could not be regarded as tangible property. Only the physical support enabling an electronic book to be read could qualify as 'tangible property' but such support was not part of the supply of electronic books.

180. Mr Pleming accepted that the *Luxembourg* case dealt with reduced rates of VAT under Article 98 rather than zero rating pursuant to Article 110, but he submitted that the PVD clearly drew a distinction between physical books, which were goods, and digital books, which were supplies of services, and applied different VAT treatments.

Discussion of the interpretation of Item 2 Group 3 Schedule 8 VATA 1994

181. It was common ground that the digital editions of the titles in this case, when supplied to readers, constituted the supply of services. It seems to me that this point is fatal to News UK's argument because, in my judgment, Item 2 Group 3 Schedule 8 VATA 1994 deals only with supplies of goods i.e. "newspapers, journals and periodicals" in physical form.

182. Item 2 Group 3 Schedule 8 VATA 1994 was originally enacted as Item 2 Group 3 Schedule 4 Finance Act 1972 in identical terms, save for the Notes to the Items. In 1972 the only Note to the Group was the equivalent of Note (1)(a) of the 1994 version. Plainly, it would be fair to say that the drafter in 1972 did not contemplate newspapers in the form of the digital editions of the titles.

183. The text of Items 1-5 and the Notes, in my judgment, supports the view that the whole of Group 3 (except as otherwise provided for in the Notes[1]) is confined to supplies of goods and does not include the supply of services. Leaving aside, for the moment, the meaning of the text in 1972, Item 6 refers to "Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for." To my mind, Item 6 strongly suggests that the articles referred to in Items 1-5 were envisaged to consist of tangible goods.

184. Secondly, Item 4 refers to "Music (printed, duplicated or manuscript)". Again, what is envisaged is music in, effectively, paper form and not music supplied in a form which constitutes a service e.g. music available for download from the Internet. I do not accept Mr Peacock's suggestion that "duplicated" was ambiguous and could refer to duplication by electronic means. Read in context, it clearly refers to duplication on paper.

185. Thirdly, Note (2) states:

> "(2) Items 1 to 6 do not include goods in circumstances where—
>
> (a) the supply of the goods is connected with a supply of services, and
>
> (b) those connected supplies are made by different suppliers.
>
> (3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier—
>
> (a) they would have been treated as a single supply of services, and
>
> (b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."

186. I note that the introductory words to Note (2) refer only to "goods". This Note is an anti-avoidance provision addressing arrangements similar to those in the *Telewest* case which involved the supply of services and (paper) magazines. The services were standard rated but because the magazines in that case were supplied by a different company which, although associated, was not part of the same VAT group as the company which supplied the services, it was held that the magazines were zero rated.

187. It seems to me that Note (2), which was inserted in 2011, operates on assumption that the scheme at which it was directed would involve the zero rated supply of goods (within Group 3) rather than services. There seems to be no reason why the same type of scheme as that used in *Telewest* could not be adapted so that, instead of a printed magazine (or book), the customer received a "magazine" in digital form. It would be odd, if digital "magazines" were indeed zero rated, but fell outside the anti-avoidance provision contained in Note (2). Inferentially, therefore, I think it

[1] Where I refer below to Group 3 of Schedule 8 applying or referring only to goods rather than services, I exclude, for brevity, the exceptions in respect of services specifically provided for in the Notes.

likely that Parliament assumed that Group 3 involved the supply of goods rather than services.

188. Finally, it is also notable that Note (1)(b) expressly provides that Items 1-6 of Group 3 include "the supply of services described in paragraph (1) of Schedule *in respect of goods* comprised in that items"(emphasis). Schedule 4 deals with "Matters to be treated as supply of goods or services" and is, effectively, a provision which delineates some of the borderline between goods and services for VAT purposes. Paragraph (1) of Schedule 4 provides:

> "1(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer—
>
> (a) of any undivided share of the property, or
>
> (b) of the possession of goods,
>
> is a supply of services."

189. Thus, for example, the lending of a book by a library for a consideration would be treated as a taxable supply of services. For present purposes, I think it is significant that Note (1)(b) refers specifically to "goods comprised in the items."

190. Drawing these threads together, it seems to me that, taking account of these points cumulatively, the text of Group 3 indicates that the contents of the Items consist of goods rather than services.

191. But how, then, does the "always speaking" principle of statutory interpretation apply in the present statutory context? Mr Peacock argued that Parliament intended that legislation should be interpreted in a way which kept pace with technological developments. Digital versions of newspapers were commonly referred to as "digital newspapers" and shared the same inherent characteristics as printed newspapers. It followed, therefore, that in accordance with the "always speaking" doctrine the digital editions of the titles should be regarded as "newspapers" within Group 3.

192. The classic and authoritative exposition of the "always speaking" principle is to be found in the speech of Lord Wilberforce in *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800 ("*Royal College of Nursing"*) at 822:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. *How liberally these principles may be applied must*

> *depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive.* They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, 'What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?', attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself." (Emphasis added)

193. In my judgment it is clear that the provisions of Group 3 and, specifically, Item 2, are intended to be, in the words of Lord Wilberforce, "restrictive or circumscribed in [their] operation". Zero rating is derogates from the general principle that all supplies of goods and services should be subject to VAT. Zero rating provisions, as with other exemptions from VAT, must be construed strictly. That is not to say that a Court or Tribunal should adopt a restricted or the most restrictive construction, simply that "the task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used" (see *Expert Witness Institute v C&EC* [2002] STC 42 CA at [17]-[19]).

194. In *Talacre Beach Caravan Sales v C&E Commissioners* C-251/05 [2006] STC 1671 ("*Talacre Beach*") the CJEU considered the UK's provisions which zero rated the supply of caravans. The removable contents of caravans were, however, excluded from zero rating under UK domestic law. In that case, the taxpayer argued that because the caravans and their contents constituted a single composite supply, the contents of the caravans should follow the zero rated treatment of the caravans. The Court rejected this argument.

195. At [16] Advocate General Kokott said:

> "This determination [i.e. the determination of the UK that zero rating should apply to caravans but not to their contents] under national law should, in principle, be strictly observed and, according to the clear wording of Article 28(2)(a) of the Sixth Directive [the forerunner of Article 110 PVD], not be extended, as the United Kingdom Government and the Commission rightly observe; it would at most be permissible to restrict the scope of the exemption. *This is because Article 28(2)(a) of the Sixth Directive is a kind of stand-still clause.* The provision was already contained in the original version of the directive and at that time permitted the maintenance, on a transitional basis, of exemptions existing on 31 December 1975. It was intended to prevent the immediate abolition of exemptions not included in the directive from leading to social hardship." (Emphasis added)

196. At [42] the Advocate General continued:

> "Finally, although it must be conceded that the Court has accepted that tax exemptions for the principal element of a composite supply may be extended to ancillary supplies connected with it, nevertheless, as the United Kingdom Government rightly submits, those cases concerned exemptions under art 13 of the Sixth Directive, and therefore exemptions enshrined in the scheme of the directive and in the application of which the right of deduction is excluded. In contrast, the national exceptions under art 28 lie outside the harmonised framework. They are not directed at the same objectives as the exemptions provided for in the directive itself and differ in form from those exemptions. *Consequently, in those cases it is necessary to take particular care that the exceptions are not extended*." (Emphasis added)

197. The Advocate General's views were endorsed by the Court, in the following words:

> "22. As the Advocate General observed in paras 15 and 16 of her opinion, art 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period.
>
> 23. Furthermore, as the Court has pointed out on a number of occasions, the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly (see, to that effect, *Customs and Excise Comrs v Madgett and Baldwin* (*trading as Howden Court Hotel*) (Joined cases C-308/96 and C-94/97) [1998] STC 1189, [1998] ECR I-6229, para 34; *EC Commission v France* (Case C-384/01) [2003] ECR I-4395, para 28; *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined cases C-394/04 and C-395/04) [2006] STC 1349, paras 15 and 16; and *Jyske Finans A/S v Skatteministeriet* (Case C-280/04) [2005] All ER (D) 133 (Dec), para 21). For that reason as well, the exemptions with refund of the tax paid referred to in art 28(2)(a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature."

198. As both the Advocate General and the Court observed, Article 110 contains a "standstill" date of 1 January 1991 as regards zero rating by Member States. Thus, the CJEU held that the scope of zero rating provisions cannot be extended beyond their 1991 limits and that they must be interpreted strictly. In my view, to extend Item 2 Group 3 beyond the supply of goods (newsprint newspapers) to cover the supply of services (digital newspapers) would be an impermissible expansion of the zero rating provisions. It is clear that the provisions of Item 2 Group 3 should be construed strictly and that this therefore, in my view, prohibits the application of the "always speaking" doctrine to extend the scope of zero rating to apply to digital editions of the

titles. The interpretation of Item 2 Group 3 should, to use Lord Wilberforce's expression, be "restrictive or circumscribed."

199. Mr Peacock forcefully argued that a purposive construction of Item 2 Group 3 should have the result that the digital editions of the titles should be regarded as "newspapers" for zero rating purposes. The digital editions, he said, served the same purpose of promoting literacy and public debate in a free society as did the newsprint editions.

200. I am minded to accept that the digital editions of the titles do indeed serve the same general purposes as the newsprint editions, as Mr Peacock submitted. I do not, however, consider that that permits the interpretation of Item 2 Group 3 for which Mr Peacock contends. Parliament's purpose in zero-rating newspapers may well have been to promote literacy and informed public debate, but purposive construction cannot be used to give effect to a perceived wider policy in cases where the words used by Parliament do not bear that meaning. As the Upper Tribunal (Asplin J and Judge Berner) said in *Revenue and Customs Commissioners v Trigg* [2016] STC 1310, at [35]:

> "There is also, in our judgment, a distinction between the policy behind, or the reason for, the inclusion of a particular provision in the legislative scheme and the purpose of that provision. Parliament might wish to achieve a particular result as a general matter, and legislate for that reason or in pursuit of that policy. But if the statutory language adopted by Parliament displays a narrower, or more focused, purpose than the more general underlying policy or reason, it is no part of an exercise in purposive construction to give effect to a perceived wider outcome than can properly be borne by the statutory language."

201. This passage was cited with approval by the Upper Tribunal in *Flix Innovations Limited v HMRC* [2016] STC 2206 at [42] and in *HMRC v Michael and Elizabeth McQuillan* [2017] UKUT 344 (TCC).

202. I have explained that the words of Group 3 indicate that all the Items in the Group (including "newspapers") in Item 2 are physical goods and not services. Quite apart from the need to give Item 2 Group 3 a meaning which is "frozen" as at 1991 in order to prevent an impermissible extension of zero rating (see below), I do not think that the words used by Parliament, when read in context, permit the meaning for which the appellant contends.

203. In any event, it seems to me that the same "standstill" argument that was fatal to the taxpayer's case in *Talacre Beach* must be fatal to the appellant's expansive construction of the word "newspapers" based on the principle of purposive interpretation. Item 2 Group 3 must be interpreted strictly and in a way which does not extend its boundaries beyond those existing in 1991. It cannot be (and it was not) suggested that in 1991 or in 1973 that Item 2 Group 3 (or its predecessor in the Finance Act 1972) was commonly understood at that date to apply to digital editions of newspapers i.e. to the supply of services as well as goods. Purposive interpretation cannot change that result. I might observe that it may well have been the case that in

Talacre Beach the social purposes which lay behind the zero rating of caravans would have been promoted by the zero rating of their contents as well; that could not, however, justify an extension of the scope of zero rating.

204. For the reasons given above, I do not accept that the word "newspapers" when read in context can be given the more liberal interpretation for which Mr Peacock contended.

205. I should add that I found the Australian authorities to which Mr Peacock referred in relation to the meaning of "newspaper" of little assistance. These authorities dealt with different provisions and shed little light, in my view, upon the question whether "newspapers" in Item 2 Group 3 included digital editions of the titles.

206. I should also add that in reaching my conclusion I am well aware that section 30 authorises the zero rating of both goods and services but consider that it is necessary to analyse the terms of the provisions of Schedule 8 in order to determine the nature of the supplies for which zero rating is provided. The question of whether a particular provision applies to the supply of goods or services (or both) can only be determined by reference to the wording of the Items of each Group.

Submissions on the principle of fiscal neutrality

207. Next, Mr Peacock submitted that the interpretation of the zero rating provisions of Schedule 8 VATA was subject to the application of EU law and, in particular, the principle of fiscal neutrality. Article 110 required that zero rating derogations of Member States had to be "in accordance with Community law."

208. The principle of fiscal neutrality applies to the UK's zero rating provisions and requires the application of the zero rate on supplies to achieve fiscal neutrality with similar supplies which are treated as zero rated (*Marks & Spencer v HMRC* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283 and *Taylor Wimpey plc v Revenue and Customs Commissioners* [2017] STC 639). Thus, Mr Peacock argued that, even if I was not inclined to conclude that all of the digital editions of the titles were "newspapers", the principle of fiscal neutrality applied and required me to identify that which is similar (i.e. looking for significant features and to avoid artificial distinctions) as regards those editions and newsprint editions. The evidence, said Mr Peacock, demonstrated that digital editions were, from the point of view of the consumer, similar to newsprint editions and, therefore, according to the principle of fiscal neutrality, should be zero rated.

209. Mr Peacock noted that the principle of fiscal neutrality was explained by the CJEU in *Rank Group v HMRC* (Joined Cases C-259/10 and C-260/10) [2012] STC 23 at [32], [37], [43], [44] and [58]. The case involved the different VAT treatment of gambling services supplied by means of mechanised cash bingo and slot machines. Mr Peacock noted that at [47] that the CJEU indicated that how, in that case, a game was accessed made no difference – a point which was important in the present appeal.

210. Generally, Mr Peacock submitted that the examination of the issue of fiscal neutrality was conducted at a "micro level". In the present case, he argued that the newsprint edition was identical to the e-reader edition, was virtually identical to the tablet edition and also virtually identical to the smartphone and website editions. Therefore, the principle of fiscal neutrality required that there should be conferred on the disadvantaged category (the digital editions) the benefit that is correctly conferred on the advantaged category (i.e. newsprint editions).

211. On this point, Mr Peacock referred to the decision of the Court of Appeal in *Sub One Ltd (t/a Subway) v Revenue and Customs Commissioners* [2014] STC 2508 ("*Sub One*") and submitted that the judgment of McCombe LJ at [60] was authority for the proposition that a disadvantaged transaction had a right to equal treatment with a correctly and more advantageously treated transaction (but a disadvantaged transaction did not have a right to equal treatment with an incorrectly treated comparator).

212. *Sub One* concerned the question whether supplies of certain toasted sandwiches (known as "subs" and "meatball marinaras") were zero-rated under Group 1 as "food of a kind used for human consumption" or standard-rated as supplies of catering (under the exception in (a) in the introduction to Group 1) on the basis that they were supplies of "hot food for consumption off the premises". The Court of Appeal held that the correct test for deciding if the supplies were of "hot food for consumption off the premises" was an objective one. The previous decision of the Court of Appeal in *John Pimblett & Sons Ltd v Customs & Excise Commissioners* [1988] STC 358 ("*Pimblett*"), which applied a subjective test, was wrong. On the correct objective test, supplies of both subs and marinaras were correctly standard-rated.

213. Mr Peacock noted that the taxpayer in that case argued *inter alia* that the UK had previously failed to implement EU law correctly, by following the *Pimblett* decision, and this had resulted in a breach of fiscal neutrality. Supplies of take-away food of the taxpayer's competitors, which when viewed objectively were similar to the taxpayer's products, had been treated as zero-rated applying the incorrect subjective test. As a result the taxpayer had been unable to compete fairly. On that basis the taxpayer argued that it should be entitled to a refund of VAT.

214. HMRC had argued that the EU principle of fiscal neutrality could not have the effect of overriding the UK's socio-political decision to exclude certain hot take away food from the zero-rate exemption. The decision taken by the UK could only be supervised at an EU level in so far as the measures taken fell outside the scope of a concept of a clearly defined social reason. McCombe LJ, approving the judgment of Arnold J in the Upper Tribunal, rejected this argument at [60]).

215. HMRC, in *Sub One*, also relied on the decision of the CJEU in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951 ("*Deutsche Bank*") to the effect that the principle of fiscal neutrality could not extend the scope of an exemption from VAT (Advocate General Sharpston at [60] and the CJEU at [45]*).*

216. *In Deutsche Bank*, the taxpayer argued that the principle of fiscal neutrality should allow portfolio management services supplied to individual investors (rather than to persons who invested via special collective investment schemes) to be exempted from VAT under Article 135(1)(f) and (g). The portfolio management services involved analysing investments and buying and selling securities. Advocate General Sharpston rejected this argument at [60] and this analysis was approved by the CJEU at [45] of its judgment.

217. Mr Peacock noted that in *Sub One* McCombe LJ rejected HMRC's argument based on *Deutsche Bank* at [64].

218. Mr Peacock also referred to the decision of this Tribunal in *Nestlé UK Limited v HMRC* [2016] UKFTT 0158 (TC) (Judge Morgan and Mrs Hunter). An appeal against this decision has, since the hearing of this appeal, recently been dismissed by the Upper Tribunal ([2018] UKUT 0029 (TCC)), but the FTT's decision on fiscal neutrality was not appealed. This appeal involved a dispute about Nesquik. Nestlé produced fruit flavoured powders which were added to milk to make a drink. Its chocolate powders had been treated as zero rated but HMRC decided that the fruit flavoured powders should be standard rated. Nestlé argued that this was a breach of the principle of fiscal neutrality. Summarising the principles to be derived from the above authorities, the Tribunal said at [175]:

> "Again, however, our view is that this does not imply a constraint on the applicability of fiscal neutrality principles in the way HMRC argue. The Court [of Appeal in *Sub One*] accepted … [at [60]] that the starting point is that it is for the UK to determine the correct border line between standard-rated and zero-rated supplies according to social policy reasons and that, on the basis of the cases including *Rank*, the principle of fiscal neutrality cannot be relied upon as depriving the UK of its discretion in this respect. However, the Court also endorsed the view that it does not follow that the UK can draw the line in such a way as to discriminate between objectively similar supplies and, as in *Rank*, it cannot distinguish between supplies which are the same from the point of view of the consumer. The Court of Appeal regarded this view on the applicability of fiscal neutrality as in accordance with *Marks & Spencer* and not affected by the *Finanzamt* decision. In the circumstances of the case, the Court of Appeal was not called upon to determine where such a line should be drawn, as it was clear that the supplies in question fell within the same category. It seems to us that this simply leaves open the question as to where the correct line is to be drawn in particular cases."

219. Mr Pleming submitted that the principle of fiscal neutrality could not extend a category of zero rating beyond its 1991 limits. Therefore, this case involved the application of a "black letter" boundary to an exemption, as McCombe LJ put it in *Sub One*. Item 2 Group 3 Schedule 8 applied only to the supply of goods and not to the supply of services. The principle of fiscal neutrality could not be used to flex the boundaries of this zero rating provision.

220. Mr Pleming further argued that this conclusion was supported by the fact that Article 98.2 PVD, which dealt with reduced rates of VAT, expressly provided that the reduced rates did not apply to "electronically supplied services." Mr Pleming accepted that the present appeal dealt with zero rating under Article 110, but argued that it was clear that the PVD drew a distinction between the supply of goods and the supply of "electronically supplied services".

221. Mr Pleming also noted that the EU had recognised the distinction between "printed matter, such as books, newsletters, newspapers or journals", and electronically supplied services such as "the digitised content of books or other electronic publications" or "subscriptions to online newspapers and journals" (Council Implementing Regulation (EU) No 282/2011). Furthermore the question of VAT rates within the EU, including a zero rates, was the subject of recent public consultation regarding electronically supplied services – including e-books and electronic newspapers. In 2016, the European Commission launched a "Public Consultation on reduced VAT rates for electronically supplied publications" which was followed in December 2016 by a draft Directive containing a proposal:

> "to grant all Member States, the possibility to apply the same VAT rates to electronically supplied publications as Member States currently apply to printed publications, which include reduced, super reduced and zero rates."

222. The Explanatory Memorandum to the draft Directive stated:

> "According to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax… electronically supplied services including electronically supplied publications… have to be taxed at the standard VAT rate (minimum 15%). On the other hand, Member States have the option to tax publications on any means of physical support at a reduced VAT rate (minimum 5%) and some Member States were granted the possibility to continue to apply VAT rates lower than the current minimum of 5% (super reduced rates) including exemptions with the deductibility of the VAT paid at the preceding stage (so-called zero rates) to certain printed publications."

223. It was, therefore, clear, Mr Pleming argued, that the EU Commission proceeded on the basis that zero rating of publications pursuant to Article 110 applied only in relation to printed matter. Extending zero rating to electronically supplied services without the permission of the EU legislature would expose the UK to the risk of infraction proceedings.

Discussion of the principle of fiscal neutrality

224. The principle of fiscal neutrality is used in two different senses in the context of VAT. First, it means that VAT should be neutral in its impact on taxable persons, so that ordinarily they should not themselves bear the burden of the tax. Its second meaning, with which I am concerned in this appeal, is that VAT should not be imposed differentially so as to distort competition between supplies which are objectively similar from the viewpoint of consumers.

225. The principle of fiscal neutrality, in this second sense, was explained by the CJEU in *Rank Group v HMRC* (Joined Cases C-259/10 and C-260/10) [2012] STC 23 ("*Rank Group*") as follows at [32], [37], [43], [44] and [58]:

> "[32] According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 22; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03) [2005] STC 1547, [2005] ECR I-4427, paras 41 and 54; *Marks & Spencer plc v Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283, para 47, and *European Commission v Netherlands* (Case C-41/09) (3 March 2011, unreported), para 66).
>
> …
>
> [37] By these questions, the referring courts seek, essentially to know whether or not, where there is a difference in the treatment of two games of chance as regards the grant of a VAT exemption ..., the principle of fiscal neutrality must be interpreted as meaning that account must be taken of the fact that those two games fell into different licensing categories and were subject to different legal regimes relating to control and regulation.
>
> …
>
> 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 (see, by analogy, *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973, para 29), avoiding artificial distinctions based on insignificant differences (see, to that effect, *European Commission v Germany* (Case C-109/02) [2006] STC 1587, [2003] ECR I-12691, paras 22 and 23).
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> 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 (see, to that effect, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 27, and, by analogy, *FG Roders BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam* (Joined cases C-367/93 to C-377/93) [1995] ECR I-2229, para 27, and *European Commission v France* (Case C-302/00) [2002] ECR I-2055, para 23).
>
> 47. In addition, it follows from that judgment, and from paras 29 and 30 thereof in particular, that the differences between public houses/bars and amusement arcades on the one hand, and licensed casinos on the other, as regards the setting in which games of chance are available, in particular the accessibility in terms of location and opening times and the atmosphere, are of no relevance to the question of the comparability of such games.

…

> 58. In the light of the foregoing considerations, the answer to the second question in Case C-260/10 is that, in order to assess whether, in the light of the principle of fiscal neutrality, two types of slot machine are similar and require the same treatment for VAT purposes it must be established whether the use of those types of machine is comparable from the point of view of the average consumer and meets the same needs of that consumer, and the matters to be taken into account in that connection are, inter alia, the minimum and maximum permitted stakes and prizes and the chances of winning."

226. In *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951 the CJEU held that the principle of fiscal neutrality could not extend the scope of an exemption from VAT. In that case, the taxpayer argued that the principle of fiscal neutrality should allow portfolio management services supplied to individual investors (rather than to persons who invested via special collective investment schemes) to be exempted from VAT under Article 135(1)(f) and (g). The portfolio management services involved analysing investments and buying and selling securities. Advocate General Sharpston rejected this argument at [60]:

> "60. Moreover, while the principle of fiscal neutrality in VAT may explain the relationship between the explicit exemptions for both direct investment and the management of joint investment funds, I do not accept that it can extend the scope of an express exemption in the absence of clear wording to that effect. As the German government observed at the hearing, it is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with—and as a limitation on—the principle of strict interpretation of exemptions. It is clear from the case law that activities which are to some extent comparable and thus to some extent in competition may be treated differently for VAT purposes where the difference in treatment is explicitly provided for. Moreover, if all activities partly in competition with each other had to receive the same VAT treatment, the final result would be—since practically every activity overlaps to some extent with another—to eliminate all differences in VAT treatment entirely. That would (presumably) lead to the elimination of all exemptions, since the VAT system exists only to tax transactions."

227. The analysis of Advocate General Sharpston was approved by the CJEU at [45]:

> "45. Lastly, it must be stated that that conclusion is not called into question by the principle of fiscal neutrality. As the Advocate General stated at point 60 of her opinion, that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions."

228. In *Sub One* McCombe LJ rejected HMRC's argument based on *Deutsche Bank* at [64] in the following words:

> "[64] The Respondents [HMRC] seek to extend those comments in the *Deutsche Bank* case to the national legislation here. However, I accept Miss Whipple [counsel for the tax payers]'s submission that the case was concerned with a 'black letter line' setting the boundaries of an exemption to be found in the Directive itself. The exemption had to be construed strictly and fiscal neutrality principles could not flex those boundaries. Here we are not concerned with such boundaries. We are concerned with a differentiation in treatment between traders supplying similar goods within the same national exemption category. The Appellant submits that if an exemption is in principle permitted in national law by the VAT Directive it must be applied consistently with the principle of fiscal neutrality. I think that Miss Whipple's submission in this respect is supported by the authorities cited in para 60 of the Appellant's skeleton argument, i.e. *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen* (Case C-45/01) [2005] STC 228, [2003] ECR I-12911, para 42) and *CopyGene A/S v Skatteministeriet* (Case C-262/08) [2010] STC 1799, [2010] ECR I-5053, para 64."

229. Recently, the Upper Tribunal (Warren J and Judge Berner) considered the principle of fiscal neutrality in *Taylor Wimpey Plc v HMRC* [2017] UKUT 34 (TCC). This case involved the "builders' block" i.e. the block on the recovery of input tax by builders on white goods that are installed in new houses. Referring to the decision of the CJEU in *Marks & Spencer plc v HMRC* (Case C-309/06) [2008] STC 1408 the Upper Tribunal said:

> "49. In *Marks & Spencer*, the issue before the Court of Justice concerned the claim for recovery of VAT wrongly accounted for on chocolate covered teacakes, which had over time been wrongly treated as biscuits (and thus as standard-rated supplies), but which should, under the domestic provisions, have been zero-rated. It was held (at [20] – [28]) that, first, Article 28(2) of the Sixth Directive [the predecessor of Article 110 PVD] did not provide a directly enforceable Community law right to have the supplies taxed at a zero rate. Community law did not require Member States to maintain exemptions with refund, and it was for the Member State alone to decide whether or not to retain a particular piece of legislation. Article 28(2) could be compared to a "stand-still" clause intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Directive. It was pursuant to national law that the taxpayer could claim the exemption with refund of the tax paid at the preceding stage.
>
> 50. The Court held, secondly, at [32] – [36], that the maintenance of exemptions or of reduced rates of VAT is permissible only in so far as it complies with the principles governing the common system of VAT, including that of fiscal neutrality. Those principles may be relied upon by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles."

230. I have concluded that applying a different VAT treatment (standard rating) to the digital editions of the titles from that applicable to the newsprint editions (zero rating) does not offend against the principle of fiscal neutrality. Although I am

satisfied that (with the exception of *The Sun Interactive App*) the digital editions were similar to the newsprint editions from the point of view of the consumer, I do not consider that the principle of fiscal neutrality can operate to extend the scope of zero rating from its original application to goods (i.e. newsprint) to services (i.e. digital editions).

231. The zero rating in respect of "newspapers" in 1991 applied only to printed matter. That "exemption with refund" complied with Community law because in 1991 "newspapers" could only have meant printed matter. There was no disparity in treatment between printed newspapers and digital editions because the latter did not exist (and neither party suggested that they did).[2] The zero rating provisions of Item 2 Group 3 Schedule 8 applied only to the supply of goods i.e. to printed newspapers. The scope of the zero rating provision was effectively "frozen" at 1991 (see the "standstill" references in *Talacre Beach*: Advocate General at [16] and the Court at [22]). By analogy, in that case the EU law principles concerning single supplies could not be used to expand the scope of a national law zero-rating statute. In my view it follows that the scope of the zero rating provision cannot be extended from the supply of goods to the supply services after 1991.

232. Effectively, this appeal involves a "black letter" boundary contained in Item 2 Group 3, to use McCombe LJ's terminology, which cannot be extended. This is not a case, like *Sub One*, where there was different treatment between traders supplying goods within the same exemption category. The digital editions of the titles, which constitute a supply of services, are simply not within the zero rating provisions and the scope of those provisions cannot be enlarged by the application of a principle of interpretation, such as that of fiscal neutrality. To expand the meaning of Item 2 Group 3 Schedule 8 to cover the digital editions would be an impermissible extension of those provisions.

EU consultations and draft Directive and Article 98 PVD

233. Mr Pleming devoted part of his submissions to the EU consultation and recent draft Directive in relation to digital publications. It is clear to me that the EU Commission proceeded on the assumption that the supply of digital publications fell outside Member States' provisions relating to reduced and zero rates of VAT. Nonetheless, although this supported Mr Pleming's other submissions, I do not think it is necessary for me to delve any deeper into this topic in this decision in the light of my conclusion that Item 2 Group 3 Schedule 8 is confined to the supply of printed goods.

[2] Group 4 Schedule 8 provides that "talking books" (e.g. "magnetic tape specially adapted for the recording and reproduction of speech for the blind or severely handicapped") for the blind and handicapped are zero rated. This zero rating provision was also contained in the Finance Act 1972. Mr Peacock accepted that Parliament had provided in 1972 for the delivery of information in magnetic tape format, being a format that was then available but submitted that nothing meaningful could be read into that provision about the scope of Group 3. In my view, Group 4 Schedule 8 provides, at best, slight inferential support for HMRC's position.

234. Similarly, although I accept Mr Pleming's submission that Article 98.2 specifically excluded electronically supplied services from the scope of reduced rates of VAT, I do not think that this sheds much light on the scope of the zero rating provisions introduced pursuant to Article 110 PVD, save to show that the EU legislature was alive to the distinction between printed and digital publications.

Single and multiple supplies

235. It was agreed between the parties that if I were to decide that some of the digital editions were standard rated and others were zero rated then, because the digital editions were sold as a "package", it would be necessary to determine the correct VAT treatment of the "package" at a subsequent hearing. However, in the light of my decision that none of the digital editions of the titles are zero rated this issue does not arise.

Decision

236. For the reasons given above, notwithstanding Mr Peacock's skilful and informative submissions, I dismiss these appeals.

Appeal Rights

237. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 8 MARCH 2018