Neutral Citation: [2023] UKFTT 00408 (TC)

Case Number: TC08813

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2019/01814, 01815, 02551, 04439, 04340

VALUE ADDED TAX – exemption for supplies of education – Article 132(1)(i) Principal VAT Directive – whether properly implemented by Group 6 Schedule 9 VATA 1994 - whether definition of an eligible body in Note (1) Group 6 breaches the principle of fiscal neutrality – Item 5B Group 6 – whether the consideration for courses supplied by two appellants to students who were eligible for student loans was ultimately a charge to funds provided by the Secretary of State – whether one appellant was a college of a UK university and qualified as an eligible body by virtue of Note 1(c) – whether one appellant which was an eligible body pursuant to Note 1(f) by virtue of teaching English as a foreign language was entitled to exemption for all supplies of education – appeals dismissed

Heard on: 16-18, 21-25, 28 November 2022
Judgment date: 03 May 2023

Before

Tribunal Judge Jonathan Cannan

Between

(1) ST PATRICK'S INTERNATIONAL COLLEGE LIMITED
(2) LONDON COLLEGE OF CONTEMPORARY ARTS LIMITED
(3) INTERACTIVE MANCHESTER LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellants: Nicola Shaw KC and Ben Blades of counsel instructed by PwC

For the Respondents: Raymond Hill and Laura Inglis of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. These appeals concern the exemption from Value Added Tax ("VAT") for certain supplies of education. In UK domestic law, the exemption appears in Group 6 Schedule 9 Value Added Tax Act 1994 ("VATA 1994"). The appellants ("SPIC", "LCCA" and "IMAN" respectively) are or were all providers of higher education courses. They contend that the domestic provisions do not properly implement Article 132(1)(i) of the Principal VAT Directive ("the PVD"). As such the appellants say that they are entitled to rely on the direct effect of the PVD and that their supplies are exempt pursuant to Article 132. In the alternative, the appellants contend that some of their supplies are exempt pursuant to the UK domestic provisions.

2. Articles 132 and 133 of the PVD provide, in so far as relevant, as follows:

> 132(1) Member States shall exempt the following transactions:
>
> > (a) …
> >
> > …
> >
> > (i) the provision of children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto, by bodies governed by public law having such as their aim or by other organisations recognised by the Member State concerned as having similar objects;
>
> 133 Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:
>
> > (a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

3. It can be seen that Article 132 is mandatory as to the exemption from VAT for education provided by certain bodies. Article 133 provides that member states may extend exemption to other bodies subject to certain conditions.

4. Group 6 Schedule 9 VATA 1994 purports to implement Articles 132 and 133. Exemption is by reference to various item numbers with accompanying notes. The relevant provisions are as follows:

> Item No
>
> 1. The provision by an eligible body of —
>
> (a) education,
>
> …
>
> 5B. The provision of education or vocational training and the supply, by the person providing that education or training, of any goods or services essential to that provision, to persons who are—
>
> (a) aged under 19,
>
> (b) aged 19 or over, in respect of education or training begun by them when they were aged under 19,
>
> …
>
> to the extent that the consideration payable is ultimately a charge to funds provided by the Secretary of State.

Notes:

(1) For the purposes of this Group an "eligible body" is —

(a) …

(b) a United Kingdom university, and any college, institution, school or hall of such a university;

(c) an institution —

(i) falling within section 91(3)(a), (b) or (c) or section 91(5)(b) or (c) of the Further and Higher Education Act 1992,

…

(e) a body which –

(i) is precluded from distributing and does not distribute any profit it makes; and

(ii) applies any profits made from supplies of a description within this Group to the continuance or improvement of such supplies;

(f) a body not falling within paragraphs (a) to (e) above which provides the teaching of English as a foreign language.

(2) A supply by a body, which is an eligible body only by virtue of falling within Note (1)(f), shall not fall within this Group insofar as it consists of the provision of anything other than the teaching of English as a foreign language.

5. Item 1 provides for exemption where the organisation making the supply of education is an eligible body as defined by Note (1). The institutions referred to in Note1(c) include Further Education Corporations ("FECs") and institutions designated by the Secretary of State. FEC's are institutions incorporated pursuant to the Further and Higher Education Act 1992 offering further education. Item 5B provides for exemption irrespective of whether the organisation making the supply is an eligible body.

6. These appeals are concerned with higher education courses. There is a distinction between further education and higher education. Further education is study after secondary school which does not include undergraduate or postgraduate degrees. Higher education is education which is part of an undergraduate or postgraduate degree course. Higher education includes Higher National Certificates ("HNCs") and Higher National Diplomas ("HNDs"). These are known as Level 4 and Level 5 qualifications respectively. An HNC is equivalent to the first year of a degree course. An HND is equivalent to the second year of a degree course. Level 6 is a degree course. In terms of provision there is an overlap. Some providers mainly providing further education also provide some higher education and vice versa.

7. The appeals are against various decisions and assessments to VAT relating to supplies in the period 1 December 2012 to 6 August 2017. That is the relevant period for these appeals and unless otherwise stated my findings cover that period. At the invitation of the parties, I shall deal with the appeals in principle, with issues of quantum to be determined by agreement of the parties or at a later date.

8. The appellants are all members of a group of companies known as Global University Systems Group ("GUS"). The education provided by each of the appellants in the relevant period can be very briefly summarised as follows:

(1) SPIC operated a further and higher education college in London providing, amongst other courses, a range of HNCs and HNDs in business management, tourism and hospitality, technology and health and social care.

(2) LCCA was a provider of further and higher education courses in fashion, visual arts, media, business and hospitality. Until 2016 it was a school of another company in the GUS Group. From 2016 it operated in partnership with South Thames College and Walsall College, both of which are providers of further and higher education.

(3) IMAN offered undergraduate and postgraduate degree courses as well as HNC and HND courses, professional programmes and certain English language courses. It was divided into four schools: an accountancy school, a business school, an English language school and a vocational school. Until 2016, IMAN also provided courses in collaboration with the University of Wales ("UoW"), London Metropolitan University ("LMU") and Grenoble Graduate School of Business ("Grenoble").

9. Not all the issues on these appeals arise in relation to each appellant. The issues may be summarised as follows:

(1) Were the appellants entitled to rely on the direct effect of Article 132 PVD? This is a pure question of law. In broad terms, the appellants say that the domestic provisions wrongly define eligibility for exemption by reference to the type of organisation, for example universities, rather than the nature of an organisation's objects. Further, they say that the UK has implemented Article 132 in a way which breaches the principle of fiscal neutrality. In broad terms, the appellants say that they made similar supplies to universities, colleges of universities and FECs but are being treated differently for VAT purposes.

(2) If the appellants were entitled to rely on the direct effect of Article 132, did their supplies qualify for exemption because the appellants have similar objects to bodies governed by public law which provide education?

(3) Were SPIC and LCCA entitled to exemption in any event, pursuant to Item 5B? Those appellants say that where they supplied designated courses for students who were entitled to student loans, some of those supplies fell within the terms of Item 5B. In particular, the consideration payable for those courses was ultimately a charge to funds provided by the Secretary of State.

(4) Was IMAN an "eligible body" within Note 1(b) on the basis that it was a college of a UK university?

(5) IMAN was an "eligible body" within Note 1(f) on the basis that it provided some teaching of English as a foreign language. Was it therefore entitled to exemption for all its supplies of education?

10. Ms Shaw KC put the appellants' case on the basis that issues (1) and (2) essentially come down to a question of fiscal neutrality, and she focussed her submissions on that question. I shall do the same, and treat issues (1) and (2) as a single issue.

11. I set out my principal findings of fact in the following section. My findings are based on the witness and documentary evidence before me, and I make those findings on the balance of probabilities. All the witnesses who gave oral evidence did so in a measured and helpful way.

12. The appellants' witnesses provided witness statements and all gave oral evidence. I had evidence from the following witnesses on behalf of the appellants:

(1) Professor Maurits van Rooijen, who is the chief academic officer of GUS and a non-executive director of SPIC.

(2) Mr Sagi Hartov, who is the executive chairman of LCCA.

(3) Mr Sharjeel Nawaz, who is director for strategy and innovation at GUS, and for a time was Principal of LCCA.

(4) Mr Valery Kisilevsky, who is the company secretary of IMAN. He is also the group managing director of GUS.

(5) Mr Alfred Morris who runs a consultancy company called Higher Education Associates. In that capacity, he has provided consultancy services to GUS including advice on corporate and academic governance matters and related regulatory requirements. To some extent Mr Morris' evidence was in the nature of expert evidence, his expertise deriving from senior positions which he has held in a number of universities in the UK in the period 1970 – 2020.

13. The respondents' witnesses provided witness statements and all gave oral evidence, save for Mr Smith and Mr Stronach whose evidence was not challenged. I had evidence from the following witnesses on behalf of the respondents:

(1) Ms Susan Lapworth, who is director of regulation at the Office for Students ("OfS"). Prior to 2018, she was director of regulation and assurance at the Higher Education Funding Council for England ("HEFCE").

(2) Ms Emma Davies, who is a deputy director in the Department for Education ("DfE"), leading the higher education quality and regulation division. She was not in post during the relevant period. It is accepted that her evidence was based on her consideration of contemporary documentation and discussions with colleagues who were involved in regulation during the relevant period.

(3) Mr Paul Williams, who is deputy director of student funding policy in the DfE.

(4) Mr Nolan Smith, who is director of resources and finance at the OfS.

(5) Mr Colin Stronach, who is head of allocation calculations in the Education and Skills Funding Agency ("ESFA").

14. The evidence and material before me included a large number of acronyms which I define during the course of this decision. That is an indication of the complexity of the regulatory framework that exists in relation to the provision and funding of higher education in England. To assist readers, I include an index of acronyms in an appendix to the decision.

15. I had the benefit of skeleton arguments from both parties and written notes on the evidence as part of the parties' closing submissions. I must pay tribute to the way in which counsel for both parties and those instructing them have marshalled the evidence and their submissions, which has greatly assisted me.

FINDINGS OF FACT

16. The main factual issues between the parties arise in connection with the regulatory regime which operated during the relevant period. The regulatory regime is not simply a matter of law, but also practice. Both parties invite me to make findings in relation to the regulatory regime by reference to public documents, and witness evidence describing the regime and how it applies to various providers of higher education in England. The supplies in the present appeals are all made in England and I should emphasise that I am solely concerned with the regulatory regime in England.

17. It is helpful to start with the regulatory regime and the funding of higher education, before going on to consider the appellants themselves, their positions within the higher education sector and the circumstances in which they provided higher education.

(1) The regulatory regime

18. I was not taken to the underlying legislative framework in detail, but it was common ground that the detailed regulatory requirements applying to various types of providers were a matter for various regulatory bodies. Witnesses gave evidence as to how the regulatory regime worked in practice and I was referred to publicly available documents which explain the regime. It is necessary to explore the regulatory regime in some detail.

19. Ms Lapworth was director of regulation and assurance at HEFCE between 2014 and 2018. In April 2018, HEFCE's role was taken over by the OfS where Ms Lapworth became the director for regulation. She is clearly well placed to describe the regulatory regime applicable to various types of providers and I have given her evidence particular weight.

20. The regulatory regime for providers of higher education has evolved during the relevant period. For example, stronger regulatory oversight was introduced in 2012-13 when annual tuition fee funding for designated courses increased from £3,375 to £6,000. The changes in 2012-13 reflected the desire of the DfE to attract new providers of higher education with a view to encouraging competition, promoting diversity and giving students more choice. At the same time, the DfE sought to maintain a rigorous approach to quality, financial sustainability, management and governance.

21. Providers of higher education include universities, colleges of universities, higher education colleges, FECs and private organisations such as the appellants. It is relevant to distinguish the following categories of higher education providers:

(1) Higher Education Institutions ("HEIs"). This term covers universities, colleges of universities, higher education corporations and certain bodies designated by the Secretary of State for Education ("the Secretary of State"). Higher education corporations are bodies which prior to 1988 were institutions maintained by local authorities, mainly polytechnics and colleges, which had a minimum number of higher education students.

(2) FECs which also offered higher education courses such as HNCs, HNDs and certain teacher training qualifications.

(3) Alternative Providers ("APs"), which comprise institutions offering higher education but which are not HEIs or FECs.

22. Within these categories, there are providers with degree awarding powers ("DAPs") and providers with university title which I describe in more detail below.

23. The status of an institution for the purposes of VAT exemption does not generally depend on whether the institution is a charity, a non-profit making institution or a profit-making institution. For example, there are profit-making universities such as BPP University which are entitled to exemption. The appellants are all profit-making institutions.

24. It is relevant at this stage to identify the two principal forms of funding of higher education providers in the relevant period, excluding research funding:

(1) Recurrent teaching grant funding to HEIs provided by the Higher Education Funding Council for England ("HEFCE").

(2) Tuition fee funding.

25. Recurrent teaching grant funding, which I shall describe as HEFCE funding, was subject to various conditions which I describe below. All HEIs could apply for this funding, but not all did apply.

26. Tuition fees are paid by students to the education provider. Many UK students qualify for student support from the Student Loans Company ("SLC"). Student support means support by way of grants or loans from the SLC to cover tuition fees and living costs. Student loans were introduced in 1998. They were available only to students on designated courses. Tuition fees are also paid by UK and international students who do not qualify for, or who do not require funding from the SLC. Providers of higher education who wanted to take international students were required to obtain Highly Trusted Sponsor Status from the Home Office so that the students could obtain visas. They were regulated for this purpose by the Home Office.

27. The main funding stream for all higher education providers is tuition fee funding. In 2014-15, HEFCE-funded providers generally received no more than 15% of their income by way of HEFCE grant funding. Most of their income came from tuition fees. Tuition fees were paid directly to the provider, either by the SLC or by the student when the student did not have a loan. Student loans were available in respect of eligible courses provided by designated providers and designated courses provided by APs. HEIs were automatically treated as designated providers and all their eligible courses qualified for SLC funding. APs could apply for specific course designation and if successful students on those courses would qualify for SLC funding. Courses provided by APs which were specifically designated were generally courses leading to an HNC or HND and degree courses provided pursuant to an arrangement with an HEI.

28. At this stage it is worth noting that the appellants fell into the category of APs with specific courses designated for student support and/or courses which were validated pursuant to an arrangement with an HEI. None of the appellants had university status or DAPs and had never applied for university status or DAPs. They were not FECs.

29. I shall consider the regulatory regime by reference to the following categories of providers:

(a) HEFCE-funded providers.

(b) APs

(c) Providers with DAPs.

(d) Providers with university title

30. Where an AP did not have university title, DAPs or any courses designated for student support then that AP would fall outside the regulatory framework for higher education. There is no suggestion that those APs would be entitled to VAT exemption.

(a) HEFCE-funded providers

31. Where an HEI received recurrent teaching grant funding from HEFCE, that funding was subject to conditions specified in a 'memorandum of assurance and accountability' ("the Memorandum"). The Memorandum was in two parts. Part one set out terms and conditions applicable to all HEIs. Part two was a funding agreement which was issued to each HEI annually and contained details of the grant and requirements specific to that provider.

32. The funding conditions in Part one included a limit on the tuition fees that could be charged to students and on the student loans that would be available for those courses. Between 1998 and 2006, HEFCE-funded providers were required to charge a prescribed course fee to the majority of students. From 2006 onwards, if an HEI had an access

agreement approved by the Office for Fair Access ("OFFA"), it benefited from a higher course fee limit than those HEIs which did not have an access agreement. A higher level of student support was also available.

33. An access agreement was a legally binding agreement to promote equality of opportunity in access to higher education. Individual agreements were negotiated with each HEI. The HEI would have to show specific plans to provide access to under-represented groups and an appropriate spending commitment to deliver those plans. They would be monitored and reviewed on an annual basis.

34. Conditions in the Memorandum required HEIs to:

(1) use grant funding for the educational purposes for which it was provided;
(2) participate in national quality assurance arrangements overseen by the Quality Assurance Agency for Higher Education ("the QAA").
(3) subscribe to the Higher Education Statistics Agency ("HESA") and submit the statistical information required by HEFCE.
(4) be governed effectively and be financially sustainable
(5) formally report to HEFCE on an annual basis that they had satisfied the conditions
(6) have an internal audit function and also be subject to audit by HEFCE or by the National Audit Office.

35. HEIs that were eligible for public funding from HEFCE were also subject to the public sector equality duty under section 149 of the Equality Act 2010. They were required to have regard to principles of equality in exercising their functions.

36. HEFCE had a duty pursuant to section 70 Further and Higher Education Act 1992 to make provision to assess the quality of education provided by HEFCE-funded institutions. When an institution first applied to become HEFCE-funded, the QAA would carry out a quality assessment. Thereafter, HEFCE-funded institutions were required to subscribe to the QAA which reviewed quality assurance on a 6-year cycle. This cyclical review activity of the QAA was removed in 2016, at which stage HEFCE started to look more closely at factors such as student outcomes, continuation rates and student satisfaction. A governance assessment required HEFCE-funded institutions to include quality assessment within their governance procedures and they were required to provide annual assurances in relation to quality. This marked a shift towards quality assurance being built on good governance.

37. In terms of governance, the Memorandum required HEFCE-funded institutions to make annual accountability returns to HEFCE. HEFCE conducted 6 yearly assurance reviews. Institutions were also required to take account of guidance known as the Committee of University Chairs Higher Education Code of Governance. Ms Davies' evidence, which I accept, was that HEIs had to demonstrate on an ongoing basis that they were complying with that code, in particular provisions as to academic freedom and the terms of office of governing bodies.

38. In order to receive HEFCE funding during the relevant period, HEIs had to submit to Privy Council oversight of their governing documents to protect the public interest in various matters. Those matters included the composition of governing bodies and academic freedom provisions. Any changes to the governing documents required Pricy Council approval. The Privy Council would normally take advice from the DfE.

39. In relation to financial sustainability, HEFCE-funded institutions were required to have a financial strategy for sustainability, and would be expected to make a surplus year on year. There were also principles which they were required to apply when entering into financial commitments. HEFCE would assess whether financial commitments presented challenges to

an institution's financial sustainability. HEFCE was looking at long-term financial sustainability, over a period beyond five years.

40. HEFCE-funded institutions were required to provide copies of their audited accounts to HEFCE, generally in December of each year, together with 3-year financial forecasts. If any issues were identified, HEFCE would engage with the institution to understand its financial strategy and the steps it was taking to ensure long-term sustainability.

41. It is convenient to note at this stage that FEC's could also obtain recurrent teaching grant funding from HEFCE, although they were principally funded by ESFA. They were regulated to an extent by conditions attached to the funding and were subject to quality assessment by HEFCE. HEFCE did not have a Memorandum with FECs because they were accountable to ESFA. Instead, HEFCE issued an annual funding agreement that was similar to the one for HEIs and incorporated relevant sections of Part one of the Memorandum.

42. For HEFCE-funded FECs, the constraints on fee charging for their higher education courses were the same as for HEIs under the Memorandum. FECs were also subject to the public sector equality duty because they received public funding.

(b) Alternative Providers

43. APs did not receive HEFCE funding. As such, they were not regulated by its terms and conditions of funding and did not fall within its quality assessment duty.

44. The courses of APs without university title or DAPs were not automatically designated as eligible for student loan funding. From 2009, to enable their students to obtain loans, APs could apply to the Secretary of State for Business Innovation and Skills ("BIS") for their courses to be designated. Initially, once a course was designated it was designated indefinitely. APs were also required to submit statistical information to HESA, although not to the same extent as HEFCE-funded institutions.

45. BIS had ultimate responsibility for higher education policy and provided funding for higher education through HEFCE and the SLC. It also managed the process of specific course designation. The regulator for APs was originally BIS, supported and advised by HEFCE. Later in the relevant period the DfE took over the role of BIS.

46. There was also oversight of APs where they offered courses which were validated or approved by another regulated institution, such as a university or a body with DAPs. In relation to HNCs and HNDs there was oversight by Pearson Edexcel, which was the awarding body for those qualifications.

47. Between 2011 and 2012, decisions by BIS on whether to grant designated course status for a course offered by an AP were based on very straightforward criteria. If the course was either an HNC, an HND or a degree course validated by a body with DAPs then the course would be designated. Any oversight was effectively limited to the contractual arrangements in place between the AP and either Pearson or the validating body. This was because there were relatively small numbers of students on courses provided by APs and the funding was considered "low risk". There was little if any direct regulation of APs in this period.

48. In 2012-13 the tuition fee funding for students on designated courses at APs was increased to £6,000 and there was a significant increase in students at APs. APs were not subject to course fee limits so in theory they could charge whatever level of fees they wished. However, their students were only eligible to receive a student tuition fee loan up to the funding cap. Between 2010 and 2013 the number of students on courses at APs claiming student support rose from 7,000 to 53,000. Half of that growth was accounted for by just five APs, including SPIC and LSBF. The government therefore moved to strengthen regulation of APs. Direct regulation of APs was introduced for the 2012-13 academic year. Student

number controls were introduced at the same time for APs with students on HNC and HND courses.

49. From March 2015 onwards, APs without DAPs had to have their courses designated each year. Designated courses of APs with DAPs did not require annual designation but their performance was monitored by HEFCE on behalf of BIS or the DfE. To obtain designation, APs had to satisfy criteria regarding teaching quality, financial sustainability, management and governance and student outcomes.

50. Applications for specific course designation were made to HEFCE which carried out assessments and would highlight any concerns. The decision was made by the DfE. Mr Williams chaired the panel at the DfE which considered such applications. Applications had to be made annually and an applicant had to have a recent and successful QAA review.

51. The DfE issued guidance for APs on specific course designation. In 2017, the DfE was the regulatory body for APs with specific course designation. The process of obtaining specific course designation was managed by HEFCE on behalf of the DfE. In broad terms the guidance remained the same between 2014 and 2017. By way of overview, it stated:

> The principles of regulation applied to alternative providers subject to the specific course designation process are designed to be consistent, as far as possible, with those applied to the HEFCE-funded sector in relation to the financial health of institutions and the academic standards and quality of their higher education provision.
>
> …
>
> Specific course designation has four key criteria which you have to satisfy for your courses to be designated. These are:
>
> • quality assessment;
> • academic performance/track record;
> • financial sustainability, management and governance; and
> • course eligibility.

52. The purpose of the quality assessment was to ensure that students were offered a high quality higher education experience. APs were required to have a successful review from the QAA when courses were first designated. Such a review would generally take at least 9 months to complete. There was also a system of annual monitoring and 5-yearly reviews. A review might also be triggered by another event, such as student numbers increasing by more than 10%.

53. In relation to quality assessments, APs with designated courses were required to join the QAA and a new category of membership was created in 2012. They were subject to the QAA process of what was known as integrated quality enhancement review ("IQER"). From September 2015, the IQER was replaced with a Higher Education Review (Alternative Providers) ("HER(AP)") as a condition of student support for designated courses. Once an AP had achieved a successful HER(AP), it would be subject to periodic review. In the years between reviews, there would be annual quality monitoring reviews by the QAA, with annual visits.

54. The purpose of the academic performance criteria was to ensure that students would achieve positive outcomes from their courses. The DfE focussed on performance indicators measuring student recruitment, progression, and qualifications based on data supplied to HESA. APs were required to have procedures in place to track student attendance and to have a procedure for dealing with student complaints.

55. The overall purpose of the criteria for financial sustainability, management and governance was to provide confidence that students would be able to achieve a qualification at the end of the course. Financial sustainability was required to be demonstrated over the medium term. The guidance states:

> The overall purpose of the financial sustainability, management and governance (FSMG) criteria are to ensure that students can have reasonable confidence that they will be able to complete their course.
> To meet the criteria, you must demonstrate that your organisation is:
> • financially viable and sustainable in the medium term;
> • owned and managed by fit and proper persons; and
> • properly constituted and fit to receive public funds.

56. The financial sustainability test looked shorter term than that for HEFCE-funded institutions. The DfE had to be satisfied that students on a 3 year course would be able to complete their course. This looked at audited accounts and 3-year financial forecasts. There was also a more limited assessment of management and governance compared to HEFCE-funded institutions. For example, this looked at the AP's filing history at Companies House and whether directors had been disqualified.

57. To be eligible, courses had to be at least one year in duration and be of a standard higher than A Levels, such as an HNC, HND, foundation degree or a first degree. They had to be validated or approved by an appropriate body. The appellants' HNC and HND courses were approved by Pearson/Edexcel, which granted "centre approval" to institutions to provide its courses. In the case of IMAN, some courses were validated by UoW and LMU.

58. These requirements had to be met by APs on a continuing basis. In particular, academic quality was overseen by the QAA and financial sustainability, management and governance were overseen by HEFCE on behalf of the DfE.

59. APs did not receive direct public funding and could not conclude access agreements with OFFA. As such, Ms Lapworth's evidence was that they were not subject to the public sector equality duty. There was some issue about this as a matter of law. The parties did not make submissions on the issue and it is not necessary for me to resolve it. APs were required to subscribe to the QAA and its Quality Code promoted diversity and equality. Statistics show that students on designated courses at APs tend to be more representative in terms of gender, age and ethnicity than students at HEIs.

60. In July 2013, HEFCE published an "Operating Framework" which explained how higher education providers in England were regulated. The operating framework was intended to explain the role of all regulatory bodies, including HEFCE, the QAA, HESA, BIS and OFFA. It distinguished HEIs, FECs offering higher education and APs. HEFCE was the direct regulator for HEIs which it funded. It had a coordinating role in the regulation of other higher education providers, holding data relevant to their performance and accountability. It could also impose sanctions to protect the interests of students and the public.

61. The Operating Framework states as follows:

> 12. Designated higher education providers are subject to the same essential requirements. The higher education they provide must meet required threshold standards, and they must be sustainable, well-governed organisations. The conditions and agreements in place – including the HEFCE Financial Memorandum – provide assurance that these requirements are being met… Obligations on providers vary depending on the type of organisation, and whether or not they have access to HEFCE funding, student support funding, or both.

62. I am satisfied that the Operating Framework was a public-facing document which was intended to provide a high level view of the regulatory regime, principally for students and their parents. It suggested that the level of regulation was "essentially the same" for all providers. However, based on the evidence as a whole, I accept Ms Lapworth's evidence at various stages to the effect:

> The substance of those particular tests is quite different depending on the status of a provider and whether it's applying for coursing designation or HEFCE designation or DAPs or [university title] and so on.

> … there are substantive differences, rather than simply differences of detail.
>
> … I am saying that those substantive requirements [for HEFCE-funded institutions], particularly as they relate to financial sustainability and management and governance, are quite different when you look at the substantive requirements that were in place through the specific course designation process for APs.

63. Consistent with Ms Lapworth's evidence, Mr Williams referred to differences, not just of detail but of degree. Ms Davies described the regulation of APs as involving a "lighter touch".

64. Mr Morris maintained that institutions which were not HEFCE-funded had similar obligations under their course designations. However, he accepted that the move to a standard set of accountability requirements was an aspiration which was not realised until the OfS was set up in 2018, after the relevant period. Indeed, the Operational Framework noted that:

> For all higher education providers (HEIs, FECs and alternative providers) there will in future be a formal, legal document which sets out the conditions of designation for student support. As far as possible we would like to move to a position where HEIs, FECs and alternative providers would be subject to a standard set of accountability requirements but we are constrained by the existing legislation at the present time.

65. The more limited regulation of APs reflected the fact that the DfE wanted to open up competition to APs, improve diversity and innovation and minimise barriers to entry.

66. Ms Shaw submitted that the real distinction in relation to regulation was between providers of designated higher education, including APs on the one hand, and other providers of higher education who were outside the regulatory regime altogether. In the latter category, students would need to satisfy themselves as to the quality of the course and the financial sustainability of the provider. She submitted that a regulatory regime which was essentially the same for APs and HEFCE-funded institutions and others would be consistent with the policy objective behind specific course designation, which was to promote competition and choice in higher education. In light of my findings based on Ms Lapworth's evidence, I do not accept the first point. The second point may be true, but the Operating Framework itself acknowledged that this was an aspiration.

67. APs are required to provide data to HESA, although the data that must be submitted is more limited than that required from HESCE-funded institutions. APs were required to submit data on designated courses, including student progress. HEFCE-funded providers were required to provide more detailed data on courses and teaching staff amongst other things. HEFCE conducted data assurance work on the data from HEFCE-funded providers. Data provided by APs was considered by the DfE and informed decisions about the designation status of an AP's courses. If there was a risk that students would not achieve their qualification or positive outcomes then sanctions were available to the DfE. Potential sanctions included the issue of an improvement notice, a freeze or cut in student numbers and, exceptionally, withdrawal of designation.

68. APs such as the appellants were also monitored by the bodies which validated their courses, such as Pearson. Pearson required its approved providers to have various resources, policies and procedures in place, such as appropriately qualified staff, quality assurance systems and equal opportunity policies. Further, where a degree course was validated by an institution with DAPs, the QAA required that institution to take ultimate responsibility for academic standards and the quality of learning opportunities. Those institutions were expected to enter into a legally binding written agreement setting out the rights and obligations of the parties including regular monitoring and review. This applied to the relationship between IMAN and UoW and LMU.

(c) Providers with DAPs

69. Section 214 of the Education Reform Act 1988 made it a criminal offence to award or offer a degree without authorisation. Such authorisation is known as 'degree awarding powers'. In the relevant period, DAPs were granted by Royal Charter or Act of Parliament pursuant to section 214(2) of the 1988 Act. Institutions granted DAPs by Royal Charter or Act of Parliament hold DAPs in perpetuity. It was also possible for the Privy Council to designate bodies as having DAPs. In those circumstances, the institution was granted DAPs for a fixed term of 6 years, after which they were required to re-apply.

70. In order to be eligible to apply for DAPs certain criteria had to be met. An institution had to demonstrate that it had at least four consecutive years' experience delivering higher education courses at a level at least equivalent to Level 6, immediately preceding the year of application. It also had to demonstrate that the majority of its higher education students were enrolled on courses which were recognised as being at Level 6 or above. These were known as "pre-application criteria".

71. The application was made in the first instance to BIS. HEFCE was responsible for processing and assessing applications on behalf of BIS but decisions rested with the Secretary of State and the Privy Council. On receipt of the application, HEFCE would ask the QAA to prepare formal advice. The QAA had an Advisory Committee on Degree Awarding Powers which oversaw its work in this area.

72. If the application fulfilled the basic eligibility criteria, it would proceed to detailed scrutiny. The QAA would inform HEFCE and directly contact the applicant to discuss the next steps in the process. The scrutiny process was intensive and was likely to last at least 12 -18 months. Once the scrutiny was complete, the QAA advisory committee would make a recommendation to the QAA Board as to whether the application should succeed.

73. The detailed criteria considered by HEFCE included governance and academic management, academic standards and quality assurance, scholarship and teaching environment. Guidance issued by BIS on applications for DAPs set out detailed evidential requirements which applicants were required to meet. It stated that these criteria were designed to establish that an applicant was a "well-founded, cohesive and self-critical academic community that can demonstrate firm guardianship of its standards".

74. The scrutiny of an application for DAPs depended on whether the applicant was HEFCE-funded or an AP. Ms Lapworth's evidence was that the assessment of HEFCE-funded institutions applying for DAPs built on the assessment for HEFCE funding. They had already faced a substantive regulatory test to obtain HEFCE funding. Obtaining DAPs required another assessment that was a "substantive assessment". For APs, the test for DAPs built on the test for course designation, but the DAPs test was "more thorough", "more comprehensive", and "more detailed at that point". I accept Ms Lapworth's evidence in this regard.

75. There was no continuous regulation once an institution obtained DAPs, but where DAPs were time limited the institution would have to re-apply and satisfy the conditions on re-application. The Guidance said as follows about re-application:

> The criteria for the renewal of degree-awarding powers are that the organisation has:
> • subscribed to QAA for the period it has held degree awarding powers
> • been subject to an external review by QAA; and
> • not received unsatisfactory judgements at the time of the QAA review. If it obtains an unsatisfactory judgement, it will be required to undergo a process of follow-up activity or partial or full review by QAA, and to achieve satisfactory judgements in all areas, as a criterion for the renewal of the degree-awarding powers.

76. The appellants did not meet the criteria to apply for DAPs during the relevant period because the majority of their courses were at Level 4 and Level 5. SPIC aspired to apply for DAPs but it had work to do in that regard. Its strategic plan for 2017-2022 noted that it would like to initiate and possibly achieve DAPs in the next five years by focusing on quality, reputation and financial sustainability. LCCA had a similar aspiration to achieve DAPs.

77. An AP with DAPS did not require individual course designation. All its eligible courses would be treated as designated courses.

(d) Providers with university title

78. The Companies Act 2006 places restrictions on the use of certain sensitive words in a company name or business name. Those restrictions apply to use of the words "university" and "university college". In the relevant period it was necessary to have permission from BIS to use those names. The process was administered by HEFCE.

79. An institution could only obtain university title once it had obtained DAPs. The Privy Council is responsible for granting the right to use the title university or university college. The right to use those titles is subject to specific conditions and may be obtained either by Royal Charter or Act of Parliament, or by obtaining approval under the Companies Act 2006. For example, I understand that BPP University has approval pursuant to Companies Act 2006 to use the title.

80. BIS issued guidance as to the criteria and process for obtaining university title. An institution could only obtain university title if it satisfied a "rigorous and thorough" application process which would take at least 6 months in a straightforward case. It would normally have to have at least 1,000 full time equivalent higher education students, of whom at least 750 were registered on degree courses.

81. Applicants for university title had to meet criteria as to quality and academic standards, management, governance and financial sustainability over the medium to long term. The consideration of quality and academic standards is based on the "rigorous scrutiny process" involved in obtaining DAPs. HEFCE will seek advice from the QAA based on a recent review. It also takes into account data from HESA on student retention and completion rates.

82. It is clear from the BIS guidance that the good governance criteria for obtaining university title were more stringent than those for obtaining HEFCE funding and specific course designation. Applicants who were not HEFCE-funded were required to commission a report on student numbers and governance from their external auditors or an independent consultant with appropriate expertise. The guidance states as follows in relation to non-HEFCE funded applicants:

> Where you have specific course or institutional designation you should note that a satisfactory assessment for this purpose does not necessarily mean that you will meet all the good governance criteria for university title or university college title. This could be because, for example, specific course designation is focussed on the medium term (up to three years) whereas university title and university college title are focussed on the medium to long term to ensure your long term commitment to higher education and the interests of your students.

83. In relation to financial sustainability, HEFCE would take into account data already provided in connection with specific designation of courses.

84. The role of HEFCE in the application process was to gather information and provide a detailed assessment in the relevant areas. The decision to award university title was taken in government, by the Privy Council for HEFCE-funded applicants and by BIS for AP applicants.

85. There was no ongoing additional regulation of institutions which had obtained university title.

The HEFCE register

86. With effect from 2014-15, HEFCE published a register of every higher education provider which provided designated courses. The register included:

(1) The institution's higher education status. In particular whether it was a university, designated for HEFCE funding, had DAPs, had an access agreement with OFFA or was an exempt charity.

(2) Whether students could apply for student loans in respect of its courses.

(3) The responsibilities of the institution, including whether it was required to demonstrate financial sustainability, meet quality assessment requirements and/or provide information to HESA on students and performance

(4) Any limits on the student fees it could charge.

87. Many providers of higher education are charities, which would normally involve regulation by the Charity Commission to ensure compliance with charity law. Universities were exempt from regulation by the Charity Commission. Instead, HEFCE ensured that they complied with charity law.

88. In relation to quality assessment, there was a link where relevant to the results of the annual quality review and a summary as to whether it met the quality and standards requirements. This page also identified whether the institution had a Teaching Excellence Framework rating ("TEF rating"). TEF ratings were introduced in 2016-17 as an award by HEFCE which rated HEFCE-funded institutions in terms of consistent delivery of teaching, learning and outcomes for students. The awards were indicated as gold, silver or bronze. The TEF rating was taken into account in relation to the fees that could be charged by an institution. To obtain a TEF rating, institutions were required to return student data to HESA over a sufficient period of time. It was voluntary for APs because they did not generally have a sufficient record of data submitted to HESA. However, they were able to receive an unclassified TEF rating. For example, in 2017 SPIC was given a TEF Year Two provisional award.

89. When I come to look at the individual appellants I shall summarise their entries on the HEFCE register in 2017.

(2) Funding of higher education

90. The current system of student loans for tuition fees and maintenance was introduced in 1998. These appeals are concerned with loans for tuition fees. Repayment of tuition fee loans is contingent on the level of a student's earnings following completion of their studies.

91. Maximum tuition fee loans for full-time students were £3,375 in 2011-12. In 2012-13 the maximum tuition fee loan for new students was increased to £6,000. For HEFCE-funded providers the maximum fees chargeable to students and the maximum tuition fee loan to students were £6,000, unless the provider had an access agreement with OFFA in which case the maximum was £9,000. The fees chargeable to students by APs were not capped, but the maximum student loan was £6,000. There were further small increases to these limits in 2017-18, in part depending on whether the provider had a TEF rating, but that is outside the relevant period.

92. Student loans are delivered and administered by the SLC, which is an executive non-departmental public body sponsored by the DfE. Prior to 2015-16 it was sponsored by BIS. It

is owned by the DfE and the devolved assemblies. In England, the SLC operates through Student Finance England.

93. The courses offered by the appellants were designated courses which attracted student support by way of grants and loans for tuition fees and maintenance. APs such as the appellants could charge course fees which were higher than the cap, but in those circumstances the students would have to fund any excess. In practice, the appellants could not and did not charge more than the capped level of tuition fee support.

94. The SLC entered into a contractual relationship with students who qualified for loans. This was described as a student finance declaration form and refers to a "loan contract". Prior to entering into this agreement, a student will have entered into a written contract with the provider of a designated course. Loans are made once the student starts their designated course. The application form for a loan in 2012-13 included the following declarations:

> **Loan Contract**
>
> **a** …
>
> **b** I acknowledge and agree that any loan(s) made to me by the Secretary of State for Business, Innovation and Skills, 'the lender' … will be on the terms set out in these declarations and in Regulations …
>
> **c** I undertake to repay the lender any loan(s) made to me, together with all and any interest…
>
> **d** I agree that any loan(s) made to me as a consequence of the acceptance of my application by the lender is a/are contract(s) between me and the lender which binds me from the payment to me of the first loan advance and that the repayment of any such loan(s), together with all and any interest, penalties and charges which apply, will be due by me to the lender as a debt.
>
> **e** I agree that I shall be obliged to make repayment of my loan(s) …

95. Tuition fee loans are paid directly by SLC to the relevant higher education provider. In 2012, repayment of the loan plus interest started in the April following completion of the course. However, repayment was subject to the former student's income being above a certain threshold, which in turn depend on when the loan was first taken out. The repayment threshold increased over time. For loans taken out since 2012-13 the current repayment threshold is £27,295. Loans are repaid by students at the rate of 9% of income above the threshold in any tax year. Repayments are collected through HMRC, either via PAYE or self-assessment. Different rates of repayment and thresholds apply to students who are not UK resident at the point of repayment.

96. The timing and amount of repayments were governed by the Education (Student Loan) (Repayment) Regulations 2009. The student committed to repaying the loan in accordance with the regulations in force at the time the repayment became due. Students were specifically advised that the regulations and the terms of their loan may change from time to time.

97. In certain circumstances loans would be cancelled. This included on death before the loan was repaid, or if the former student became disabled and permanently unfit for work. Loans were also cancelled after a certain period of time. For students entering higher education on or after 1 September 2012, loans and interest outstanding would be written off after 30 years. A forecast in 2017-18 indicated that 30% of full time higher education entrants were expected to fully repay their loan within the 30 year period. Whilst most students would repay at least some of their loan, the majority were not expected to fully repay their loan. It was predicted that 45% of loan outlay in respect of full-time students would not be repaid. There are similar patterns for subsequent years and in relation to part-time students, although some 50% of part-time students were expected to repay their loans in full.

98. Mr Williams described student loans as being "subsidised by the taxpayer". He acknowledged that there is an expectation that on average a proportion of all student loans will not be repaid. He accepted that the purpose of the regulation of APs was to protect the interests of students and to ensure that expenditure of public money was properly managed

according to Treasury rules. The Operating Framework described the purpose of regulation as ensuring accountability for public funding and safeguarding the public interest:

> The operating framework for higher education in England is designed to ensure accountability for public funding, protect the student interest, and safeguard institutional autonomy and academic freedom …
>
> [The] approach aims to balance the needs of a more open market for higher education with the absolute requirement for effective safeguards to protect the student and public interest.

99. I am satisfied from the evidence that regulation of APs in relation to designated courses was introduced at least partly because they were in receipt of public funds and should be accountable to ensure value for money. It was also to protect students undertaking designated courses and to give students confidence in the courses.

100. Ms Shaw submitted that APs of designated courses were required to act in the public interest. I am not satisfied that there was a duty on APs to act in the public interest as such. However, plainly there was a public interest in the provision of good quality higher education and to ensure accountability and value for money in respect of public funds provided by way of student loans.

(3) The appellant's generally

101. I turn now to consider facts relevant to each appellant. It is convenient this stage to record that it was not disputed that profits made by the appellants generally aided the development of education within each company and the wider GUS Group. There was no evidence before me as to the distribution of profits by the appellants, but nothing turns on that. The appellants each invested significantly in the provision of education and vocational training.

SPIC

102. In September 2012, SPIC delivered education across six academic schools: Art and Design, Business Management, Health and Social Care Management, Hospitality Management, Law, and Technology. It rapidly expanded during the relevant period. In September 2012, SPIC had roughly 640 full-time students. By October 2018 it had 2449 students.

103. The internal governance of SPIC has altered over time. For most of the relevant period, the senior decision making body was a board of governors which was responsible for strategic and operational decisions. The board of governors set and administered SPIC's budgets. There was an independent academic board which had oversight of academic matters. This form of internal governance is typical of higher education providers generally.

104. The remit of the academic board included: (1) ensuring the college took appropriate account of the requirements of all relevant higher education, academic, professional and statutory bodies, (2) monitoring and reviewing academic policies, procedures and systems for quality management, and (3) ensuring that the regulatory framework governing academic administrative procedures within the college remained appropriate and fully implemented. SPIC measured its academic success principally by reference to progression rates, completion rates, student satisfaction rates and employment rates.

105. SPIC's stated aims were to widen participation in education, empower its students through education and to encourage social inclusivity. These remained SPIC's aims throughout the relevant period. Ultimately it aimed to equip its students to "thrive in the working world". Its students were largely mature students who had typically left school without A' levels or any equivalent qualification.

106. HEIs generally have similar aims such as the advancement of education, widening participation in higher education and for some institutions, not including the appellants, the advancement of research.
107. SPIC voluntarily adopted a general commitment to widening access. It had a statement on its website demonstrating its commitment to widening access and it was highly effective in having a majority of its students drawn from minority backgrounds. It prioritised access to those from deprived areas or backgrounds. One of its stated values was to "aspire to be a model of good equality and diversity practice". It was among only two or three higher education providers which had a majority of its students from ethnic minorities. SPIC sought to eradicate financial barriers to higher education through a hardship fund.
108. In contrast, HEFCE-funded institutions which entered into access agreements with OFFA were obliged to promote equality of opportunity for under-represented groups pursuant to those agreements. They were subject to specific requirements and monitoring.
109. The majority of students at SPIC were studying HNC and HND courses accredited by Pearson Edexcel. These were designated courses and covered in particular business management, information systems and network engineering. Successful completion of an HND would grant access onto the final year of a relevant degree course. Pearson maintained ultimate control over the structure and delivery of the courses. It prescribed the curriculum and operated as the examining body. The syllabus and examination procedures were the same regardless of the provider's identity.
110. The fees charged by SPIC for designated courses from 2012-13 onwards were generally £6,000. Whilst SPIC was not subject to any fee cap it could not in practice charge more than the maximum amount of tuition fee funding available from the SLC. This was because of competitive forces and also SPIC's commitment to equality and diversity. APs providing HNCs and HNDs would typically charge tuition fees at the same rate as the SLC funding available. Competition with similar providers was high, particularly where similar courses were offered by other institutions based in London such as the University of East London.
111. The evidence included the IQER of SPIC conducted by the QAA in September 2012. The review concluded that there was confidence in SPIC's management of its responsibilities and the standards of the awards it offered.
112. The HEFCE register for SPIC in 2017 showed that it had some designated courses for student support and that student finance was available for those courses. It also showed that SPIC was required to demonstrate financial sustainability, have regular quality reviews, provide information to HESA and ensure student complaints were reviewed independently. There was a link to its quality review outcomes which also stated:

> Since September 2015, Government policy has been that all alternative higher education providers in England, who want their students to be eligible for student support, have had to have a successful Higher Education Review (Alternative Providers) (HERAP) from the Quality Assurance Agency (QAA) on entry. These providers must maintain their relationship with the QAA and continue to meet the expected standards during annual monitoring and in any future reviews.

113. SPIC produced a strategic 5-year plan in 2017, indicating that it aspired to obtain DAPs. One of the obstacles was that in 2017 SPIC did not have a sufficient proportion of Level 6 students. The plan included a brief roadmap to obtaining DAPs and the work that it would have to do to obtain those powers.

LCCA

114. LCCA was originally a faculty of the London School of Business and Finance ("LSBF"), albeit operating under its own name. I understand that LSBF became a part of

GUS at some stage. In 2016, LCCA started to operate independently of LSBF. It set up its own academic board and governance structure but it remained within the GUS group.

115. LCCA offered a range of academic courses including foundation courses, HNCs and HNDs, BA degree courses and postgraduate degree courses. The courses were generally concerned with fashion, visual arts, media, business and hospitality. LCCA was comprised of four schools: the School of Fashion and Design, the School of Still and Moving Image, the School of Graphic and Spacial Design and the School of Creative Management. The courses were principally taught from two campuses in central London.

116. Some 90% of LCCA students were studying HNC and HND courses and most received student support from the SLC. Until 2016 these courses were provided pursuant to the status of LSBF as an approved centre by Pearson. Thereafter, the courses were offered pursuant to the approved centre status of Walsall College and South Thames College. Similar courses were provided by FECs and universities in the London area. LCCA obtained direct Pearson approval in November 2017, after the end of the relevant period. Pearson would conduct quality assurance visits to LCCA to ensure its standards were being met. Students who had successfully completed those courses could go on to further study and obtain a full degree pursuant to agreements it had with UK universities such as the University of East London and the University for the Creative Arts.

117. LCCA also offered degree courses and postgraduate degree courses pursuant to agreements with overseas institutions such as Grenoble in France and the International Telematic University, in Italy.

118. The stated aim of LCCA was to widen participation in high quality education. In particular, it sought to provide education opportunities to students from disadvantaged backgrounds. It considered that its focus on diversity and widening participation was greater than many other providers of higher education prior to the formation of the OfS in 2018.

119. LCCA had a particular focus on the employment prospects of students following completion of their studies. It sought to provide students with the skills and technical knowledge to obtain employment. It had the motto "Making Art Work".

120. LCCA's strategic objectives were: (1) curriculum innovation, (2) developing partnerships with other domestic and international providers of education, (3) ensuring financial sustainability by growing student numbers, (4) targeting 70% completion rates and 80% student satisfaction rates, (5) developing teaching excellence, (6) acquiring DAPs and (7) diversifying the courses on offer.

121. Mr Hartov's evidence was that LCCA had regular visits from the QAA reviewing academic standards and student satisfaction. However, Mr Nawaz said that QAA reviews were "desktop" reviews and there would only be a visit in exceptional circumstances if a desktop review indicated any problems. For example, issues with student retention, performance or satisfaction. I have already made findings in relation to the regulatory regime for APs generally, including a finding that the QAA would make annual visits to APs with designated courses.

122. The HEFCE register entry for LCCA in 2017 showed that it delivered higher education on behalf of a HEFCE-funded provider, which was identified as South Thames College. It did not have its own designated courses. There was no reference to any regulatory requirements for LCCA, but the entry noted that students were registered with South Thames College and taught by LCCA. South Thames College would be subject to the regulatory requirements.

IMAN

123. IMAN was an associate of LSBF and operated in Manchester from 2009 onwards. At that time, LSBF was already an established provider of business, vocational, accountancy and English language schools in London. IMAN traded under various names during the relevant

period including LSBF Manchester and the Language Gallery. During the relevant period, IMAN comprised four schools: the professional school, the business school, the language school and the vocational school. It ceased enrolling new students in 2016 and is now a dormant company.

124. The primary aim of IMAN was the provision of higher education. It was an AP in respect of courses which were designated courses or courses validated by an HEI.

125. IMAN's publicly stated aims were expressed slightly differently in relation to each school of study. The theme running though those aims was in broad terms to "prepare students for leadership, excellence and success". It sought to provide students with "opportunities to develop and flourish" and "opportunities to advance knowledge and practice". In pursuing those aims it sought to be recognised as "providing a quality higher educational experience". It had a focus on promoting equality and diversity, academic excellence and student employability.

126. LSBF had a Higher Education Strategy document which described the opportunities for students arising from the range of UK and international partnerships it intended to develop with universities. This document did not specifically refer to UoW or LMU. Neither did the LSBF Student Handbook for 2015.

127. IMAN did not have its own entry on the HEFCE register, but its courses were included under the entry for LSBF.

128. Each of IMAN's four schools offered a targeted range of courses. The four schools operated as follows.

The Professional School

129. The professional school offered courses leading to professional qualifications with the Association of Chartered Certified Accountants ("ACCA"), the Chartered Institute of Management Accountants, the Chartered Financial Analyst Institute and the Chartered Institute of Marketing. IMAN was accredited to provide these courses by the relevant professional bodies. The course content and examination were designed by the professional bodies and were identical to the same courses provided by other accredited providers. Other providers included various universities and FECs.

130. IMAN offered an option to students studying for the ACCA qualification to add an MBA course and qualification to their studies. Mr Kisilevsky thought that the majority of ACCA students did the combined course. IMAN's brochure for the professional school stated that the MBA awarding body would be "one of LSBF's partner universities" which may be subject to change from time to time. The ACCA course would typically last between 2 and 4 years, after which many students would start the MBA element of the combined course. Some students might start the MBA element before completing the ACCA course, having passed 9 out of 12 units on the ACCA course.

The Business School

131. The business school provided undergraduate and postgraduate business-focused degree courses validated by UoW, LMU and Grenoble. These courses were provided pursuant to agreements between the partner institutions and LSBF, acting on its own behalf and its associated companies such as IMAN.

132. The courses provided in conjunction with UoW and LMU included various MBA courses with different specialisations, such as project management or Islamic finance and banking. Various MSc courses in marketing and finance were also offered. These were generally one year postgraduate courses. It will be necessary to consider the detailed provisions of the agreements which IMAN had with UoW and LMU.

Validation agreement with UoW

133. UoW did not itself teach students in the relevant period. It was an awarding body and teaching was carried out by other institutions. It had very few physical student resources, other than a Welsh language library. It had no student union facilities.

134. The agreement between IMAN and UoW was dated December 2009 and described as a "Validation Agreement". It covered 20 specific courses identified in the agreement. The agreement provided that courses would be designed and taught by IMAN but would be validated, overseen and qualifications awarded by UoW. The agreement commenced on 3 November 2009 for a minimum period of 5 years and was to continue thereafter from year to year until terminated. In the event, it continued until about 2017. It was initially agreed that the teaching by LSBF and associated entities would take place in London. IMAN was subsequently authorised to teach the courses in Manchester. The relevant terms of the agreement may be summarised as follows:

(1) IMAN was obliged to seek candidates and to enrol at least 10 students on each course. UoW had absolute discretion as to the contents of any promotional material prepared for this purpose. The maximum number of students to be enrolled was to be set out in writing before the start of each academic year by UoW.

(2) The entry requirements, in addition to a minimum English language requirement, were agreed to be either a degree recognised by UoW or relevant experience in accordance with UoW's academic protocols and regulations.

(3) UoW notified IMAN of the registration information which it required in respect of each student to be enrolled onto a course. UoW was not required to enrol on a course any student where it had not received the required registration information.

(4) UoW agreed to award its qualification to any student enrolled on a course who successfully completed the course in accordance with UoW requirements.

(5) IMAN was required to pay to UoW certain fees required by the agreement.

(6) IMAN prepared the courses. Draft assessment materials including examination papers and course assessments together with the names of persons who would act as internal examiners for those assessments were to be submitted to UoW. Internal examiners were to be members of IMAN's teaching staff. UoW had absolute discretion to require amendments to be made to those materials or to disqualify any internal examiner.

(7) There was an examination board of external examiners to be appointed by UoW. The examination board was permitted to visit IMAN for the purpose of finalising marks awarded to students by the internal examiner.

(8) Any changes in relation to the courses were subject to the prior approval of UoW.

(9) A joint studies board with representatives of IMAN and UoW was to be set up, meeting at least every year to consider the course, including any amendments to the course.

(10) UoW was to hold ultimate responsibility for the academic standard of the courses and IMAN agreed to implement UoW quality assurance procedures. IMAN agreed to participate fully in reviews by UoW of its validated courses, including reviews by the QAA. UoW was also entitled to regularly review IMAN's performance under the agreement, and IMAN was required to provide all reasonable information and documents for that purpose. If reviews by UoW identified problems or issues then

UoW could require IMAN to take action, failing which it was entitled to terminate the agreement.

(11) There were provisions as to the ratio of teaching staff to students which could not be reduced without the approval of UoW.

(12) Students could use the UoW complaints procedure.

(13) Students could use the UoW provisions for appeals in relation to assessments and awards.

(14) UoW had a right to terminate the agreement in certain circumstances, including if IMAN was in breach. After November 2011, it could also terminate the agreement on 6 months' notice without reason.

(15) The agreement expressly provided that it did not create a partnership, joint venture or a relationship of principal and agent.

135. The evidence included an external examiner's report by a senior lecturer from Newcastle University Business School. The report considered various matters, including the standard of the course and marking, the course aims, the general quality of students' work, the methods of assessment and the quality of teaching.

Joint venture agreement with LMU

136. LSBF and associated companies including IMAN entered into a joint venture agreement with LMU on 5 April 2012. The agreement covered the provision of various courses by IMAN in the fields of accountancy, finance, marketing and business administration. The joint venture related to the design, validation, marketing and delivery of higher education courses. Most of the courses led to BSc, MSc and MBA degrees awarded by LMU. LMU had ultimate responsibility for academic standards and the quality of courses. The agreement was for an initial period of 3 years, terminable thereafter on 12 months' notice.

137. The agreement placed obligations on LSBF and IMAN as follows:

(1) To provide the validated courses, undertaking marketing, recruitment of students and course delivery. The courses were to be taught to standards assessed by LMU and in accordance with validation documents produced by LMU.

(2) Courses were to be provided at IMAN's campus.

(3) LMU had absolute discretion in respect of the course material, content, standards, admission policies and attendance policies.

(4) IMAN was to market each course at its own cost. It was required to obtain the written approval of LMU to any marketing material, practices and strategies.

(5) Students were to be recruited by IMAN in accordance with LMU's policies, procedures and entry requirements. LMU had the final decision on whether a student would be made an unconditional offer of a place on a course.

(6) IMAN was required to recruit and train its teaching and administrative staff in accordance with requirements set out in the validation documents.

(7) IMAN was to provide students on the courses with access to all campus facilities and electronic study facilities.

(8) IMAN was required to participate fully in any quality assurance or review exercises carried out by any person, including the QAA.

(9) LMU imposed strict conditions on the use by IMAN of its marks and logos.

138. The agreement placed obligations on LMU as follows:

(1) To validate the courses in accordance with a validation process. This involved setting up a validation panel which would validate courses in accordance with guidance provided by LMU to ensure the quality and standards of courses, including the design, approval and monitoring of standards. Validation was intended to ensure that appropriate and effective teaching, support, assessment and learning opportunities were provided for students.

(2) To undertake quality assurance assessments and if it considered there were valid reasons to do so, to reverse a decision to validate a course.

(3) To undertake the LMU registration process applying the LMU admissions policy. Registered students were issued with LMU student numbers and LMU student cards. LMU had absolute discretion as to whether a prospective student should be admitted.

(4) To act as a sponsor to international students and ensure compliance with UKBA requirements in respect of those students.

(5) To issue students who attained the relevant academic standards with the appropriate academic qualification.

(6) To provide students on validated courses with access to LMU student facilities, including its student union, library facilities, IT facilities and learning resources.

139. IMAN students taking LMU validated courses were not included in LMU's student numbers for the purposes of student number controls. At the time the agreement was entered into, universities such as LMU were capped in terms of student numbers.

140. One of the issues in this appeal is whether IMAN was a college of UoW and/or LMU which depends on a number of factors. I deal with further findings of fact relevant to that issue when I come to consider it in more detail below.

141. The course provided in conjunction with Grenoble was described as a "Program Cooperation Agreement for the Implementation of the Degree Program" in an agreement from about August 2013. The degree program was a Master in Business to be delivered in Manchester. It belonged to and was awarded by Grenoble. Grenoble set the entry requirements, the requirements for award of the qualification, maintained oversight over the assessment materials, maintained oversight over the examiners, held ultimate responsibility for academic standards, had control over the course content, and approved the IMAN teaching staff delivering the program.

The Language School

142. The language school offered courses for teaching English as a foreign language ("TEFL"). It originally operated as The School of English in Manchester and later as The Language Gallery. The courses were designed and created by an associated company. They included non-examined teaching courses which were accredited by the British Council, and preparation courses leading to tests set and marked as part of the International English Language Testing System.

143. The teaching was classroom based and students were required to follow a strict code of conduct. The courses had no set duration. Teachers were directed to follow a set textbook for the majority of the teaching but could supplement this with other textbooks and materials. Homework was set three times a week. Weekly and monthly assessments were set and marked. The quality of teaching was ensured by regular teacher observations. The

improvement of English language was the benchmark against which students were assessed against various competencies, including listening and understanding, reading, spoken interaction and spoken product.

The Vocational School

144. The vocational school provided HNC and HND courses accredited by Pearson. A number of courses were offered, for example HNDs in business, engineering and media. As set out above, Pearson maintained control over the course content, standards and assessment. IMAN's HNC and HND courses were designated courses for the purposes of student support.

145. The vocational school courses accounted for a significant proportion of IMAN's turnover. In the period 2014 to 2016 it accounted for between 70% and 86% of turnover.

CONSIDERATION OF THE ISSUES

146. I now turn to consider the four issues.

(1) Direct reliance on Article 132(1)(i)

147. The appellants say that Group 6 Schedule 9 VATA 1994 does not properly implement Article 132(1)(i) and as such they can rely directly on the provisions of that Article. In summary, Ms Shaw submitted as follows:

> (1) Group 6 fails to give effect to the objective of the exemption. In particular, the definition of an eligible body ought to depend on the organisation's objects. Instead, it depends on whether the organisation falls within a number of closely prescribed categories. It cannot be said that the exclusion from exemption is justifiable by reference to the discretion afforded to member states in Article 133(a) PVD. It is clear that the UK has not applied the condition in that Article. For example, a university will always qualify for exemption whether or not it is profit-making.
>
> (2) Group 6 breaches the principle of fiscal neutrality. In particular, unequal treatment can only be justified if an organisation does not have similar objects to bodies governed by public law. However, the distinctions drawn in Group 6 are not concerned with the objects of the organisations concerned.
>
> (3) The appellants are entitled to exemption under Article 132(1)(i) because they have similar objects to bodies governed by public law providing education and vocational training.

148. The precise formulation of this issue has changed over time. Ms Shaw submitted that fiscal neutrality was at the heart of the question of whether the UK had properly implemented Article 132(1)(i). The question is not whether the UK was entitled to recognise universities, colleges of universities and FECs as organisations with similar objects. She accepts that the answer to that question is obviously, yes. The question is whether by failing to recognise the appellants as eligible bodies, the UK had breached the principle of fiscal neutrality. That is the real issue. The relevant question is whether the appellants are sufficiently similar to universities, colleges of universities or FECs such that their supplies of education should have the same treatment.

149. There was much common ground between the parties as to the approach I should take to this question. In light of the parties' closing submissions it seems to me that the following propositions are common ground:

> (1) If Group 6 Schedule 9 does not properly implement Article 132(1)(i) then the appellants can rely on the direct effect of the PVD.

(2) The appellants make supplies of education and have similar educational aims to universities, colleges of universities and FECs, which all fall within the definition of "eligible body" for the purposes of Group 6.

(3) The reference in Article 132(1)(i) to "bodies governed by public law" has a specific and very narrow meaning. Such bodies must be part of the public administration of the state. UK universities are not governed by public law because they are legally independent and autonomous institutions (see *Cambridge University v HM Revenue & Customs* [2009] EWHC 434 (Ch)). The reason why UK universities, colleges of universities and FECs are exempt from VAT on their supplies of education to students is because HMRC has recognised them as having similar objects to bodies governed by public law.

(4) The exemption must be interpreted strictly, but also in a way which is consistent with its objective. The objective of the exemption is to facilitate access to supplies of education by certain bodies, avoiding the increased cost that would result if those supplies were subject to VAT (see *Minister Finansów v MDDP sp z oo Akademia Biznesu sp komandytowa* Case C-319/12).

(5) Activities which are carried out on a for-profit basis may still be exempt. Parliament has chosen not to limit exemption to non-profit making institutions (See Lord Kitchin in *SAE Education Ltd v HM Revenue & Customs* [2019] UKSC 14 at [28]).

(6) Institutions must fulfil the condition of pursuing objects similar to those of bodies governed by public law if their supplies of education are to be exempt (See *MDDP* at [35]). This may be described as a "supplier condition".

(7) HMRC has a discretion in laying down conditions by reference to which organisations will be recognised as having similar objects to bodies governed by public law. Member states are given such a discretion because they may have very different education systems (see Advocate General Kokott in *MDDP* at [19]).

(8) HMRC does not have an unfettered discretion in identifying which bodies should be treated as having such objects. Its discretion is limited by reference to the principles of equal treatment and fiscal neutrality (see *MDDP* at [38] and *SAE* at [45]).

(9) The principle of fiscal neutrality precludes economic operators carrying out similar transactions from being treated differently (see *JP Morgan Fleming Claverhouse Investment Trust Plc v Revenue and Customs Commissioners* (Case C-363/05)). It may be engaged where the supplies in question are sufficiently similar from the point of view of the consumer, where differences between them do not have a significant influence on the choice of the consumer and where they meet the same needs of the consumer (see *Rank Group Plc v Revenue and Customs Commissioners* (Joined Cases C-259/10 and C-260/10)).

150. Whilst it was common ground that HMRC did not have an unfettered discretion in what organisations it could recognise as having similar objects to bodies governed by public law, there were issues as to how that discretion was limited and how the principle of fiscal neutrality operated to limit that discretion.

151. It is convenient to start by considering what is meant by organisations having "similar objects". This was an issue in *Revenue and Customs Commissioners v Open University* [2016] EWCA Civ 114. In that case, HMRC contended that the expression 'similar objects'

at the end of what is now Article 132(1)(i) meant 'the same objects', in the sense that other organisations must have the object of providing one or more of the six specified types of education. The taxpayer contended that 'similar' did not mean 'the same'.

152. The Court of Appeal held at [93] that 'similar objects' means the 'same objects', namely the object of providing one or more of the six specified types of education identified in Article 132(1)(i). I understand that the parties accept this proposition.

153. The principal issue raised by the appellants is the extent to which the UK has a discretion to recognise organisations as having those objects. The appellants say that they have similar objects to bodies governed by public law and HMRC was bound to recognise them as such. In failing to recognise them as having similar objects the UK has breached the principle of fiscal neutrality.

154. I must first deal with a submission by Mr Hill on this issue that I am bound by existing Court of Appeal authority. He submitted that the Court of Appeal decision in *Finance & Business Training Limited v HM Revenue & Customs* [2016] EWCA Civ 7 ("*FBT")* is binding authority to the effect that the implementation of Article 132(1)(i) by Note 1(b) is consistent with the discretion given to member states and the principle of fiscal neutrality. The taxpayer and HMRC in that case were both making the same arguments as the appellants are making in the present appeals.

155. I am satisfied that the Court of Appeal was considering the same arguments that are being pursued in these appeals. The conclusions of the Court of Appeal in the judgment of Arden LJ as she then was are set out at [53-56] and [59]:

> 53. All [the taxpayer's] submissions proceed on the basis that Parliament has not set conditions for the education exemption in compliance with EU law. It is now clear from MDDP that a member state can and should set the conditions for bodies which are not governed by public law which are to be entitled to the education exemption ("non-public bodies"). How it sets those conditions is a matter for national law.
>
> 54 No one has suggested that Parliament had to use any particular form of words to set these conditions. In my judgment, it was therefore open to Parliament to exercise the UK's option by deciding which non-public bodies were to qualify and then including a list of them in the relevant legislation. That is what Parliament has done in note 1(b).
>
> 55 Parliament is obviously constrained by article 132.1(i) as to what bodies it can include. In those circumstances, it has taken the view that the body must be one which provides education in like manner to a body governed by public law, that is, there must be a public interest element in its work. It has decided to draw the line, in the case of universities to those colleges, halls and schools which are integrated into universities and which are therefore imbued with its objects.
>
> 56 For FBT to show that its exclusion from this group is a breach of the fiscal neutrality principle would require it to say that it belongs to the same class as those institutions which meet the integration test in note 1(b). Neither of the tribunals made any findings that would support that conclusion and this court is hearing an appeal only on a point of law.
>
> …
>
> 59. Parliament has taken a cautious view of who should be a non-public body entitled to the exemption especially when compared with Poland's (non-compliant) law before the MDDP case, but FBT has not in my judgment shown that its choice did not comply with any of the requirements of article 132.1(i) or of the principles of fiscal neutrality and legal certainty.

156. Subject to one important issue, I am satisfied that this judgment is binding in so far as it establishes that Note 1(b) is a valid implementation of Article 132(1)(i). The UK was entitled

to limit exemption to the bodies specified in Note 1(b). Broadly, universities and colleges of universities. The same must apply to Note 1(c), which limits exemption to FECs.

157. However, I do not consider that the decision of the Court of Appeal is binding in so far as the appellant's arguments on fiscal neutrality are concerned. The reason why the taxpayer in *FBT* could not rely on the principle of fiscal neutrality was because there were no findings of fact to support its submission that there was a breach of the principle of fiscal neutrality. In the present case, the evidence before me and the findings of fact which I have made may support a conclusion that the appellants do fall to be treated in the same way as universities and their colleges, or FECs. The decision of the Court of Appeal does not in my view prevent a different taxpayer seeking to establish that fiscal neutrality requires it to be treated in the same way as those institutions.

158. Mr Hill referred me to a decision of the FTT in *Essex International College Limited v HM Revenue & Customs* [2018] UKFTT 0085 (TC). In that case the FTT also found that it was bound by *FBT*. It went on to say that there was no evidence to establish that the taxpayer was in the same position as a UK university and therefore it could not establish a breach of the principle of fiscal neutrality. It did not say that the taxpayer could not put forward a fiscal neutrality argument in light of *FBT*. I respectfully agree with the approach of the FTT in *Essex International College*. In the circumstances, the issue before me is limited to the question of whether by excluding the appellants from exemption, the domestic legislation breaches the principle of fiscal neutrality. It is not necessary for me to address the parties' separate submissions as to whether the UK was entitled to recognise only universities, colleges of universities and FECs as eligible bodies having similar objects to bodies governed by public law.

159. In relation to fiscal neutrality, HMRC relied upon *Happy Education SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca* Case C-612/20, a persuasive authority post Brexit. The question in that case was whether a provider of educational after-school programmes was an organisation having similar objects. Under Romanian law, recognition as such depended on the provider entering into a partnership with an educational establishment. Happy Education had not entered into any partnership. The CJEU held that its supplies did not qualify for exemption despite the fact that it carried out educational activities in the public interest. Mr Hill submitted that there was no suggestion in that case that the conditions required by Romanian law were in breach of the principle of fiscal neutrality. The Court found at [35] that an entity such as the taxpayer in that case could not be regarded as having similar objects to those of an educational body governed by public law since it did not satisfy the conditions laid down for that purpose by Romanian law.

160. However, as Ms Shaw pointed out, the finding of the Court in that case was subject to [32] which stated:

> 32. Furthermore, it is for the national courts to examine whether the Member States, in imposing such conditions, have observed the limits of their discretion in applying the principles of European Union law, in particular the principle of equal treatment, which, in the field of VAT, takes the form of the principle of fiscal neutrality (judgment of 28 November 2013, MDDP, C-319/12, EU:C:2013:778, paragraph 38 and the case-law cited).

161. I turn therefore to consider whether on the facts as found the appellants have established a breach of the principle of fiscal neutrality arising from their exclusion from exemption under Group 6 Schedule 9.

162. The appellants' case on that issue is not that they "belong in the same class" as universities and colleges of universities in Note 1(b). They say that the evidence establishes

that they are similar to such institutions, and to FECs in Note 1(c), and that it is a breach of the principle of fiscal neutrality if their supplies are not also exempt.

163. In *Rank*, the CJEU was concerned with the VAT treatment of certain gaming machines. It considered the relevance of the regulatory framework which applied to the different machines. In that case the regulatory framework was not relevant to the choice of a typical consumer. However, the Court did recognise at [50] that there may be "exceptional cases" where differences in the regulatory framework may create a distinction in the eyes of consumers.

164. I was referred to a number of exceptional cases where the regulatory framework was relevant, including *R (otao TNT Post UK Ltd) v Revenue and Customs Commissioners* (Case C-357/07) and *Pro Med Logistik GmbH v Finanzamt Dresden-Süd* (Case C-454/12). I shall come back to *TNT*. In *Pro Med Logistik* the existence of the regulatory framework did affect consumer choice.

165. Ms Shaw observed that Article 132 is under a heading in the PVD which refers to "exemptions for certain activities in the public interest". She submitted that there can be little doubt that the appellants, as designated providers of higher education, were acting in the public interest. That is why their students received public funding from the SLC and why they were subject to the regulatory regime described above. That is true as far as it goes, but it does not really help in identifying whether the appellants and the services they supply are sufficiently similar to universities, colleges of universities or FECs.

166. Ms Shaw submitted that the principal question in relation to fiscal neutrality is whether from the point of view of students, the supplies by APs of designated courses are sufficiently similar to the supplies of eligible bodies and whether they meet the same needs of the consumer. The appellant's aims were consistent with the aims of designated higher education providers generally, and the courses they offered were the same or substantially similar to courses offered by exempt higher education providers. HMRC was focusing too much on the viewpoint of the regulator. Differences in the regulatory framework were not a key factor. What matters, is the point of view of students, and those differences would be immaterial to the typical student. What students would be concerned about would be the distinction between designated providers of higher education, including the appellants, on the one hand and other providers of higher education falling outside the regulatory regime. The purpose of regulation was in part to reassure students as to the quality of the course and the financial sustainability, governance and management of the provider so that they could expect to satisfactorily complete their course. In other words, this was not an exceptional case where differences in the regulatory framework was relevant to the choice of a typical consumer.

167. Ms Shaw further submitted that it was relevant that the appellants shared the central objects and characteristics of other providers of higher education in that:

(1) They all had similar objects. Their key objectives were to widen participation in and provide access to education. Such objectives are shared by most if not all providers of higher education.

(2) The appellants were established specifically to provide education and/or vocational training and they provided education of real substance.

(3) The majority of students on courses provided by the appellants were entitled to government funding.

(4) The quality of the education provided by the appellants is overseen and regulated either by DfE, HEFCE, QAA or Pearson. Regulation is comparable to that which applies to all regulated providers of further and higher education.

(5) The commercial nature of the appellants' activities does not preclude exemption. In any event, profits made by the appellants aided the development of education within each company and the wider GUS Group. The appellants are comparable to numerous profit-making universities.

(6) The appellants invested significantly in the provision of education and vocational training.

168. I am satisfied for the reasons given above that the regulatory regime for universities was significantly stronger than the regulatory regime for APs with designated courses. The differences were not simply a matter of detail but were a matter of degree and substance. They arose from the additional regulations applicable to obtaining DAPS and obtaining university title. For these purposes there is no distinction between universities and colleges of universities.

169. The HEFCE register identifies that the appellants, or at least two of them, were required to have regular quality reviews, demonstrate financial sustainability, provide information on performance and have an independent complaints procedure. Those are the same descriptions applicable to universities, however the register does not say anything about differences in the substance of that regulation. For example, the register for Coventry University and SPIC shows the same headings on right hand side, but Coventry has DAPs, university title, is HEFCE-funded and has an access agreement with OFFA. All of these factors involved additional regulatory requirements to which SPIC was not subject.

170. I accept that the separate regulation of HEFCE-funded institutions is not relevant to the question of fiscal neutrality. That form of regulation did not apply to APs, but neither did it apply to universities operating for profit or to universities which did not want to be subject to the specific requirements applicable to that funding, including the capping of fees.

171. Ms Shaw noted that the operating framework was described as a "public-facing document". She submitted that is significant in the context of the test for fiscal neutrality which looks at the views of a typical consumer. The typical consumer would regard APs and HEIs as being subject to essentially the same regulatory regime. The real distinction from a consumer perspective would be between regulated providers such as the appellants and non-regulated providers who did not offer designated courses.

172. Mr Hill submitted that for the purposes of fiscal neutrality, it is not enough for the appellants to show that they make similar supplies of education to universities or that they compete with universities. In determining what amounts to a comparable situation it is necessary to take into account the subject matter and aim of the provisions in question - see *Rzecznik Praw Obywatelskich (RPO) v Prokurator Generalny* Case C-390/15 at [42].

173. In *RPO*, the CJEU was concerned with the similarity between supplies of paper books and digital books. The Court identified the object of the reduced rate for books and at [48] observed that from the point of view of the consumer the manner in which books were supplied did not play a decisive role. However, Mr Hill submitted that it is inherent in Article 132 that similar or identical supplies of education will be treated differently and be taxable or exempt by reference to the supplier condition. The Article contained a condition which required an exempt supply to be made by a body governed by public law or an organisation recognised as having similar objects. The possibility of unequal treatment by reference to a supplier condition was recognised by the CJEU in *HM Revenue & Customs v Bridport and West Dorset Golf Club Limited* Case C-495/12 at [36] in the context of sporting exemptions:

> 36. … it should be observed that the scope of the exemptions in Article 132(1)(b), (g), (h), (i), (l), (m) and (n) of Directive 2006/112 is defined not only by reference to the substance of the

> transactions covered, but also by reference to certain criteria that the suppliers must satisfy. In providing for exemptions from VAT defined by reference to such criteria, the common system of VAT implies the existence of divergent conditions of competition for different operators.

174. Similarly, in *TNT* the CJEU was concerned with exemption for public postal services, which was limited to operators undertaking to provide all or part of a universal postal service. The CJEU said that such a limitation did not breach the principle of fiscal neutrality:

> 36. It follows that public postal services within the meaning of art 13A(1)(a) of the Sixth Directive must be regarded as operators, whether they are public or private (see, to that effect, Commission v Germany, para 16), who undertake to supply postal services which meet the essential needs of the population and therefore, in practice, to provide all or part of the universal postal service in a member state, as defined in art 3 of Directive 97/67.
>
> 37. Such an interpretation is not contrary to the principle of fiscal neutrality, which precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT (see JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Comrs (Case C-363/05) [2008] STC 1180, [2007] ECR I-5517, para 46 and the case law cited).
>
> 38. As the Advocate General observes in para 63 of her opinion, the assessment of the comparability of the services supplied hinges not only on the comparison of individual services, but on the context in which those services are supplied.
>
> 39. As the facts in the main proceedings demonstrate, on account of the obligations described in para 12 of this judgment, which are required under its licence and connected with its status as the universal service provider, an operator such as Royal Mail supplies postal services under a legal regime which is substantially different to that under which an operator such as TNT Post provides such services.

175. I accept Mr Hills submissions. The focus is not only on whether the supplies are similar from the perspective of the consumer, but also on whether the suppliers are comparable. In *Rank* and *Pro Med* the CJEU was solely concerned with the perspective of the consumer because the exemption in those cases did not involve a supplier condition.

176. In my view, the exclusion of the appellants from exemption by virtue of Note 1(b) does not breach of the principle of fiscal neutrality. The UK was entitled to recognise universities and their colleges as having similar objects to bodies governed by public law. That was established by the Court of Appeal in *FBT*. The regulatory regime for DAPs and university title did not apply to the appellants. As such, they were not in a comparable position to a university or a college of a university, unless it can be said that they are a college of a university. That is Issue 3 in relation to IMAN.

177. Similarly, the appellants and FECs covered by Note 1(c) are not comparable for these purposes. FECs are required by section 22A Further and Higher Education Act 1992 to be charities. None of the appellants were charities. The UK was clearly entitled to restrict the exemption for FECs to non-profit making organisations by virtue of Article 133(a) PVD.

(2) Were any supplies by SPIC and LCCA exempt pursuant to Item 5B VATA 1994?

178. SPIC and LCCA contend that their supplies are exempt in so far as they provide education for persons under the age of 19 or who were under that age when the education or training began. What is disputed is whether, as those appellants contend, the course fees paid in respect of such education is "ultimately a charge to funds provided by the Secretary of State". It is also said that the age restrictions in Item 5B were discriminatory and therefore in breach of EU law. If that is right, then I understand the appellants to say that the age-related aspects of Item 5B are of no effect, which essentially leaves all supplies of education to be

exempt to the extent that the consideration is ultimately a charge to funds provided by the Secretary of State.

179. The scheme for making student loans available and for the repayment of student loans was substantially the same throughout the relevant period. I am satisfied that the structure of the arrangements in place involved SPIC and LCCA entering into agreements with students to supply educational courses in respect of which the students were required to pay course fees. A majority of students would apply for and enter into what is described as a loan contract with the SLC. If accepted, the SLC would pay the sum approved under the loan contract directly to SPIC or LCCA. The student would commit to repay that sum plus interest on the terms set out in regulations. Repayment was contingent on the student having earnings above the income threshold in any tax year.

180. Ms Shaw submitted that the course fees were ultimately a charge to funds provided by the DfE because at the time of supply for VAT purposes there was no liability on students to repay the loans. The obligation to repay was contingent on future events, in particular the student exceeding the income threshold in tax years following the end of the course. Outstanding balances were often written off. As such, it is said that at the time of supply there was no loan in a conventional sense. If students were only potentially liable to repay the loans, the students were not funding the courses. It was the DfE which ultimately funded the courses.

181. Ms Shaw submitted that there is a material distinction between an obligation to repay in the future and a future contingent obligation to repay. In the former case there is a present obligation to repay an amount in the future. In the latter case, there is no present obligation to repay any amount. She relied on *Smart (H M Inspector of Taxes) v Lincolnshire Sugar Co Ltd* 20 TC 643 which involved advances to businesses involved in the sugar industry. These were part of a statutory scheme implemented to mitigate difficulties arising from a fall in the price of sugar. The advances were repayable by deduction from subsidies also payable in respect of sugar production in a two year period. The taxpayer received advances which in the events which happened were not in fact repayable. The Inland Revenue treated the advances as trading receipts whilst the taxpayer argued that they were loans. The House of Lords held that the advances were trading receipts, affirming the decision of the Court of Appeal. I was referred to the judgment of Lord Wright MR in the Court of Appeal who considered whether the advances were properly to be regarded as loans:

> Now so far, to my mind, this very peculiar and anomalous state of things bears no resemblance to a loan at all. I think it is a payment of money subject to a contingent liability in certain events to repay, or perhaps more strictly, to submit to a deduction, in the very limited circumstances which I have specified, of an amount which might or might not, if it ever eventuated, come in any way within the same sums as the amounts which were paid.

182. I was also referred to *Marren v Ingles* 54 TC 76 where the issue was whether contingent deferred consideration payable in respect of a disposal of shares was chargeable to capital gains tax. One of the taxpayer's arguments was that paragraph 11(1) Schedule 7 Finance Act 1965 took the sum payable out of charge to tax. It provided generally that where a person incurs a debt to another, no chargeable gain accrues to the original creditor on a disposal of the debt. Lord Wilberforce dealt with the argument as follows:

> [Is] the taxpayer exempted by para 11(1) of Sch 7? This is a provision of notable obscurity, the purpose and philosophy of which it is difficult to detect. It has to be examined at two points in time. First, was there a debt in September 1970? In my opinion there was not. No case was cited, and I should be surprised if one could be found, in which a contingent right (which might never be realised) to receive an unascertainable amount of money at an unknown date has been considered to be a debt - and no meaning, however untechnical, of

> that word could, to my satisfaction, induce such a right. The legislation does, of course, make provision for debts not immediately payable; it does so by the draconian method of charging them, when a charge arises, without any allowance for deferral (Sch 6, para 14(5)): and I would, for the purpose of argument, be prepared to agree that a contingent debt might come within the paragraph. In Mortimore v Commissioners of Inland Revenue (1864) 2 H & C 838 - a case concerned with stamp duty - Martin B. so held. But from this it would be a large step to hold to be included an unascertainable sum payable, if a contingency happens, at an unascertainable date, a step which I am unable to take.

183. Mr Hill relied upon *MacNiven v Westmoreland Investments Limited* [2001] UKHL 6 where payments of interest were held to be deductible in computing profits even though they were funded by way of an additional loan. The House of Lords held that payments of interest satisfied a statutory requirement that they should be "ultimately borne by the company".

184. In my view, none of the cases or dicta cited on this issue provide any real assistance in determining whether fees for the appellants' courses are ultimately a charge to funds provided by the Secretary of State for the purposes of Item 5B. They are specific both to the particular legislation being construed and the particular circumstances of the cases. The point was made succinctly by Lord Fraser in *Marren v Ingles* at p100 in considering the meaning of the word "debt":

> The meaning of the word debt depends very much on its context. It is capable of including a contingent debt which may never become payable - Mortimore v Commissioners of Inland Revenue (1864) 2 H & C 838. It is also capable of including a sum of which the amount is not ascertained - O'Driscoll v Manchester Insurance Committee [1915] 3 KB 499.

185. In the present appeal the relevant question is not whether there was a loan to students in order to pay the course fees, but whether the course fees were "ultimately a charge to funds provided by the Secretary of State" within the meaning of that phrase in Item 5B.

186. Mr Hill's primary submission was that Item 5B was intended to exempt the provision of further education and not higher education. In order to make good that submission he relied on the form of the original provisions and amendments to those provisions since 2012. Item 5B had originally provided for exemption for supplies of education and vocational training to the extent that the consideration for the supply was "ultimately a charge to funds provided by" the Young People's Learning Agency for England ("the YPLA"), under Part 3 of the Apprenticeships, Skills, Children and Learning Act 2009, or the Chief Executive of Skills Funding under Part 4 of that Act. The YPLA was abolished by the Education Act 2011 and its staff, property, rights and liabilities were transferred to the Secretary of State. The existing version of Item 5B was inserted by that Act with effect from April 2012.

187. The YPLA had no power to fund higher education, save to a very limited extent where it was provided by further education institutions. The YPLA generally funded education up to Level 3, which was the equivalent of A' levels. It did so by way of direct grant to the providers and in circumstances where providers were required not to charge students.

188. I am satisfied against this background that Item 5B does not apply to the supplies of education made by SPIC and LCCA. Whilst the new provision was not expressly limited to supplies of further education, in my view there is no reason to give the phrase "ultimately a charge to funds provided by Secretary of State" any different meaning to that which it had in the previous provision. I am satisfied that in the previous provision the phrase referred to grant funding provided directly to providers for the provision of education. Funds provided by the SLC by way of loans to students do not fall within the meaning of the phrase.

189. Even without regard to the previous provision, I agree with Mr Hill that the word "charge" in this context would imply a contractual liability to pay the fees resting with the Secretary of State.

190. Ms Shaw submitted that even if the student loans could properly be described as loans, there was no liability to repay until the contingency was satisfied when students exceeded the income threshold at some stage. In the absence of a liability to repay, the funding provided by the SLC was a charge to funds provided by the Secretary of State within Item 5B.

191. I do not accept that submission. To the extent a student loan is not repaid, the Secretary of State will bear the economic burden of the funding. However, it will not be known at the time of supply whether an individual loan will be recovered from the student or whether the Secretary of State will bear the burden of the funding. The treatment of the supply must be determined at the time of supply. In my view it cannot be relevant in determining the treatment of an individual supply whether the loan will in fact be repaid or written off. I do not consider that the Secretary of State had any contractual liability to pay the tuition fees. At most the Secretary of State had a liability to the student to discharge the student's liability to pay the fees.

192. The appellants also say that the age restrictions in Item 5B are discriminatory. Reliance is placed on the CJEU decision in *Kücükdeveci v Swedex GmbH & Co KG* Case C-555/07 where the Court acknowledged that non-discrimination on the grounds of age was a general principle of EU law. However, given my finding that tuition fees charged by SPIC and LCCA are not ultimately a charge to funds of the Secretary of State, this argument does not help the appellants. Even if the age-related aspects of Item 5B were not effective, it would still be necessary for the appellants to establish that the consideration for their supplies was ultimately a charge to funds of the Secretary of State. They have not done so and therefore their supplies could not be exempt pursuant to Item 5B.

(3) Was IMAN a college of a UK university within Note 1(b)?

193. IMAN contends that during the relevant period it was a college of UoW and /or LMU within Note 1(b). As such, it was an eligible body for the purposes of Item 1(a) and entitled to exemption. It is common ground that if IMAN was a college of a university within Note 1(b) then all its supplies of education were exempt, not just those made in its capacity as a college of a university.

194. The question of whether an education provider is a college of a UK university was considered by the Supreme Court in *SAE*. Lord Kitchin observed at [47] to [53] that the reference to a "United Kingdom university" in Note 1(b) extended to private universities which are run for profit, and the same must apply to a "college of a university". A college of a university is not limited to colleges which are a constituent part of a university in a constitutional or structural sense. He stated at [51] that the focus is on "*the objects of the body in issue, the nature of the educational services that it supplies, and how integrated those services are with those of the university*". He identified five questions at [53] which are likely to be highly relevant in considering whether there is sufficient degree of integration, although not to the exclusion of all the circumstances of a particular case:

> (i) whether they have a common understanding that the body is a college of the university; (ii) whether the body can enrol or matriculate students as students of the university; (iii) whether those students are generally treated as students of the university during the course of their period of study; (iv) whether the body provides courses of study which are approved by the university; and (v) whether the body can in due course present its students for examination for a degree from the university.

195. Lord Kitchin described the test at [56] in these terms:

> In my view the correct approach was expressed succinctly by Arden LJ in FBT at para [55], which I have recited above. The question is whether the college and the university are so integrated that the entity is imbued with the objects of the university, and that is best answered in the manner I have described.

196. The test for college status is not limited to the five factors identified by Lord Kitchin. He stated at [54] and [55]:

> 54. If a body can establish the presence of each of these five features, focused as they are on the objects of the body, the relationship between the students of the body and the university and the degree to which the activities of the body are recognised by and integrated with the university, then in my judgment it is highly likely to be a college of the university within the meaning of Note (1)(b). Again, I do not suggest that there may not be other cases where the degree of integration of the activities of the body and the university is such that it may properly be described as a college of the university in light of some or most of the factors I have identified and other aspects of the services it supplies. All will depend on the particular circumstances of the case.
>
> [55] However, some of the SFM factors are, in my view, likely to be of much less assistance in light of the matters to which I have referred. Here I have in mind: (i) whether the body is independent from the university; (ii) whether the body is financially dependent on the university, or whether the body and the university are financially interdependent; (iii) whether the body generates any distributable profit; (iv) whether the body is entitled to public funding; (v) the presence or absence of permanent links between the body and the university; (vi) the degree of physical proximity between the body and the university; and (vii) whether the body has any an obligation to offer a minimum number of university places. I do not suggest that none of these matters will ever have any evidential weight. For example, the duration of the relationship between the body and the university and how long it may be expected to last may have some relevance, if only as part of the background, but these and similar matters are unlikely to be determinative.

197. The Supreme Court in *SAE* found that the principal factors relied on by the FTT in finding that SAE was a college of a university were sufficient to reach that conclusion. There was therefore no basis on which it could interfere with the FTT's finding. Those factors were summarised at [38] as follows:

> 38. The FTT carried out a multi-factorial assessment in order to determine whether SEL was sufficiently integrated with MU to justify the conclusion that it was a college of the university … It set out the factors which it considered carried the greatest weight at para [293]:
>
> '(1) Status of Associated College, combined from September 2010 with status of Accredited Institution.
> (2) Long-term links between SAE Institute and MU. Similar purposes to those of a university, namely the provision of higher education of a university standard.
> (3) Courses leading to a degree from MU, such courses being supervised by MU, which regulated their quality standards.
> (4) Conferment of degrees by MU, received by SAE students at MU degree ceremonies.'

198. The question whether an organisation is "imbued with the same objects" as a university is not simply a reference to the objects identified by an institution in its mission statements, for example the aim of widening participation in education. Mr Hill submitted, and I accept that objects in this context means the way in which the organisation and the university provide education. It encompasses the relationship between the two institutions and the way in which the institutions achieve their overall objective of providing education.

199. Mr Hill described this as a high threshold. Ms Shaw submitted that it did not involve a particularly high threshold, otherwise it would be inconsistent with the objective of Article

132(1)(i) of facilitating access to education. It would tend to increase the cost of education provided by bodies with links to universities. In my view it is not helpful to describe the test for college status as involving a high or low threshold. It is simply a matter of applying the test described in *SAE* to the facts of the case.

200. Mr Hill submitted that it is not possible for an institution to be a college of more than one university. That is because an institution cannot be imbued with the objects of two universities at the same time. IMAN had relationships not just with UoW and LMU, but also with Grenoble, various professional bodies and Pearson. The number and variety of its relationships meant that it could not be fully integrated with either UoW or LMU.

201. It seems to me that these are circumstances to be taken into account as part of the multi-factorial analysis described by Lord Kitchin. In my view there is no rule of law to the effect that an institution cannot be a college of different universities at the same time. For example, where an institution has different schools, separate schools may be colleges of different universities. It will all depend on the facts and on the overall analysis.

202. Ms Shaw pointed out that in SAE, it appeared that SAE also partnered with an American University. However, this was in the context of what were described as "SAE entities worldwide". It is not clear that the specific appellant in that case also had a partnership with an American university. In any event, the point was not argued in *SAE*.

203. I now turn to consider the five factors referred to in *SAE* and the circumstances generally. I do so separately in relation to UoW and LMU.

UoW

204. I agree with Ms Shaw that in considering the *SAE* factors in relation to UoW it is important to recognise the nature of UoW. It was in the nature of a virtual university. It did not have a physical campus and it was only through third party institutions such as IMAN that UoW was able to provide degree courses.

205. The first factor is whether UoW and IMAN had a common understanding that IMAN was a college of the university.

206. Mr Kisilevsky's evidence was that IMAN considered itself to be a college of UoW. However, what is more important is the objective evidence that IMAN considered itself to be a college of UoW, and that UoW shared that understanding. I am satisfied that IMAN aligned its academic processes in relation to the validated courses with those of UoW in terms of course design, teaching and assessment. This was all part of the validation process pursuant to the validation agreement. External examiners reviewed the assessment of students in accordance with the processes and procedures of UoW. The award of degrees was moderated by an examination board of external examiners. A joint studies board reviewed courses annually. There was certainly a degree of integration between IMAN and UoW in relation to the validated courses.

207. In my view, the best objective evidence of a common understanding is likely to be the way in which the two institutions present themselves to students and potential students. However, there is no material from UoW to indicate that it regarded IMAN as a college of the university. It is not sufficient to say that UoW was a virtual university that could only provide degrees through partner institutions. That fact in itself says nothing about how it understood its relationship with those partner institutions, or whether it regarded some or all of them as colleges of the university.

208. There is nothing in the validation agreement itself to indicate that either party saw IMAN as a college of UoW, although as I have said the terms of the agreement evidence a degree of integration. There is no other contemporaneous documentation to suggest that

IMAN was a college of UoW and there was no witness from UoW giving relevant evidence from which it might be inferred that UoW saw IMAN as a college of the university and on what basis. The validation agreement included provisions for termination forthwith, on breach by IMAN. That is a factor which points away from UoW regarding IMAN as being a college of UoW, given the impact termination would no doubt have on students. Similarly, the right to terminate on 6 months' notice without giving any reason suggests that UoW did not see IMAN as its college.

209. IMAN's brochure for the professional school stated that the MBA or MSc awarding body for students combining an accountancy qualification with a masters degree would be "*one of LSBF's partner universities [which] are subject to change from time to time*". I am satisfied from Mr Kisilevsky's evidence that students would know the identity of an awarding body when they commenced their studies. However, the document does not suggest that IMAN saw itself as a college of UoW or LMU. Rather, it suggests the universities were seen as a source of DAPs and as substitutable.

210. Taking into account the evidence as a whole, I am not satisfied that UoW saw IMAN as its college. In the circumstances, there could be no common understanding to that effect.

211. The second factor is whether IMAN could enrol or matriculate students as students of UoW. The reference to enrolment and matriculation refers to the entering of a student's name in the university's register of students.

212. The validation agreement specifically required the enrolment process to be conducted by IMAN. UoW could only refuse to enrol a student if it had not received all the registration information it had requested or if IMAN wished to admit a student late to the course.

213. I am satisfied that the second factor is present here.

214. The third factor is whether students at IMAN were generally treated as students of UoW during their period of study. UoW had very few facilities of its own. I am not satisfied that there were any relevant electronic resources to which IMAN students were given access. Students were able to use the UoW complaints procedure and the appeal procedure in relation to assessments. UoW did not have a students' union and did not issue student identity cards. There was no UoW career service or any counselling service.

215. In the particular circumstances of UoW, it was really only in relation to complaints, appeals against assessments and the awarding of degrees that students were treated as students of UoW. Otherwise, students of IMAN could not meaningfully be treated as students of UoW. However, the circumstances are such that I do not consider this factor carries much weight in the overall analysis.

216. The fourth factor is whether IMAN provides courses of study which are approved by UoW. In some senses, UoW controlled delivery of the courses. It could require the teaching staff:student ratio to meet a certain level. IMAN drafted and prepared the course materials and UoW validated the courses pursuant to the validation agreement. UoW could require amendments to those draft materials. Once a course had been validated, any change to the course required the written approval of UoW.

217. Mr Hill submitted that whilst UoW had to be satisfied that the courses met its quality standards, it did not specifically approve the contents of the courses. UoW could insist on amendments to assessment materials, but not the content of the courses themselves. I do not accept that submission. The validation agreement provided that if on a review UoW formed the view that an issue with the course might impair IMAN's academic standards or affect the reputation of UoW then it could require appropriate action to be taken or it could terminate the agreement.

218. For the purposes of this multi-factorial exercise, I do not consider that there is any real distinction between specific approval of course content and being satisfied that the course met the quality standards of UoW. I am satisfied that this factor is present, to the extent set out above.

219. The fifth factor is whether IMAN could present its students for examination for a degree from UoW. It was common grounds that this factor was present.

220. There are also other aspects of the services supplied by IMAN which fall to be taken into account.

221. I consider it relevant that IMAN's courses validated by UoW constituted only a small proportion of its supplies of education generally. Arden LJ in *FBT* acknowledged at [32] that the extent to which FBT was otherwise providing university standard education was relevant. It was also relevant in *SAE* that the taxpayer was providing higher education of a university standard. In the present case, a significant proportion of IMAN's course were HNC and HND courses which were not Level 6 courses, although they were equivalent to years 1 and 2 of a university degree course. IMAN's Level 6 courses through UoW, LMU and the professional courses never exceeded 22% of its turnover in any one year. There was no separate breakdown of what proportion of supplies were attributable to UoW courses.

222. In *SAE*, Lord Kitchin suggested that the duration of the arrangement and how long it might be expected to last may have some relevance, if only by way of background. The UoW agreement was for a minimum term of 5 years and thereafter from year to year. In the event it lasted for 8 years. It was not in my view a short-term agreement.

223. It is not a matter specifically referred to in SAE, but students of other institutions associated with UoW could not benefit from IMAN's facilities.

224. Taking all these factors into account, I am not satisfied that during the relevant period IMAN and UoW were sufficiently integrated to make IMAN a college of UoW.

225. I should also record that Mr Hill relied on the fact that the agreement in *FBT* between FBT and UoW was the same agreement as in the present appeal. The FTT in *FBT* held that it was not sufficiently integrated with UoW to establish it as a college of UoW. However, it is not suggested that IMAN is estopped from arguing that it was a college of UoW. Further, the issue inevitably involves a value judgment and different tribunals may reach different conclusions in relation to the same agreement. Especially where it is not just the terms of the agreement which are relevant but also the surrounding circumstances. I have therefore paid no regard to the decision of the FTT in *FBT*.

LMU

226. I now consider the factors relevant to whether IMAN was a college of LMU. I do so on the basis that it was not a college of UoW for the reasons given above.

227. The first factor is whether LMU and IMAN had a common understanding that IMAN was a college of the university.

228. Mr Kisilevsky's evidence was that IMAN considered itself to be a college of the LMU and LMU considered IMAN to be its college. I am satisfied that IMAN aligned its academic processes in relation to the joint venture courses with those of LMU in terms of course design, teaching and assessment. This was all part of the validation process pursuant to the joint venture agreement. There was a considerable degree of integration between IMAN and LMU in relation to the validated courses and a high degree of oversight by LMU. I accept Ms Kisilevsky's evidence that this level of integration and oversight in relation to the courses was required at least partly because LMU acted as a sponsor of international students on the

courses for Home Office visa purposes. For the same reason, IMAN students on courses covered by the agreements were treated by LMU as its students for the purposes of its HESA returns. Having said that, IMAN students taking LMU validated courses were not included in LMU's student numbers for the purposes of student number controls. At the time the agreement was entered into, universities such as LMU were capped in terms of student numbers.

229. There is no evidence from any witness from LMU that it considered IMAN to be its college and no documentary evidence to indicate that LMU considered IMAN to be its college. In particular, there was no evidence as to how specifically presented the relationship to students and potential students. It was not suggested that students could access IMAN courses through LMU's entry in the Universities and Colleges Admissions Service. I do not know what other relationships LMU had with other organisations or how those relationships were presented by LMU.

230. Overall, I cannot be satisfied that LMU regarded IMAN as its college or that there was a common understanding to that effect.

231. Secondly, whether IMAN could enrol or matriculate students as students of LMU. The joint venture agreement required IMAN to carry out the recruitment process. Students were to be recruited by IMAN in accordance with LMU's policies, procedures and entry requirements. LMU had the final decision on whether a student would be made an unconditional offer of a place on a course.

232. I am not satisfied that IMAN could enrol or matriculate students of LMU, but there was clearly a degree of integration in the enrolment process.

233. The third factor is whether students of IMAN were generally treated as students of LMU during their period of study. Students were taught solely at IMAN's premises in Manchester. However, LMU was obliged to provide students on relevant courses with access to LMU facilities, which included its student union, library facilities and online learning resources in London. Students were issued with LMU student numbers and LMU student identity cards. There was no provision for LMU students to benefit from IMAN facilities.

234. The first point of contact for a student in relation to counselling and careers services would be IMAN. However, LMU provided such services and the LMU services could also be used by IMAN students. Student discipline standards were set by LMU and applied by IMAN. Complaints could be escalated to LMU.

235. Overall, I am satisfied that students of IMAN on courses covered by the joint venture agreement were generally treated as students of LMU.

236. The fourth factor is whether IMAN provided courses of study which were approved by LMU. It is common ground that this factor was satisfied.

237. The Fifth factor is whether IMAN could present its students for examination for a degree from LMU. It is common ground that this factor was satisfied.

238. It is also relevant to take into account the fact that IMAN's courses validated by LMU constituted only a small proportion of the consideration for its supplies of education generally. Degree level courses through UoW, LMU and the professional courses never exceeded 22% of IMAN's turnover. There was no separate breakdown of what proportion of supplies were attributable to LMU courses.

239. In my view it is also relevant that IMAN's business school also had relationships with UoW and Grenoble at the same time as having the joint venture agreement with LMU.

240. The LMU agreement was for an initial period of 3 years, and thereafter terminable on 12 months' notice. In the event, it lasted for about 5 years when IMAN ceased taking new students. In the context of university education, I consider that the initial 3 year period is a relatively short timeframe, effectively lasting for the duration of a degree course.

241. The relationship between IMAN and LMU is more difficult to characterise than IMAN's relationship with UoW. On balance, I am not satisfied that there was a sufficient degree of integration to make IMAN a college of LMU for the purposes of Note 1(b).

(4) Were all IMAN's supplies of education exempt pursuant to Item 1(f)?

242. It is common ground that IMAN made some supplies of TEFL. It provided traditional classroom based teaching of English as a foreign language in the relevant period. As such, it was an eligible body by virtue of Item 1(f). It contends that all its supplies of education therefore qualify for exemption. It says that the restriction in Note (2) which limits exemption to supplies of TEFL is incompatible with EU law.

243. IMAN's case is that Parliament has recognised that providers of education falling within Note 1(f) have similar objects to bodies governed by public law which supply education. Once a provider has been recognised as such, Article 132(1)(i) requires all supplies of education by such bodies to be exempt. In the same way as HMRC has accepted that if IMAN was a college of a university within Note 1(b), then all its supplies of education would be exempt.

244. HMRC rely on a decision of the High Court in *Customs and Excise Commissioners v Pilgrims Language Courses Ltd* [1998] STC 784. Richards J as he then was held that the taxpayer was making separate supplies of TEFL and separate supplies of vocational training. The taxpayer argued that once it was an eligible body, Article 13 of what was the Sixth Directive and is now Article 132 PVD, gave exemption for all supplies of education and vocational training. Richards J rejected that argument, stating at p804a:

> …the result that the provisions must in my view have been intended to achieve, and as a matter of substance do achieve, is to bring language schools within the scope of the exemption in so far as their object is the teaching of English as a foreign language, but not in so far as they have other objects. That is a result envisaged and permitted by the directive...

245. This passage was part of the reasoning of Richards J, and it was not subject to appeal. There was an appeal against a finding that the taxpayer was making separate supplies of TEFL, but not against the scope of Article 13. In the event, the Court of Appeal overturned the judgment of Richards J that there were separate supplies of TEFL. Schiemann LJ noted in his judgment that it had been common ground between the parties that Parliament could define eligible bodies in such a way that where they carried out several activities within Article 13, some of those activities could be exempt and others could be excluded from exemption. He said that he had "hesitations" with that proposition, but that there was no need for him to elaborate.

246. Ms Shaw's reliance on the hesitation of Schiemann LJ to endorse the decision on Article 13 is in the context of subsequent decisions of the CJEU and the domestic courts in *MDDP*, *Open University* and *SAE* referred to above. She submitted that it was apparent from those decisions that Parliament did not have an unfettered discretion to choose which bodies to recognise as eligible bodies for these purposes. It follows that Parliament could not choose which supplies of education by an eligible body should be exempt. I am not satisfied that those subsequent authorities establish any such principle. Those cases say nothing about

whether a member state could recognise bodies as having similar objects only for some supplies of education. The issue did not arise.

247. Ms Shaw described the judgment of Richards J in *Pilgrims* as "technically binding" on me. In those circumstances, I do not see that I can treat it otherwise. I am bound to find that Note (2) is compatible with EU law.

248. There was some consideration as to what effect it would have if I were to find that Note (2) was incompatible with EU law. Mr Hill argued that IMAN would still have to establish that its objects were similar to bodies governed by public law if its other supplies of education were to be exempt. In light of my finding that I am bound by existing authority, I prefer not to consider the implications if Note 2 was incompatible with EU law.

DISPOSAL

249. I have set out above my reasons for determining the appeals in principle as follows:

(1) The appellants cannot rely on the direct effect of Article 132(1)(i). I am not satisfied that their exclusion from exemption by Note (1) involves any breach of the principle of fiscal neutrality.

(2) Supplies by SPIC and LCCA were not exempt pursuant to Item 5B.

(3) IMAN was not a college of a university within Note 1(b).

(4) The exemption in Note 1(f) extended only to IMAN's supplies of TEFL.

250. The parties should set out their proposed directions, agreed if possible, for the final determination of the appeals. The proposed directions should be sent to the Tribunal within 60 days of the date on which this decision is released.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

251. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 03rd MAY 2023

APPENDIX

Index of Acronyms

ACCA	Association of Chartered Certified Accountants
AP	Alternative Providers
BIS	Secretary of State for Business Innovation and Skills
DAPs	Degree Awarding Powers
DfE	Department for Education
ESFA	Education and Skills Funding Agency
FEC	Further Education Corporation
HEFCE	Higher Education Funding Council for England
HEI	Higher Education Institution
HER(AP)	Higher Education Review (Alternative Providers)
HESA	Higher Education Statistics Agency
HNC	Higher National Certificate
HND	Higher National Diploma
IQER	Integrated Quality Enhancement Review
OFFA	Office for Fair Access
OfS	Office for Students
QAA	Quality Assurance Agency for Higher Education
SLC	Student Loans Company
TEF	Teaching Excellence Framework
TEFL	Teaching English as a Foreign Language
YPLA	Young People's Learning Agency for England