Neutral Citation: [2024] UKFTT 00636 (TC)

Case Number: TC09241

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Hearing venue: Taylor House, London

Appeal reference: LON/2008/1746

*VAT – investment management services – exemption for supplies to special investment funds - services of management of AIFs and other non-UCITS funds – funds intended for investment by charities, Church of England entities and local authorities - Art 135(1)(g), Principal VAT Directive*

**Heard on:** 11 December to 13 December 2023
and written submissions filed on 23 April 2024,
3 May 2024 and 10 May 2024
**Judgment date:** 15 July 2024

**Before**

**TRIBUNAL JUDGE ALEKSANDER**
**CATHERINE FARQUHARSON**

**Between**

**CCLA INVESTMENT MANAGEMENT LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: David Scorey KC, counsel, instructed by DLA Piper UK LLP

For the Respondents: Matthew Donmall and Ajay Ratan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

**INTRODUCTION**

1. CCLA Investment Management Limited ("CCLA") provides fund management services. The subject matter of this appeal is the provision of fund management services to thirteen investment funds ("the Funds"), whose investors are charities, Church of England entities, and local authorities.

2. CCLA is the representative member of a VAT group which includes its subsidiary CCLA Fund Managers Limited ("CCLAFM"). Unless the context otherwise requires, references in this decision to CCLA are to be taken to include CCLAFM.

3. Historically the services provided by CCLA to the Funds were treated as fully taxable for VAT, and CCLA has accounted for output tax on the services, and deducted input tax. CCLA contend that those services should have been treated as exempt supplies for VAT – specifically as fund management services supplied to "special investment funds" (or equivalent) for the purposes of Art 135(1)(g) of the Principal VAT Directive (2006/112/EC) ("PVD"). It is not disputed that the same services, when provided by CCLA to collective investment funds established as Charity Authorised Investment Funds ("CAIFs"), are properly treated as exempt supplies.

4. CCLA have applied to HMRC for a refund of the output tax charged on the services supplied to the Funds (less the input tax previously deducted). CCLA will account to the Funds for any VAT refunded, so there is no issue of unjust enrichment. The amount of output tax in dispute is over £70m plus interest. The amount of input tax that needs to be deducted in order to calculate the amount of any refund has not yet been quantified. This hearing therefore addresses solely the principle of whether CCLA is entitled to a refund. To the extent that the appeal is determined in favour of CCLA, the quantum of the refund will need to be determined either by agreement, or will require a further hearing.

5. We heard evidence on behalf of CCLA from Peter Hugh Smith, the chief executive of CCLA, and expert evidence from Julie Patterson, who used to be Director of Regulation, Operations and Tax at the Investment Management Association, as well as having held a number of other appointments in the investment management sector. Both were cross-examined. We found both witnesses to be reliable. However, much of the evidence given by Ms Patterson was a description of financial regulatory law and regulations – which are matters for the Tribunal (and both the Tribunal Judge and Member have considerable expertise and experience in relation to investment funds arising from both their professional practice and from sitting in the Upper Tribunal in financial services appeals). We therefore placed no weight on her evidence on these matters.

6. During the course of writing up this decision we sought further written submissions from the parties on the status of the CBF Funds (as defined below), which we have taken into account in reaching our decision.

7. Four electronic bundles comprising 5740 pages in total were submitted in evidence, and both parties provided skeleton arguments, each extending to thirty or thirty-one pages.

8. Counsel for both parties made helpful submissions, both oral and written, for which we are grateful. We have carefully considered these, along with all of the evidence, in reaching our decision, but in so doing have not found it necessary to refer to each and every argument advanced by them on behalf of their respective clients nor to all of the authorities cited.

## THE APPEALS

9. The periods for which VAT is being reclaimed are the VAT quarters ending November 1994 to November 1996, in respect of which *Fleming* claims were made, and then non-*Fleming* claims from November 2003 up to October 2020. There is no dispute as to CCLA's ability to make claims for these periods.

10. Because of the continuing nature of CCLA's supplies, a number of claims for repayment have been made, resulting in multiple appeals that have all been consolidated into this appeal. An issue arises in relation to an extension of time for appeals originally numbered LON/2008/1746, LON/2008/1750, and LON/2008/1804. HMRC do not object to CCLA's application for an extension of time, which we grant.

11. The appeal concerns three categories of investment funds to which CCLA provided fund management services:

> (a) There are six Charities Official Investment Funds ("COIFs"). Five of these are common investment funds ("CIFs") and one is a common deposit fund ("CDF"). The investors in the COIFs are charities. Each COIF is established pursuant to a scheme of the Charity Commission and is a registered charity in its own right. Prior to July 2014, CCLA provided fund management services directly to the COIFs. From July 2014 CCLAFM took over as the provider of the fund management services, but the actual provision of the services was then delegated by CCLAFM back to CCLA;
>
> (b) there are six Church of England Central Board of Finance ("CBF") Funds. One of the CBF Funds is a deposit fund. The investors in the CBF Funds are entities within the Church of England. The CBF Funds are established pursuant to the Church Funds Investment Measure 1958 ("1958 Measure"). Each CBF Fund is a charity in its own right. For all relevant periods CCLA provided fund management services to the CBF Funds; and
>
> (c) there is the single Local Authorities' Property Fund ("LAPF"). The investors in the LAPF are local authorities. The LAPF is established pursuant to a scheme approved by HM Treasury ("HMT") under s11, Trustee Investments Act 1961. As with the COIFs, the fund management services were provided to the LAPF by CCLA prior to July 2014; thereafter the services were provided by CCLAFM, albeit that actual delivery was delegated back to CCLA.

12. All of the funds are constituted as trusts.

## BREXIT

13. The supplies under appeal were all made prior to the end of the Brexit implementation period, namely IP Completion Day at 23:00 GMT on 31 December 2020. The VAT under appeal is therefore governed by EU as well as UK law. In addition, the regulatory framework within which the funds operated was also subject to EU law.

14. We note that s22, Retained EU Law (Revocation and Reform) Act 2023 provides that s3 (abolition of supremacy of EU law) and s4 (abolition of general principles of EU law) of that Act do not apply in relation to anything occurring before the end of 2023.

15. The parties agree (and we find) that EU law (including the jurisprudence of the CJEU prior to IP Completion Day) applies to the determination of this appeal.

## VAT LAW

16. It is agreed that none of the supplies under appeal have ever come within the UK exemptions under s31 and Schedule 9, Group 5, Value Added Tax Act 1994 ("VAT Act"). In

consequence, little reference to the UK legislative provisions has needed to be made in this decision.

17. Article 135(1)(g), PVD provides as follows:

> 1. Member States shall exempt the following transactions:
>
> […]
>
> (g) the management of special investment funds as defined by Member States;
>
> […]

18. The PVD came into force on 28 November 2006. Prior to that date, the Sixth VAT Directive (77/388/EEC) provided for an almost identical exemption in Article 13B(d)(6) as follows:

> 13B. Other exemptions
>
> Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:
>
> […]
>
> (d) the following transactions:
>
> […]
>
> 6. management of special investment funds as defined by Member States;
>
> […]

19. As the relevant provisions of the PVD and the Sixth VAT Directive are almost identical, this decision will refer to both provisions collectively as the "SIF Exemption".

20. It is agreed (and we find) that the SIF Exemption had direct effect in the UK at all material times. It therefore follows that if CCLA can establish that their supplies of fund management services fall within the SIF Exemption, then those supplies are exempt for UK VAT purposes, notwithstanding that they do not fall within any of the exemptions under the VAT Act.

21. The purpose of the SIF Exemption was described by the CJEU in *Abbey National plc and Inscape Investment Fund v Commissioners of Customs & Excise* (Case C-169/04) [2006] STC 1136 at [62] as follows:

> As the Advocate General observed in point 68 of her Opinion, the purpose of the exemption, under Article 13B(d)(6) of the Sixth Directive, of transactions connected with the management of special investment funds is, particularly, to facilitate investment in securities for small investors by means of investment undertakings. Point 6 of that provision is intended to ensure that the common system of VAT is fiscally neutral as regards the choice between direct investment in securities and investment through undertakings for collective investment.

22. It is worth mentioning at this point that the provisions in the PVD providing for exemption from VAT have to be given a strict interpretation, as they constitute exemptions to the general rule that VAT is to be levied on all services supplied for consideration by a taxable person. The meaning of "strict interpretation" was usefully summarised by the Court of Appeal in *HMRC v Insurancewide.com Services Ltd* [2010] EWCA Civ 422 at [83]:

> Before leaving the case law, it is important to comment on the proper application of the numerous statements in the European cases, some of which are cited above, that the exemption in Article 13B(a), like the other exemptions in Article 13, should be interpreted strictly since it constitutes an exception to the general principle that turnover tax is levied on all services supplied for a consideration to a taxable person. As Advocate General Fennelly said, in paragraph 24 of his opinion in *Card Protection*, this does not mean that a particularly narrow interpretation will be given to the terms of an exemption. As Chadwick LJ said in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, at paragraph [17], the Court is not required to give the words in the exemption the most restricted, or most narrow, meaning that can be given to them.

**THE BATTLEGROUND**

23. The jurisprudence of the CJEU relating to the

> management of special investment funds as defined by Member States

has considered both the meaning of "management" and the meaning of "special investment funds as defined by Member States".

24. What constitutes "management" is not in issue in this appeal. Both parties agree, and we find, that CCLA is engaged in "management" within the meaning of the SIF Exemption. In issue in the appeal is whether the Funds are "special investment funds as defined by Member States", and the meaning of "special investment fund" ("SIF").

25. There is substantial common ground between the parties as to the analytical framework within which the appeal needs to be resolved. The parties are agreed that although not all investment funds qualify as SIFs for the purposes of the SIF Exemption, all investment funds constituted as Undertakings for Collective Investment in Transferable Securities ("UCITS") qualify as SIFs, and therefore management services provided to UCITS fall within the SIF Exemption. But even if a fund does not qualify as a UCITS, it may still benefit from the SIF Exemption if the fund has characteristics which are equivalent to those of a UCITS, or is sufficiently comparable so as to be in competition with a UCITS (under the principle of fiscal neutrality).

26. Many investment funds that are not UCITS will fall to be treated for EU law as alternative investment funds ("AIFs") subject to Council Directive 2011/61/EU ("AIFMD"). The AIFMD has applied since July 2014.

27. The EU VAT Committee in its Working Paper 936 (9 November 2017) agreed guidelines for a fund to be to be considered to be displaying features that are sufficiently comparable to a UCITS for the purposes of the SIF Exemption, based on the jurisprudence of the CJEU. The guidelines note that they merely set out the views of a consultative committee, and do not constitute an official interpretation of EU law. Nonetheless they have persuasive authority. Paragraph 4 of the guidelines state that the VAT Committee agreed by a large majority, based on the case law of the CJEU, that an AIF shall qualify as for the SIF Exemption only if it meets all of the following conditions:

> (a) the fund must be a collective investment;
>
> (b) the fund must operate on the principle of spreading risk between investors;
>
> (c) the return on the investment must depend on the performance of the investments, and the holders must bear the risk connected with the fund;
>
> (d) the fund must be subject to specific state supervision; and

(e) the fund must be subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS.

28. The guidelines go on to state that the VAT Committee agreed by a large majority that whether an AIF can be treated as a SIF must be determined on a case-by-case basis. In particular, if an AIF can be seen as not targeting the same circle of investors as UCITS - because of the characteristics of its investment portfolio or because of the conditions under which the investors are allowed to participate in that fund - that AIF does not qualify as a SIF.

29. In broad terms, there is no dispute that conditions (a), (b), and (c) (collective investment, risk-spreading, and allocation of investment risk to beneficiaries) are satisfied by all of the Funds – and we so find. The differences between the parties relate to the nature of the state supervision of the Funds and the extent to which the Funds are competitive with UCITS funds.

30. HMRC take the position that condition (d) requires that the Funds are individually regulated as such by the Financial Conduct Authority ("FCA") – whereas CCLA take the position that the fact that the fund manager is regulated by the FCA meets the condition. HMRC take the position that for investment funds to be in competition with UCITS funds for the purposes of condition (e), they must be suitable for retail (or at least small) investors, whereas funds regulated under the AIFMD do not satisfy this condition as they are not designed for retail investors.

31. Whilst HMRC treat (d) and (e) as two separate requirements, CCLA submit that they might be regarded as the opposite sides of the same coin, as state regulation is relevant to the question of competition. They referred us to the comment made by the Upper Tribunal (Nugee J (as he then was) and Judge Herrington) in *The Commissioners for HM Revenue & Customs v The Learning Centre (Romford) Ltd; L.I.F.E. Services Ltd* [2019] UKUT 2 (TCC) at [59]:

> […] although in general the consumer is not interested in the regulatory regime which governs a supplier of services, there can be particular contexts where the regulatory framework or legal regime governing the supplies in question may create a distinction in the eyes of the consumer […] because from the point of view of the consumer the protections and guarantees inherent in a system of state regulation make a regulated supplier of investment services dissimilar from an unregulated one.

32. Whilst we acknowledge the strength of CCLA's submission in this regard, it is convenient to treat the two requirements separately in this decision.

### FUND REGULATION

33. As the nature of the state supervision of the Funds is one of the issues that needs to be resolved, we briefly outline the regulatory framework within which the Funds operate.

## The Charity Commission

34. The COIFs and the CBF Funds are charities in their own right.

35. The CBF Funds are exempt charities, and not subject to the regulatory oversight of the Charity Commission[1].

36. The COIFs are established by Charity Commission schemes made under s96 Charities Act 2011 (or the corresponding earlier provisions (now repealed) in s22 Charities Act 1960 or ss24 and 25 Charities Act 1993) as CIFs or CDFs. The Charity Commission has published

[1] Section 5(1) of the 1958 Measure

model schemes, and the COIFs largely follow the form of the Charity Commission's model schemes, but with some modifications.

37. In its 1 July 2014 policy paper, the Charity Commission states that its primary consideration when establishing a fund under s96 is the interests of subscribing and potentially subscribing charities and will have regard to the following factors in deciding whether a proposed fund is in the interests of those charities:

(a) Whether the proposed fund is in the interests of the charitable sector generally;

(b) The financial viability at creation of the proposed fund; and

(c) The appropriateness of the proposed fund as a charity and an investment vehicle specifically for charities.

38. The paper states in section 2.2:

> The commission's approach to the regulation of CIFs is that it can only regulate them as charities so that they comply with charity law requirements. The financial regulation will be by the FCA in their regulation of the fund manager under the AIFMD implementing measures unless the issue impacts on charity law matters.

39. Similar statements are made later in the paper in relation to CDFs.

**FCA**

40. The FCA is the principal regulatory authority for investment funds and their fund managers in the UK. Its regulatory requirements are set out in its Handbook of rules and guidance. The Handbook distinguishes between "rules" made under Financial Services and Markets Act 2000 ("FSMA"), which are obligatory (suffixed with an "R"), and "guidance" (suffixed with a "G"), which is not. Guidance is intended to illustrate ways (but not the only ways) in which a regulated person can comply with the rules.

41. The Handbook is divided into a number of sourcebooks, each dealing with a particular regulatory topic and identified by an acronym. Following the introduction of AIFMD, the FCA reorganised its sourcebooks relating to investment funds into two: COLL (Collective Investment Schemes) and FUND (Investment Funds). COLL deals with the regulation of authorised funds (such as UCITS) and FUND deals with the regulation of other funds (including AIFs). The relationship between an investment manager and its clients is governed by COBS (conduct of business) – which in the case of investment fund clients applies in addition to COLL or FUND. In addition to these specific sourcebooks, there are other sourcebooks which set out requirements that are of general application.

**Kinds of investor**

42. For regulatory purposes, investors are categorised between professional and retail investors[2]. This distinction is not the same as the difference between individual and institutional investors.

43. A professional client or investor includes various kinds of financial institutions and large undertakings. Council Directive 2009/65/EC[3] ("UCITS Directive") and the FCA Handbook set out minimum financial requirements for an undertaking to be treated as a

[2] There is also a category of "eligible counterparty" which comprises a limited class of financial institutions, but it is not relevant to this appeal, and so is not considered further.

[3] Council Directive 85/611/EEC was the original Directive governing UCITS, and had been subject to a number of amendments. It was replaced by Directive 2009/65/EC – which in turn has been amended a number of times.

professional investor. A professional investor can request to be treated as a retail investor, and thereby obtain the benefit of increased investor protection provisions.

44. A retail client or investor is anyone who is not a professional client. Retail clients include individuals and entities that are not big enough to meet the professional client requirements.

45. A retail investor can request to "opt-up" to be treated as a professional investor if it meets various criteria. But irrespective of whether it meets those criteria, an investment firm cannot agree to an opt-up request unless it has satisfied itself that the client has the appropriate level of knowledge and expertise of investment decision making and understanding of investment risks to justify professional treatment.

46. Ms Patterson's evidence (which is consistent with that of Mr Hugh Smith) is that many UK charities (including, in relation to investors in the CBF Funds, parochial church councils) do not meet the financial minima for treatment as professional clients, and may not meet the criteria to be able to opt-up to professional status.

**UCITS**

47. UCITS are described by the EU VAT Committee in its working paper 936 at 2.2.2 as:

> […] "traditional" investment funds intended to be marketed to retail investors and marketed across borders, providing a strong consumer protection framework which ensures the funds are suitable for retail investors. Eligible funds are permitted to use the UCITS label and benefit from a cross-border marketing passport, allowing them to market without barriers to all investors throughout the EU.

48. UCITS are defined in Article 1(2) of the UCITS Directive as undertakings:

> (a) the sole objective of which is the collective investment in transferable securities of capital[4] raised from the public and which operate on the principle of risk-spreading; and
>
> (b) the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets.

49. UCITS are therefore, by definition, open ended funds.

50. The term "public" is not defined, but common practice since the original directive came into force in 1985 has been for UCITS to accommodate all types of investors, both individuals (natural persons) and institutions, and of all degrees of financial sophistication.

51. The FCA sourcebook governing the regulation of UCITS and other authorised funds is COLL.

52. COLL and the UCITS Directive places restrictions and limitations on the nature of the assets a UCITS can invest in, requirements for diversification of investments, and limits on the amount it can borrow (and any borrowings must be temporary). The fund's governing documents may place additional restrictions on the fund, such as, for example, stating that the fund will invest predominantly in US securities.

53. UCITS are required to be authorised by the FCA, and the FCA will scrutinise the documents governing the proposed fund when deciding whether to authorise the fund. These documents include the instrument constituting the fund and scheme particulars (COLL 4 refers to the scheme particulars as a prospectus). COLL prescribes in some detail the required content of these documents.

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[4] Since 2003/4, UCITS have been able to invest in a wider range of instruments than just transferable securities.

54. Investors in UCITS must be able to buy or redeem shares/units at least fortnightly. These requirements make UCITS particularly suitable for retail investors. However - as Ms Patterson pointed out in her evidence – investors in UCITS are not limited to retail investors, and professional investors may choose to invest in UCITS. Indeed, some fund managers place restrictions on the investors (such as large minimum investment amounts) which effectively limit investment to institutional investors.

55. Historically UK authorised open-ended funds took the form of authorised unit trusts ("AUTs"). UK law was amended to allow for the creation of open-ended investment companies ("OEICs") from 1997, with the aim of providing a UK fund vehicle that would be attractive to non-UK investors. Authorised contractual schemes ("ACSs") were introduced in 2013 as a tax-transparent arrangement, which may be attractive to tax-exempt investors such as pension funds. AUTs are formed as trusts, and ACSs are contractual arrangements[5]. UCITS established in the UK can take the form of AUTs, OEICs, or ACSs.

56. Each UCITS is required to have a single authorised fund management company ("FMC"), or be self-managed. The manager of an authorised fund, such as a UCITS, is referred to in the FCA Handbook as an Authorised Fund Manager ("AFM"). In practice, UCITS funds in the UK have not adopted a self-managed model. FMCs are responsible for the overall operation of the fund, including investment management, administration, and marketing. The FMC will commonly delegate all or some of its responsibilities. So, for example, investment management will be delegated to an appropriately authorised investment manager, and fund administration will be delegated to a business that specialises in providing such services to many funds.

57. UCITS must also appoint a single authorised Depositary (in the case of AUTs, the Depositary is the trustee of the unit trust). As well as being responsible for the safe custody of the fund's investments, it also has an oversight role. Whilst a Depositary can delegate custody of fund assets (which is common in the case of a global custody network), it cannot delegate its oversight responsibility. According to Ms Patterson, Depositaries are generally not found outside Europe, and are considered by the FCA and other European regulators as a core feature of investor protection.

58. The UCITS Directive requires the Depositary to be operationally separate from the FMC. In the UK, the FCA requires the Depositary of UCITS and other authorised funds to be independent of the AFM in order to avoid conflicts of interest and to ensure that the Depositary acts only in the interest of investors.

59. COLL applies to the fund, the AFM and the Depositary. In this context it is important to note that an ACS is a contractual arrangement, and there is no fund entity. In the case of ACSs, COLL applies to the AFM and Depositary of the ACS, as the ACS is not an entity.

**AIFs**

60. The EU VAT Committee in its working paper 936 gave the following description of AIFs at 2.2.2:

> AIFs are funds designed for professional investors, which are not regulated at EU level by the UCITS Directive. They include, among others, hedge funds and private equity funds. The AIF portfolio composition is left entirely at the discretion of AIF managers. There is no EU passport to market the AIFs to retail investors, but only to professional investors. Marketing to retail investors can nonetheless be made at Member States' discretion.

[5] Whilst theoretically an ACS could be structured as a limited partnership, Ms Patterson's evidence was that she was not aware of limited partnerships being used as a structure of authorised funds in the UK.

61. AIFs are defined in Article 4 of the AIFMD as follows:

> (a) 'AIFs' means collective investment undertakings, including investment compartments thereof, which:
>
> > (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
> >
> > (ii) do not require authorisation pursuant to [the UCITS Directive];

62. The AIFMD came into force in July 2014, and fundamentally changed the governance structures adopted by non-UCITS funds. Prior to the coming into force of the AIFMD, non-UCITS funds were treated as unregulated collective investment schemes.

63. The AIFMD extended the EU harmonisation beyond UCITS to encompass other kinds of funds. The AIFMD introduced a marketing passport that enabled authorised AIF managers in any EU Member State to market their AIFs to professional investors in any other EU Member State. It established an EU-wide harmonised framework for monitoring and supervising risks posed by AIFs and their managers.

64. As a consequence of AIFMD, the FCA split its sourcebooks governing fund structures into two, and AIFs are subject to the FUND sourcebook.

65. An AIF must have a single authorised fund manager, or be self-managed. The manager of an AIF is referred to in the FCA Handbook as an AIF Manager ("AIFM"). An AIF must also have a single authorised Depositary. As with UCITS, the Depositary has an oversight role in addition to being responsible for the safe custody of the AIF's investments. Unlike authorised funds, the FCA does not require the Depositary of an AIF to be outside the corporate group of the AIFM, but there must be arrangements in place to avoid conflicts of interest and to maintain organisational separation.

66. In contrast to the UCITS Directive, the AIFMD does not regulate AIFs themselves, but their managers. AIFs are not authorised as such by the FCA, instead it is the AIFM that has to be authorised. The obligations imposed by FUND are imposed on the AIFM rather than the AIF. The reason for this is because of the very diverse types of AIFs it would be disproportionate to regulate the structure or composition of AIFs. AIFMs are required to obtain FCA approval in order to market an AIF in the UK. The procedure for applying for, and obtaining, such authorisation might be described as "light touch" when compared with the obtaining of authorisation for a UCITS under COLL.

67. AIFs are not subject to the mandatory restrictions imposed on their investments that apply to UCITS. Rather they are required to make available to their prospective investors a statement setting out (amongst other things) the investment strategy of the AIF and the investment and borrowing restrictions that the AIF proposes to adopt.

68. There are differences between the description of the operation of an AIF in the AIFMD compared with the corresponding provisions relating to UCITS in the UCITS Directive. This is because AIFs can invest in assets other than financial instruments, and because of the need to regulate the administration and marketing of UCITS for the protection of retail investors. The same requirements do not apply to the marketing of AIFs to professional investors.

**Other UK authorised funds**

***NURSs, QISs and LTAFs***

69. In addition to UCITS, other open-ended funds are authorised by the FCA for marketing to retail investors including non-UCITS retail schemes ("NURS"), qualified investor schemes ("QISs") and long-term asset funds ("LTAF"). Whilst all of these are AIFs, they can be

marketed to retail investors and are required to be authorised by the FCA in a similar manner to UCITS.

70. As AIFs, they must have an AIFM. But because they are authorised funds, they are also subject to COLL (with appropriate modifications). As authorised funds, the Depositary is required to be independent of the AIFM.

71. The investment powers for NURS are very similar to those for UCITS, but they permit additional eligible assets (immovable property and gold), apply higher investment and concentration limits in some areas, and permit (but limit) permanent borrowing. HMRC accept that NURS are a SIF and benefit from the SIF Exemption.

72. The investment and borrowing powers for QIS and LTAF are considerably more permissive, reflecting the fact that they can be marketed only to sophisticated retail (as well as professional) investors.

***MMFs***

73. Money Market Funds ("MMFs") hold bank deposits or money market instruments. Interest and other income derived from the investments are distributed to investors pro rata to their investment in the MMF. The COIF Deposit Fund and the CBF Deposit Fund operate in a similar way to an MMF. MMFs can be constituted as a UCITS, NURS or QIS.

***ITCs***

74. Investment Trust Companies ("ITCs") are investment companies with a fixed capital structure (and are therefore closed-ended) and are incorporated under company law. ITCs are required to be approved by HMRC as meeting the requirements of s1158 Corporation Tax Act 2010. These requirements include a condition that the business of the ITC must consist of investing its funds in shares, land, or other assets with the aim of spreading investment risk. In addition, the ordinary shares of the ITC must be admitted to trading on a regulated market (typically the Main Market of the London Stock Exchange). An ITC is required to have a published investment policy. Although ITCs' shares (in common with other listed companies' shares) cannot be directly marketed to retail investors, they can be acquired by retail investors, as their shares are traded on the London Stock Exchange. ITCs are regarded by the FCA as unregulated funds within the scope of AIFMD, even though they are regulated by the FCA in its capacity as UK Listing Authority. The relevant FCA sourcebook governing listed companies is LR (Listing Rules). LR 15 sets out the provisions governing the listing of closed-ended investment funds, such as ITCs. Few restrictions are placed on the investment powers of an ITC by LR 15. Of these the most relevant to this appeal are:

(a) LR 15.2.2 R - requires it to invest and manage its assets in a way which is consistent with its object of spreading investment risk;

(b) LR 15.2.3A R – it must not undertake any trading activity which is significant in the context of the group as a whole;

(c) LR 15.2.7 R – requires it to have a published investment policy relating to asset allocation, risk diversification, gearing, and maximum exposures;

(d) LR 15.2.8 G requires the policy to include quantitative information that is sufficiently precise and clear so that an investor can assess (amongst other things) the investment opportunity;

(e) LR 15.4.2 R requires it to manage its assets in accordance with its investment policy;

(f) LR 15.6.2 R requires the annual financial report to include a quantitative analysis of how it has invested its assets in accordance with its investment policy;

(g) LR 15.4.8 R requires any material changes to the investment policy to be approved by both the FCA and shareholders.

75. In addition to the application of LR 15, the ITC will be a client of its investment manager, who must be regulated by the FCA. The investment management relationship will be governed by COBS.

***CAIFs***

76. The CAIF regime was created in 2016, and the first CAIF was registered by the Charity Commission in December 2017. CAIFs are registered with the Charity Commission as a charity and authorised by the FCA. The effect of this is that they are subject to the regulation of both the FCA and the Charity Commission. In other words, a CAIF is both an investment fund authorised and regulated by the FCA, as well as being a registered charity. Like the COIFs, the only permitted investors in a CAIF are charities.

77. Since the establishment of the CAIF regime, the Charity Commission has stopped registering new COIFs. For this reason, new funds created by CCLA which are intended for charity investment have been established as CAIFs.

78. CAIFs are subject to COLL, and COLL 14 sets out the provisions relating to CAIFs. COLL 14.1.3 R provides that CAIFs can be established as a UCITS, NURS, QIS or LTAF.

79. Included within the evidence bundle were a number of articles and examples of promotional literature relating to CAIFs.

**Regulatory enforcement**

***FCA***

80. Ms Patterson's unchallenged evidence was that the FCA expects the FMC, AIFM, and the Depositary to ensure compliance with the scheme particulars of the UCITS or AIF. However, the FCA does not routinely monitor or test compliance itself. The FCA will receive in the case of AIFs very detailed periodic reports from the AIFM on the AIFs that they manage, on a monthly or quarterly basis, with great detail about their exposures, the use of derivatives, the geographical markets in which they are invested, the type of investment assets, and so on, so that it can monitor overall trends in the marketplace but can also delve into one particular fund if it had concerns. That information is not reported on a regular basis for UCITS. The reporting requirement for AIFs was introduced with the AIFMD because of the regulators' concerns about systemic risk in the marketplace and exposures to derivatives.

81. The FCA expects the Depositary to monitor compliance with the scheme particulars and the relevant FCA sourcebook for both UCITS and AIFs, and the Depositary is under an obligation to report areas of concern to the FCA. In the case of a breach, Ms Patterson's evidence was that the FCA would expect to also have received a report from the FMC or AIFM with details about what the breach was, the materiality of the breach, the size of the breach, the way in which it arose, whether it was absolutely a one−off for some reason, such as extenuating market circumstances, or indeed whether there was a series of small breaches; and it would question the FMC or the AIFM (as the case may be) and the Depositary about this. The FCA would then come to a judgment as to whether it would (in the words of Ms Patterson) "as it were, rap the firm over the knuckles and say, 'Don't do this again, sort it out'". In more serious cases it could require an expert person to investigate and report on the relevant systems and controls, and consider enforcement action such as levying a fine on the defaulter, or censuring individuals. Ms Patterson's evidence is that the FCA would treat breaches by a fund whose investors included retail clients (or in the case of AIFs, investors

other than "per se" professional clients – such as opted-up retail clients) more seriously than breaches by funds without retail investors (irrespective of how the fund was constituted or regulated).

82. Enforcement by the FCA should be distinguished from the FCA undertaking systemic or thematic reviews, and the evidence of Mr Hugh Smith was that the FCA had visited CCLA in the course of these kinds of review. However, these visits would not have been prompted by (or in order to check for) defaults or in order to enforce compliance with the FCA Handbook.

83. The FCA can require an FMC, AIFM, or a Depositary to compensate investors in the event of the mismanagement of a fund (such as significant or persistent breach of rules or gross negligence).

***Charity Commission***

84. In its 1 July 2014 policy paper, the Charity Commission says in relation to its regulatory role:

> **2.5 The commission's regulatory role with regards to CIFs**
>
> The commission's role with regard to CIFs can be summarised as follows:
>
> - to ensure the administration of CIFs is properly managed in accordance with charity law and their scheme provisions and scheme particulars and to encourage good practice
> - to investigate allegations of misconduct or mismanagement relating to the duties of the trustees
>
> It cannot be overemphasised that the commission is not a financial adviser or regulator and is not responsible for the financial regulation and supervision of CIFs. As already stated the FCA has a limited role in the financial oversight and monitoring of CIFs. The disclosure of expenses, costs and commission fees etc provided in documentation such as the scheme particulars should provide sufficient transparency to enable charities as investors to be able to take a closer scrutiny of the performance of their investments themselves.
>
> **2.6 The extent of the commission's regulation of CIFs**
>
> On investment matters, the individual charity trustees, the corporate managers and the advisory committees or advisory boards of CIFs (if applicable) are responsible for:
>
> - setting measurable performance objectives
> - determining the investment policy and strategy
> - determining the risks that may be associated with such policy and strategy
>
> The manager and the trustee are regulated and subject to monitoring by the FCA. The commission does not attempt to duplicate the regulatory functions of the FCA. This means that the commission does 'not' regulate the efficacy of investment policies or ensure that the investment policies being adopted are necessarily appropriate or meet the expectations of the investing charities. It only regulates CIFs as charities with regard to their compliance with charity law.

85. The paper makes virtually the same statements in relation to CDFs in sections 7.5 and 7.6.

86. At the risk of stating the obvious, the Charity Commission is not a competent authority for the purposes of the AIFMD or the UCITS Directive.

**THE FUNDS**

**COIFs**

87. The COIFs are established pursuant to a Charity Commission scheme under s96 Charities Act 2011 (or the corresponding earlier provisions). The COIFs are registered charities and have at all times been subject to the regulatory oversight of the Charity Commission (both before and after the introduction of the AIFMD regime). The only permitted investors are charities.

88. The six COIFs are AIFs. Prior to July 2014, the COIFs were treated as unregulated collective investment schemes.

89. Because the AIFMD provided that CCLA could not act as an AIFM in circumstances where it conducted activities under the Markets in Financial Instruments Directive [6] ("MiFID"), CCLAFM was appointed as the AIFM of the COIFs in July 2014, but delegated the actual delivery of fund management services back to CCLA. The COIFs have at all material times been managed by CCLA or CCLAFM, which have at all material times been regulated for these purposes by the FCA (or its predecessors).

90. The Charity Commission's 2014 guide to CIFs states (at section 2.2):

> […] although CIFs are "unregulated" investments and, strictly speaking, the provisions of Collective Investment Schemes Sourcebook (COLL) (which sets out the FCA's requirements for authorised collective investment schemes) do not apply to them as stated above, the commission takes the view that the requirements of COLL provide an appropriate level of financial regulation for CIFs and therefore have reflected this along with the AIFMD requirements in the provisions of the commission's new model schemes.

Therefore, for CIFs, the equivalent of the UCITS Directive and COLL investment and borrowing powers summarised above are included as terms in the Charity Commission's Model Scheme document. The provisions of the scheme documents for all of the COIFs include restrictions and limitations that directly mirror many (but not all) of the requirements of UCITS and COLL. Examples of provisions that are not mirrored include the absence of prescriptive limits on the exposure of the fund to any one issuer's securities or on the amounts that can be invested in another collective investment fund. Other examples of non-mirrored provisions include wider powers of borrowing that would be permitted for a UCITS, and high-level statements about the need for diversification, rather than prescriptive limits. This can be seen, for example, in the case of the COIF Charities Global Equity Income Fund where the 15% net asset limit in the Commission's model scheme was not included in the scheme governing this fund. We note that the trustee of the COIFs has the power to amend some of the scheme provisions (in 2014, for example, the board of the COIF Charities Ethical Investment Scheme Fund amended the provisions of its scheme) – this power of amendment would allow the trustee to further relax the prescriptive limits included in the fund's documents.

91. As regards CDFs, the Charity Commission's Model Scheme document includes provisions restricting the kinds of deposits eligible for investment, diversification requirements, and requirements relating to the liquidity of the investment portfolio in a similar manner to authorised MMFs.

[6] Directive 2014/65/EU

92. Although the COIFs (as AIFs) are subject to FUND and not COLL, in practice CCLA has managed the COIFs largely in line with the requirements of COLL.

93. The very great majority of charity investors in the COIFs are classified as retail investors. Although AIFs cannot usually be marketed to retail investors, COBS 4.12B7R provides an exemption for promotions made to persons eligible to invest in funds constituted under ss 96 or 100, Charities Act 2011 (which includes the COIFs).

94. Mr Donmall cross-examined Mr Hugh Smith at length about CAIFs, and challenged the evidence in his witness statement that (in the eye of an investor) there was no material difference between a CIF and a CAIF. Mr Donmall noted that a significant number of fund managers had converted their charitable funds from CIFs to CAIFs, and referred Mr Hugh Smith to documentary evidence stating that CAIFs had advantages over CIFs – in particular their regulatory environment and that they qualified for the SIF Exemption. Mr Hugh Smith's unchallenged evidence was that CCLA is the largest manager of charity assets in the UK, and the great majority of those assets are held through the COIFs. As CCLA has increased its assets under management over many years, Mr Hugh Smith believed that the fact that the COIFs were organised as CIFs and not CAIFs appears not to have any great bearing on investor behaviour. Mr Hugh Smith stated that at the time of the hearing CCLA had no plans to convert the COIFs into CAIFs, but it is a matter that they keep under review.

**CBF Funds**

95. The CBF Funds are established under the 1958 Measure. Each CBF Fund is a charity in its own right, but the 1958 Measure exempts the CBF Funds from regulatory oversight by the Charity Commission. At all material times they have been managed by CCLA.

96. HMT issued a consultation document in March 2013 about the implementation of AIFMD in the UK. In it they stated that funds constituted under church legislation (which would include the CBF Funds) "are outside the scope of AIFMD because they do not raise external capital and the funds are not managed as a regular business." The CBF Funds are not regulated as AIFs by the FCA, and the FCA applies neither COLL nor FUND to them.

97. Because the basis on which HMT reached their view was unclear, we requested further written submissions from the parties on this point after the hearing. CCLA submit that it may be that HMT regard the Church of England as a unitary entity, and therefore as a single investor and in consequence there is no pooling of investments. However, as both parties recognise, this is inconsistent with the underlying legal status of the various emanations of the Church of England. The institutional structure of the Church is that there are separate legal entities for each parish and diocese. We were referred to the decision of the House of Lords in *Aston Cantlow and Wilmcote with Nillesley PCC v Wallbank and another* [2003] HL 37 at paragraph [84]:

> The [Parochial Church Council] is thus a creature of statutory provision by what was then the National Assembly of the Church of England. It has only those functions, duties and powers which have been conferred upon it by that or other legislation. It is part of a structure known as the Church of England but the Church of England is not itself a legal entity. The legal entities are the various office-holders and various distinct bodies set up within that structure.

98. HMRC submit that HMT may have reached its view on the basis that the CBF Funds are not operating by way of business. However, as submitted by the Appellants, although the trustee of the CBF Funds may be exempt from registration on the basis that the trustee is not operating the funds by way of business, CCLA, as investment manager, manages the funds by way of business, and it is FCA authorised. There is a difference of view between HMRC

and the Appellants on the distinction between “management” of the funds by CCLA and “operation” of the funds by the trustee – but this is not a distinction which we need to resolve.

99. All that said, both parties confirm that in their view the CBF Funds are collective investment schemes for the purposes of the SIF Exemption, and we agree and so find. However, HMRC note that the CBF Funds are not treated as AIFs by the UK state, and that this is acknowledged in documents issued to investors in the CBF Funds.

100. The CBF Funds have at all material times been managed by CCLA, which has at all material times been regulated for these purposes by the FCA (or its predecessors).

101. Given HMT’s view that the CBF Funds are not AIFs, the FCA does not regulate them as investment funds and the FCA does not require them to appoint an AIFM or a Depositary. Instead, the relationship between the CBF Funds and CCLA is governed by COBS and those provisions within the FCA Handbook that are of general application. This includes a requirement for CCLA to deal with the FCA in an open and cooperative way and disclose anything to the FCA of which the regulator would reasonably expect notice (PRIN 2.1R). In practice, CCLA manages the CBF Funds in a similar way to its management of its other funds that fall within AIFMD.

102. Notwithstanding the absence of any regulatory requirement to appoint a Depositary, the trustee of the CBF Funds has appointed a regulated entity to monitor CCLA in respect of its management and administration of the CBF Funds. But this entity is not a “Depositary” for regulatory purposes and does not have a regulatory obligation to report regulatory breaches to the FCA.

103. Investors in the CBF Funds are restricted to charitable trusts with objects connected to the Church of England. These include Church of England parishes, dioceses, cathedrals, and other church charitable trusts. Many of these entities are small and are classified as retail investors.

104. As the CBF Funds are unregulated, they cannot be marketed to retail investors. However, marketing to Church bodies is permitted by COBS 4.12B7R, which provides an exemption for promotions made to persons eligible to invest in funds constituted under the 1958 Measure.

105. The governing documents of the CBF Funds refer to the manager being authorised by the FCA and operating in accordance with the FCA Handbook (or its predecessors' rules). As with the COIFs, the Funds’ governing documents include restrictions and limitations that directly mirror many (but not all) of the requirements of UCITS and COLL. Examples of provisions that are not mirrored include the absence of prescriptive limits on the exposure of the fund to any one issuer’s securities or on the amounts that can be invested in another collective investment fund. Other examples of non-mirrored provisions include wider powers of borrowing than would be permitted for a UCITS, and high-level statements about the need for diversification, rather than prescriptive limits.

**LAPF**

106. The LAPF is an unregulated open ended collective investment scheme approved by HMT as a scheme under s11 Trustee Investments Act 1961. The trustee is the Local Authorities Mutual Investment Trust, a company which is exempt from the need to be authorised by the FCA by virtue of paragraph 45 of the Schedule to the FSMA 2000 (Exemptions) Order 2001 (SI 2001/1201).

107. The LAPF invests in real estate either directly or indirectly by investing in other real estate funds (including UCITS and AIFs).

108. It is not disputed that HMT has not undertaken any ongoing supervision of the LAPF – for example CCLA and CCLAFM were appointed as investment managers without HMT involvement.

109. The LAPF is an AIF. Prior to July 2014, it was treated as an unregulated collective investment scheme.

110. Because the AIFMD provided that CCLA could not act as an AIFM in circumstances where it conducted activities under MiFID, CCLAFM was appointed as the AIFM of the LAPF, but delegated the actual delivery of fund management services back to CCLA. The LAPF has at all material times been managed by CCLA or CCLAFM, which have at all material times been regulated for these purposes by the FCA (or its predecessors).

111. AIFs cannot usually be marketed to retail investors. Many of the local authority investors in the LAPF are classified as retail investors. In order to invest in the LAPF, they must "opt-up" to be treated as professional investors, but this is subject to CCLA being satisfied that the investor has an appropriate level of expertise to justify professional treatment. Alternatively, some local authorities invest through an independent financial advisor for which another exemption is available.

**Generally**

112. Mr Hugh Smith's evidence was that the Funds were marketed in competition with funds managed by other fund managers. From the perspective of a typical charity investor (the vast majority of which will be classified as retail investors), there are many types of funds into which they could invest, and which are actively marketed in competition with one another. The charity sector is well served by the market, and a number of leading fund managers operate CIFs, CDFs, and CAIFs. Further, charities are not restricted to investing in CIFs, CDFs, and CAIFs – they can invest in other collective funds such as UCITS or NURS, provided the fund's investment policy is not contrary to the charity's objects. Included in the documentary evidence were a number of surveys and comparisons comparing various fund managers serving the charity sector.

113. Aside from the CBF Funds, there are no other funds specifically designed for Church of England investors. However, Church entities can invest in other funds, including charity investment funds (such as CIFs, CDFs, and CAIFs), as well as bespoke investments and segregated accounts operated by wealth managers.

114. There are two property funds in direct competition with the LAPF which are managed by competitor fund managers and targeted at local authority investors, both of which are AIFs. Mr Hugh Smith was also aware of three other property funds, although not specifically designed for local authority investment, are recommended as investment vehicles for local authorities. These three funds are AIFs, of which one was structured as a NURS.

CASE LAW

115. The term "special investment funds as defined by Member States" is not defined in legislation. Its meaning has been considered in a number of decisions of the CJEU. It can be unpacked into two elements – "special investment funds" and "as defined by Member States".

116. The CJEU considered the qualification "as defined by Member States" in its decision in *JP Morgan Fleming Claverhouse Investment v The Commissioners for HM Revenue & Customs* (Case C-363/05) [2008] STC 1180. This decision considered the application of the SIF Exemption to ITCs which did not come within the UK domestic VAT exemption at the time. In issue in the *Claverhouse* appeal was the extent of the discretion of Member States to define special investment funds. The CJEU held that the discretion of Member States to

determine which funds could benefit from the SIF Exemption was limited, but that that closed-ended funds (such as ITCs) were capable of coming within the meaning of special investment funds.

117. In its decision in *Wheels Common Investment Fund Trustees Ltd & Others v The Commissioners for HM Revenue & Customs* (Case C-424/11) [2014] STC 495 at [14] the CJEU said:

> A member state cannot in particular, without negating the very terms "special investment funds", select from among special investment funds those which are eligible for the exemption and those which are not. Those provisions thus grant it only the power to define, in its domestic law, the funds which meet the definition of "special investment funds".

118. The central issue in this appeal is the meaning of "special investment fund". As the harmonisation of investment fund regulation in the EU was originally based on UCITS, such funds have been used by the CJEU as the comparator for determining whether an investment fund is a SIF. The jurisprudence of the CJEU in relation to SIFs has had as its focus whether a fund is comparable to a UCITS. We were taken to a number of decisions of the CJEU on this issue.

**Abbey National**

119. We have referred to *Abbey National plc* above. The issue in dispute was the meaning of "management", which is not in dispute in this appeal. But the Court explained the reasons behind the SIF Exemption, and that the common system of VAT should be fiscally neutral for small investors as regards the choice between direct investment in securities and investment through a collective investment scheme. In her opinion the Advocate General Kokott said (at [68]):

> If the exemption did not exist, the owners of units in common funds would have a greater tax burden than investors who invest their money directly in shares or other securities and do not have recourse to the services of a fund [manager].

And at [79]:

> There is a certain tension between this orientation of Directive 85/611 and the obligation to interpret strictly the provisions of the Sixth Directive which provides for exemptions from VAT – in the present case, specifically the concept of the management of a common fund. The conditions of the two legal acts can be harmonised, however, if the concepts of Annex II to Directive 85/611 are regarded not as definitions of the management services of a common fund, but as a description of the typical functions of the management company. This approach leaves room for taking into account in the context of the Sixth Directive only as an indication of the existence of activities of the management of a common fund. At the same time the requirement of a strict interpretation of the exceptions can then be taken into account as far as necessary.

120. This reasoning is then adopted by the CJEU at [62] of its decision:

> As the Advocate General observed in point 68 of her Opinion, the purpose of the exemption, under Article 13B(d)(6) of the Sixth Directive, of transactions connected with the management of special investment funds is, particularly, to facilitate investment in securities for small investors by means of investment undertakings. Point 6 of that provision is intended to ensure that the common system of VAT is fiscally neutral as regards the

> choice between direct investment in securities and investment through undertakings for collective investment.

**Claverhouse**

121. As also discussed above, *Claverhouse* concerned the extent of the discretion (if any) conferred on Member States to define which funds constituted SIFs, and whether a closed-ended fund (such as an ITC) was capable of constituting a SIF. It held that for closed-ended funds, the discretion of Member States to define SIFs was limited, but that closed-ended funds were not excluded from being SIFs.

122. In her opinion, Advocate General Kokott said the following:

> 30. The objective of the exemption of the management of special investment funds from VAT is in particular to avoid making access to that form of investment more difficult for small investors. If the exemption did not exist, the owners of units in investment funds would have a greater tax burden than investors who invest their money directly in shares or other securities and do not have recourse to the services of a fund management. It is precisely small investors for whom investment in investment funds is particularly important. Because of the small volume of investment available to them, they have only a restricted opportunity of investing their money directly in a wide spread of securities. In addition, they often do not have the necessary knowledge for comparing and selecting securities.
>
> […]
>
> 40. The United Kingdom fears that, on that interpretation of the principle of neutrality, the scope of the exemption from VAT for special investment funds would become boundless. Exemption would then also have to be extended to the management of numerous other forms of pooled investments, such as pension funds, unit-linked life assurance policies, investment clubs and venture capital trusts.
>
> 41. As the Commission correctly points out, however, the only issue in these proceedings is whether the management of closed-ended investment funds such as ITCs falls under the exemption referred to in art 13B(d)(6) of the Sixth Directive. How certain other investment vehicles should be assessed having regard to the objectives of that provision and to the principle of fiscal neutrality remains a hypothetical question.
>
> 42. The United Kingdom government further submits that, even if the existence of a competitive relationship is the decisive factor, the difference in tax treatment has no effect on it, because the amount of the extra tax burden borne by ITCs is in practice too small.
>
> 43. That cannot be accepted. The principle of fiscal neutrality precludes unequal treatment of similar and therefore competing goods or services as regards exemption from VAT. Breach of that principle does not require the unequal taxation actually to result in a demonstrable distortion of competition. Otherwise exemption would apply on a case-by-case basis. That is because the actual influence of the taxation of fund management on competition depends on the underlying circumstances of the individual case, such as, for example, the cost structure of the particular type of fund and the price sensitivity of the fund segment concerned.
>
> 44. However, in the context of assessing observance of the principle of neutrality, the comparability of the management activities themselves or the equal treatment of the external fund managers is not in issue in this case. The decisive factor is, rather, the comparability of the investment funds whose

market position may affect the tax burden on the fund management. In that situation, the principle of fiscal neutrality therefore precludes any difference in the tax treatment of supplies depending on the recipient of the supply in so far as the recipients of the supplies are for their part comparable and in competition with each other.

45. In its order for reference, the referring tribunal states that ITCs, in the same way as AUTs and OEICs, enable private investors to invest in widely spread portfolios of investments and thus reduce stock market risk. Moreover, with all types of fund, private investors benefit from professional fund management, the expenses of which are shared, and from reduced overall dealing and administrative costs. ITCs also fulfil the same functions for institutional investors. This indicates that ITCs are comparable to the types of fund (AUTs and OEICs) which are entitled to exemption from VAT and in competition with them. Consequently, their management should also be exempted from VAT.

46. Unequal treatment would be permissible only if the various types of fund did not serve in the same way to achieve the objectives of the exemption. The exemption is intended inter alia to facilitate access for small investors to investment in securities through collective investment. That group of investors is scarcely able to monitor the activities of a fund itself and is therefore particularly reliant on statutory protection mechanisms.

47. In so far as art 13B(d)(6) of the Sixth Directive refers to the definition of special investment funds by member states, the provision leaves it to them to establish the legal framework for the structure and management of the investment vehicles entitled to exemption from VAT. It would be consistent with the objectives of the exemption if, in exercising that power of definition, member states also allowed themselves to be guided by the extent to which investor protection is ensured in the case of a given type of fund.

48. In the case of funds covered by [the UCITS Directive], the member states no longer retain any discretion in that respect; in their case an adequate level of investor protection must be assumed. Other forms of investment fund, on the other hand, may be excluded from the exemption if they do not ensure a level of investor protection comparable to that ensured by funds whose management is exempt.

49. It is for the referring tribunal to establish whether the level of investor protection afforded by ITCs is comparable to that afforded by AUTs and OEICs. Depending on the type of fund, quite different mechanisms, leading in effect to a comparable level of protection, can be employed for that purpose.

123. At paragraph [15] of its decision, the CJEU noted that, unlike AUTs and OEICs, ITCs are not subject to authorisation by the Financial Services Authority ("FSA") (the predecessor to the FCA) under FSMA, but were regulated as listed companies by the FSA acting as the UK listing authority. The Court confirmed (as it had decided in *Abbey National*) that the legal form cannot determine whether a fund is a SIF, and therefore "the provisions of the UCITS Directive cannot be relied on to derive a restricted meaning of the term 'special investment funds'" (at [31]). The Court then went on to consider the application of the principle of fiscal neutrality:

45. In that regard it must be observed, first, that the purpose of the exemption, under Article 13B(d)(6) of the Sixth Directive, of transactions connected with the management of special investment funds is, particularly, to facilitate investment in securities by means of investment undertakings by

> excluding the cost of VAT. That provision is intended to ensure that the common system of VAT is fiscally neutral as regards the choice between direct investment in securities and investment through undertakings for collective investment (*Abbey National*, paragraph 62).
>
> 46. Second, the principle of fiscal neutrality, on which the common system of VAT established by the Sixth Directive is based, precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT. That principle does not require the transactions to be identical. According to settled case-law that principle precludes, in particular, treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see Case C-109/02 *Commission v Germany* [2003] ECR I-12691, paragraph 20; Joined Cases C-453/02 and C-462/02 *Linneweber v Akritidis* [2005] ECR I-1131, paragraph 24; *Kingscrest, Associates and Montecello*, paragraph 54; Case C-106/05 *L.u.p.* [2006] ECR I-5123, paragraph 32; *Turn- und Sportunion Waldburg*, paragraph 33; and *Solleveld and van den Hout-van Eijnsbergen*, paragraph 39).
>
> 47. The principle of fiscal neutrality includes the principle of elimination of distortion in competition as a result of differing treatment for VAT purposes (see, to that effect, Case C-481/98 *Commission v France* [2001] ECR I-3369, paragraph 22). Therefore, distortion is established once it is found that supplies of services are in competition and are treated unequally for the purposes of VAT (see, to that effect, Case C-404/99 *Commission v France* [2001] ECR I-2667, paragraphs 45 to 47). It is irrelevant, in that connection, whether the distortion is substantial.
>
> 48. It follows from the foregoing that any application of national legislation which excludes the management of special closed-ended investment funds from the exemption provided for by Article 13B(d)(6) of the Sixth Directive is contrary to the objective of that provision and to the principle of fiscal neutrality where those closed-ended funds are collective investment undertakings which allow investors to invest in securities and where those funds are in competition with funds exempt from VAT.

124. The Court then went on to give guidance to the national court as follows:

> 50. […] the management of AUTs and OEICs, which are collective investment undertakings as defined in the UCITS Directive, is exempt from VAT in the United Kingdom. Although, at present, ITCs are not collective investment undertakings within the meaning of the UCITS Directive, the fact remains that, as the referring court observes, AUTs, OEICs and ITCs are three forms of special investment which spread risk. In addition, the referring court considers that ITCs, like AUTs and OEICs, involve investment in securities through the intermediary of a collective investment undertaking which allows private investors to invest in wide-ranging investment portfolios and thus reduce the stock market risk.
>
> 51. Thus, according to the statements put before the court, the management of ITCs falls within the objective of the Sixth Directive and ITCs constitute investment funds comparable to AUTs and OEICs which fall within the definition of 'special investment funds'. In those circumstances, the exclusion of ITCs from the exemption provided for by Article 13B(d)(6) does not appear justified in the light of the objective of that provision and the principle of fiscal neutrality.

**Deutsche Bank**

125. The issue in *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* (Case C-44/11) [2012] STC 1951 related to the provision of investment management services by Deutsche Bank to its clients. The dispute did not relate to collective investments in any form, and the CJEU held that the SIF Exemption was not available. Interestingly Advocate General Sharpston said the following in her opinion:

> 58. It is true that the court has stated that the principle of fiscal neutrality, inherent in the VAT system, precludes treating similar, competing supplies differently for VAT purposes, and that the exemption under art 135(1)(g) is intended to ensure such neutrality as regards the choice between direct investment in securities and investment through joint undertakings.
>
> 59. I accept also that individual portfolio management enters into competition, at least to some extent, with both those modes of investment. As became even clearer at the hearing, however, the choice which any investor makes—when he has sufficient assets to be in a position to choose—is likely to depend on a considerable number of factors, of which VAT treatment will be only one. And, even if VAT treatment may in some cases be a consideration, it is not clear that taxation, with its corollary of deductibility of input tax, will necessarily be significantly less advantageous to the customer, in the final event, than exemption, with input VAT irrecoverably embedded in the price of the services. As was pointed out at the hearing, both portfolio management and special investment funds attract large investors, who may be taxable persons enjoying a right of deduction.
>
> 60. Moreover, while the principle of fiscal neutrality in VAT may explain the relationship between the explicit exemptions for both direct investment and the management of joint investment funds, I do not accept that it can extend the scope of an express exemption in the absence of clear wording to that effect. As the German government observed at the hearing, it is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with—and as a limitation on—the principle of strict interpretation of exemptions. It is clear from the case law that activities which are to some extent comparable and thus to some extent in competition may be treated differently for VAT purposes where the difference in treatment is explicitly provided for. Moreover, if all activities partly in competition with each other had to receive the same VAT treatment, the final result would be—since practically every activity overlaps to some extent with another—to eliminate all differences in VAT treatment entirely. That would (presumably) lead to the elimination of all exemptions, since the VAT system exists only to tax transactions.

126. Advocate General Sharpston appears to suggest that if funds are in competition, such that one incurs VAT and the other does not, this may not matter to some large investors who are taxable, and therefore able to recover any VAT charge as input tax. We note that this reasoning was not adopted by the CJEU in its decision.

**Wheels**

127. *Wheels Common Investment Fund Trustees Ltd and others v Revenue and Customs Commissioners* (Case C-424/11) [2014] STC 495 concerned the pooling of investments by a number of different defined benefit occupational pension schemes, and whether the pooled fund was a SIF. At paragraphs [18] to [20] of its decision, the CJEU restated the principles that the purpose of the SIF Exemption is to:

> […] facilitate investment in securities by means of investment undertakings by excluding the cost of VAT and, in that way, ensuring that the common system of VAT is neutral as regards the choice between direct investment in securities and investment through collective investment undertakings

And that:

> […] the principle of fiscal neutrality precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT

128. At paragraph [21] the Court noted that this principle does not require the transactions to be identical, as the settled case law is that the principle also precludes treating similar transactions for services, which are in competition with each other, differently for VAT purposes

129. The CJEU started from the position (at [23]) that UCITS are SIFs. It then went on to state at [24] that:

> funds which, without being collective investment undertakings within the meaning of the UCITS Directive, display characteristics identical to theirs and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds.

130. However, the Court concluded that a defined benefit scheme could not come within the SIF Exemption, because it was not sufficiently comparable to a UCITS, as it constitutes a benefit granted to employees, and the members of the underlying pensions schemes did not bear any investment risk. It therefore followed that the Wheels fund could not benefit from the SIF Exemption.

131. Although the Court stated that the fund was "not open to the public", we consider that this was in the context of the fund being used to provide pension benefits for employees, in contrast to it being an investment vehicle. This interpretation is confirmed by the opinion of Advocate General Cruz Villalón in *ATP*.

**ATP**

132. *ATP Pension Service A/S v The Skattemimisteriet* (Case C-464/12) [2014] STC 2145 - considered a defined contribution pension scheme.

133. In his opinion, Advocate General Cruz Villalón discussed the methodology that should be adopted to determine whether there was a competitive relationship such that the principle of fiscal neutrality applied:

> 44. The criterion of a competitive relationship is a difficult one. Advocate General Sharpston commented on its dangers in *Deutsche Bank*, remarking that there always is some overlap between activities and if all activities 'partly in competition with each other had to receive the same VAT treatment, the final result would be the elimination of all differences in VAT treatment.
>
> 45. The danger perceived by Advocate General Sharpston can be eliminated by applying a correct methodology of comparison. First of all a comparator needs to be established that falls under the concept 'special investment fund'. The fund at issue will only be compared to that comparator. According to what I have stated above, funds which are collective investment undertakings within the meaning of the UCITS Directive fall

> under the concept of 'special investment fund' and hence can serve as a comparator.
>
> 46. Whether the fund analysed must also be included in the concept of 'special investment fund' or not is a question of whether that fund and the comparator are sufficiently comparable for them to be in competition with each other. The criteria of the funds that are to be compared to establish sufficient likeness for there to be competition are not chosen randomly. Neither is the analysis an entirely economic one. Rather, it has to be based on the objective of the exemption. Relevant criteria are thus, for example, whether the fund is a method of spreading risk, whether the investors benefit from the gains in the investment etc.

134. The Advocate General then went on to analyse the relevant comparative criteria in more detail:

> (a) Point of view of comparison
>
> 54. Before I can list irrelevant and relevant criteria I have to point out that pension schemes can be analysed as asset-pooling instruments of employers or of employees. Which of these two paradigms applies depends on whether the employees or the employers benefit from the investment. According to the description of the referring court, the employees benefit from the fund in the case at hand.
>
> (b) Irrelevant criteria
>
> 55. As the analysis of the comparable character of the funds at issue with UCITS has to be undertaken with the objective of the exemption in mind, a number of elements that have been discussed in this case are irrelevant to the comparison.
>
> 56. This is, contrary to the allegations of Denmark, true with respect to the purpose of the investment. Whether the investor saves for pensions or for other purposes has no relevant impact on the competitive relationship. Hence the fact that the funds at issue are pension funds does not prevent them from constituting 'special investment funds'. In contrast to *Wheels*, I would consequently dismiss the relevance of the employer's legal obligation with respect to paying defined pension benefits as an irrelevant 'purpose' of the investment.
>
> 57. The fact that occupational pension funds are not agreed on individually but collectively is irrelevant. First of all, the employees' representatives negotiate the characteristics of the funds with the employers' representatives. Even though a collective agreement might mean that there is very little economic competition between the funds and UCITS outside of voluntary supplementary payments by the employees, this is not relevant to the objective of the exemption. In this respect the court has already decided that the exemption covers funds whatever their legal form. To that extent the possibility of making supplementary payments or the voluntary adherence of some persons to occupational funds is equally irrelevant.
>
> 58. The same consideration applies to the question whether the contributions to a fund are income tax deductible or not. A favourable income tax treatment for contributions to some funds over others might have a considerable impact on the economic competitive relationship, but it has no significance with respect to the objectives of the exemption and hence must be disregarded.

> 59. Similarly, the mode of payments out of the retirement fund (life annuity or lump sum) is not significant for the fund's characterization, as transfers between the various options are possible by a simple financial transaction.
>
> 60. Where occupational pension funds are bundled with an insurance element and the two elements cannot be separated, as is the case here, the national courts have to determine which element is prevalent.
>
> (c) Relevant criteria
>
> 61. As I have stated above, the criteria relevant for the comparison have to be deduced from the purpose of the exemption, namely to allow the pooling of funds of several investors, and to spread the risk over a range of securities.
>
> 62. According to this premise, only a limited number of elements are essential for comparing occupational pension funds to UCITS for the purposes of fiscal neutrality under the exemption analysed. First of all, several beneficiaries have to pool their funds to spread the risk over a range of securities. The fund can only be considered a pooling of the beneficiaries' funds if the beneficiaries enjoy an unconditional legal right with respect to their investment. They may not be able to realise the right at will (i.e. sell their entitlement) and they may receive the benefit of their investment only upon retirement. However, where the investment is lost in case of death and does not fall to the heirs of the beneficiary, one can hardly speak of a pooling of the beneficiaries' funds.
>
> 63. Finally, the beneficiaries have to bear both the cost of the fund and the risks of the investment, even though the contributions can be paid by their employer as part of their payment package. This will generally be the case with respect to defined-contribution, but not with respect to defined-benefit schemes. As I have already stated, the application of these criteria is incumbent on the national courts.
>
> 64. I therefore conclude that art 13B(d)(6) of the Sixth Council Directive has to be interpreted as meaning that the term 'special investment funds as defined by Member States' has to include occupational pension funds where such funds pool the assets of several beneficiaries, and allow the spreading of the risk over a range of securities. This is only the case where the beneficiaries bear the risk of the investment. The fact that the contributions are made by their employers for their benefit under a collective agreement between organisations representing employees and employers and that payments out of the fund are only made upon retirement is irrelevant, as long as the beneficiary has a secure legal position with respect to her or his assets. Whether a fund fulfils these requirements is for the national courts to decide.

135. We note that the regulatory framework governing the fund was not addressed in the Advocate General's opinion.

136. The Court in its decision set out the principles by which to determine whether a fund is comparable to one which falls within the UCITS Directive as follows:

> 47. Furthermore, funds which – without being UCITS within the meaning of Directive 85/611 – display characteristics identical to those of UCITS and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be competition with such undertakings must also be regarded as special investment funds (see, to that effect, *Abbey National*, paragraphs 53 to 56; *JP Morgan Fleming*, paragraphs 48 to 51; and *Wheels* paragraph 24).

> […]
>
> 49. In that regard, art 1(2) of Directive 85/611 states that the directive covers any undertaking the sole object of which is the collective investment in transferable securities and/or in other liquid financial assets of capital raised from the public and which operates on the principle of risk-spreading and the units of which are, at the request of holders, re-purchased or redeemed, directly or indirectly, out of that undertaking's assets.
>
> 50. Such undertakings are those in which many investments are pooled and spread over a range of transferable securities which can be managed effectively in order to optimise results, and in which individual investments may be relatively modest. Such funds manage their investments in their own name and on their own behalf, while each investor owns a share of the fund but not the fund's investments as such (*Deutsche Bank*, para 33).
>
> 51. The essential characteristic of a special investment fund is the pooling of assets of several beneficiaries, enabling the risk borne by those beneficiaries to be spread over a range of securities. From the statements provided by the referring court, this appears to be the situation in the case before it, as groups (ii) and (iii) of the Danish pension system schemes are funded by the persons to whom the retirement benefit is to be paid. Moreover, the referring court states—in Question 1(c)—that the sums in question are invested using a risk-spreading principle and—in Question 1(a)—that the pension customers bear the investment risk.

137. The Court went on to contrast the circumstances in *ATP* with those in *Wheels*, because in *Wheels* the beneficiaries of the fund did not bear any investment risk.

138. As with the opinion of the Advocate General, the Court made no reference to the regulatory framework governing the fund.

139. The Court therefore concluded at [59] that the ATP fund could come within the SIF Exemption as:

> pension funds such as those at issue in the main proceedings may fall within the scope of that provision if they are funded by the persons to whom the retirement benefit is to be paid, if the savings are invested using a risk-spreading principle, and if the pension customers bear the investment risk.

**Fiscale Eenheid**

140. Although there was no reference in the CJEU's decision in *ATP* to the need for specific Member State supervision, in *Staatssecretaris van Financiën v Fiscale Eenheid X NV cs* (Case 595/13) [2016] STC 2230 the CJEU decided that such supervision was a requirement for the SIF Exemption to apply.

141. Advocate General Kokott rehearsed in her opinion the observations made in previous decisions of the CJEU, namely that VAT had been harmonised before financial regulation. It was for this reason that the Sixth VAT Directive had to refer to national law when exempting from VAT the management of investment funds subject to specific state supervision – as originally only Member States determined which funds were to be subject to State regulation. However, once investment funds were regulated at the EU level by the UCITS Directive, the CJEU limited the discretion of Member States to define SIFs for the purposes of the SIF Exemption. Advocate General Kokott then went on to say:

> 24. As long as supervisory law is not regulated at EU level, however, Member States continue to have the power to define. This is because in the sixth recital of the UCITS Directive, the EU legislature stated that

> harmonisation should 'initially' concern only funds other than those that are closed-ended and which invest exclusively in transferable securities. For this reason, the Court of Justice was able to find that a closed-ended investment company State oversight of which is not regulated by EU law can nevertheless fall within the definition of a special investment fund pursuant to Article 13B(d)(6) of the Sixth Directive.
>
> 25. For the case in question, that situation has not changed. This is because the more far-reaching harmonisation of supervisory law in respect of investment funds that was undertaken with the AIFM Directive has no bearing on the main proceedings, in which the legal situation as it was in 1996 must be taken into account.
>
> 26. Thus, on the basis of the legal situation that existed at that time, the meaning of the term 'special investment fund' as used in Article 13B(d)(6) of the Sixth Directive is determined both by EU law and by national law. In so far as EU law makes investment funds subject to specific state supervision by means of the UCITS Directive, they are special investment funds for the purposes of the tax exemption. Moreover, in so far as Member States provide for specific state supervision for other types of investment funds also, these too will generally benefit from the tax exemption.
>
> 27. It is also in this sense that our case-law is to be understood, according to which Member States are to regard as special investment funds those funds which, without being collective investment undertakings within the meaning of the UCITS Directive, at least display features that are sufficiently comparable for them to be in competition with such undertakings. Such competition can essentially exist only between investment funds that are subject to specific state supervision. Only those kinds of investment funds can be subject to the same conditions of competition and appeal to the same circle of investors.

142. She observed at [28] that the *ATP* judgment is consistent with the requirement for state supervision:

> […] because occupational retirement pension schemes are also generally subject to such supervision, as is apparent from Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision.

143. At [29] the Advocate General noted that limiting the application of the SIF Exemption of funds subject to state supervision was consistent with the obligation to interpret tax exemptions strictly.

144. The Advocate General then went on to consider funds investing solely in immoveable property (such as the funds that were the subject of the appeal in question) as these were not capable of qualifying as a UCITS (at least as regards EU law as it stood in 1996). She made a number of points in relation to such a fund:

> (a) In accordance with the principles discussed in her opinion, a fund comprising solely immoveable property could only qualify as a SIF if it was subject to state supervision under national law (at [31]);
>
> (b) The purpose of the SIF Exemption was directed at the management of the fund, rather than at the purchase and sale of the underlying investments. So, the fact that transactions in immoveable property were generally liable to VAT (whereas transactions in securities were generally exempt) was irrelevant in determining whether the SIF Exemption applied (at [39]);

(c) With the enactment of the AIFMD, EU supervisory law was extended beyond collective investments in securities to other collective investment undertakings. It therefore follows that including real estate funds within the scope of the SIF Exemption would not breach the fiscal neutrality requirements, as such funds are subject to comparable specific state supervision (at [40] and [41]); and

(d) Risk spreading exists even if a fund invests in a single large property, since (for example) the risk of voids is spread over a number of units within the property (at [42]).

145. In its decision, the CJEU noted with approval the comments made by Advocate General Kokott at [21] to [29] of her opinion and endorsed her opinion that a fund investing exclusively in immoveable property (which in 1996 could not be a UCITS) can only be treated as a SIF if national law provided for state supervision of such a fund:

> 37. Furthermore, funds which, without being collective investment undertakings within the meaning of the UCITS Directive, display characteristics identical to theirs and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings must also be regarded as special investment funds (see, to that effect, judgments in *Abbey National*, C-169/04, EU:C:2006:289, paragraphs 53 to 56; *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, C-363/05, EU:C:2007:391, paragraphs 48 to 51; *Wheels Common Investment Fund Trustees and Others*, C-424/11, EU:C:2013:144, paragraph 24; and *ATP PensionService*, C-464/12, EU:C:2014:139, paragraph 47).
>
> 38. However, it must be held that companies such as those at issue in the main proceedings, which have been set up by a number of investors with the sole aim of investing the assets which they have assembled in immovable property cannot be regarded as constituting a collective investment undertaking within the meaning of the UCITS Directive. An investment consisting exclusively of immovable property is not subject to the UCITS Directive, which is applicable, according to Article 1(1) and (2) thereof, only to investments in transferable securities.
>
> 39. In order to be capable of being regarded as exempt special investment funds within the meaning of Article 13B(d)(6) of the Sixth Directive, companies such as those at issue in the main proceedings must therefore display characteristics identical to undertakings for collective investment as defined by the UCITS Directive and carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings.
>
> 40. In that regard, it must be noted as a preliminary point that, as the Advocate General indicated in points 22 to 29 of her Opinion, the exemption referred to in Article 13B(d)(6) of the Sixth Directive applies to investment undertakings that are subject to specific supervision at national level.
>
> 41. As the Court has repeatedly observed in connection with the interpretation of the exemption of the management of special investment funds within the meaning of that provision, the legislation on VAT was harmonised before harmonisation of the legislation relating to the authorisation and supervision of investment funds and, in particular, the UCITS Directive (judgments in *Abbey National*, C-169/04, EU:C:2006:289, paragraph 55, and *JP Morgan Fleming Claverhouse Investment Trust and*

> *The Association of Investment Trust Companies*, C-363/05, EU:C:2007:391, paragraph 32).
>
> 42. As the Advocate General noted in point 21 of her Opinion, the Member States originally determined that investment funds were funds regulated at national level and subject, therefore, to licensing and oversight rules, namely authorisation by the public authorities and control, with the aim particularly of protecting investors. Referring to the national law of the Member States for the definition of 'special investment funds' has thus enabled the exemption under Article 13B(d)(6) of the Sixth Directive to be reserved to investments that are subject to specific state supervision.
>
> 43. It is evident from the first and second recitals in the preamble to the UCITS Directive that, on account of the differences between the laws of the Member States governing collective investment undertakings, particularly as regards the obligations and controls which are imposed on those undertakings, the EU legislature wished to coordinate those laws with a view to approximating at EU level the conditions of competition between those undertakings, ensuring more effective and more uniform protection for unit-holders, and making it easier for a collective investment undertaking situated in one Member State to market its units in other Member States.
>
> 44. The UCITS Directive thus established common basic rules for the authorisation, structure and activities of collective investment undertakings situated in the Member States and the information they must publish.
>
> 45. The introduction at EU level by the UCITS Directive of the first measures to regulate the supervision of investment funds limited the discretion of Member States to define special investment funds as referred to in Article 13B(d)(6) of the Sixth Directive.
>
> 46. The Member States' power to define was thus overlaid by the coordination, at EU level, of laws relating to the supervision of investments. The concept of 'special investment funds' within the meaning of Article 13B(d)(6) of the Sixth Directive is therefore determined both by EU law and by national law.
>
> 47. The Court has thus held that investments covered by the UCITS Directive and subject in that context to specific state supervision, on the one hand, and funds which, without being collective investment undertakings within the meaning of that directive, display characteristics identical to theirs and thus carry out the same transactions or, at least, display features that are sufficiently comparable for them to be in competition with such undertakings, on the other, must be regarded as exempt special investment funds within the meaning of that provision (judgments in *Wheels Common Investment Fund Trustees and Others*, C-424/11, EU:C:2013:144, paragraphs 23 and 24, and *ATP Pension Service*, C-464/12, EU:C:2014:139, paragraphs 46 and 47).
>
> 48. As the Advocate General stated in point 27 of her Opinion, only investment funds that are subject to specific state supervision can be subject to the same conditions of competition and appeal to the same circle of investors. Those other types of investment funds may therefore, in principle, be eligible for the exemption in Article 13B(d)(6) of the Sixth Directive if the Member States provide for specific state supervision of those funds also.

146. The Court went on to consider whether the principle of fiscal neutrality limited the scope of the SIF Exemption to funds which invested solely in securities:

> 60. As the sixth recital in the preamble to the UCITS Directive and Article 24 thereof indicate, and as is apparent from Article 19(1)(e) of that same directive, as amended by Directive 2001/108, not applicable at the material time in the main proceedings, the coordination of legislation in relation to supervision is intended to cover not only UCITS but also other collective investment undertakings (see, to that effect, judgment in *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies*, C-363/05, EU:C:2007:391, paragraphs 32 and 34). Investment in transferable securities is therefore only one particular form of regulated investment.
>
> 61 The fact that [the AIFMD], which represents at EU level a further step in the harmonisation of specific state supervision of investments, also applies to real estate funds, as indicated inter alia by recital 34 in the preamble thereto, supports that interpretation.

147. The decision concerned a fund which invested in real estate. At [55] the Court specifically rejected the argument that there was any lack of spreading of risks merely because the fund invested in real estate. However, we note that when the case went back to the national courts of the Netherlands, the domestic courts found that there was no specific state supervision, as the funds under appeal were exempt from regulation. Further the domestic courts held that there was no fund management, as the funds simply operated the properties (such as arranging for caretaking and letting).

**LIFE**

148. *The Learning Centre (Romford) Ltd v Revenue and Customs Commissioners; LIFE Services Ltd v Revenue and Customs Commissioners* [2020] STC 898; [2020] EWCA Civ 452 was a decision of the Court of Appeal addressing the principle of state regulation and fiscal neutrality. LIFE provided day services to adults with disabilities, it had a formal care plan with the local council for the provision of those services. The issues before the Court were (i) whether LIFE could benefit from a VAT exemption because it was state regulated, and (ii), if not, was it a breach of the principle of fiscal neutrality to treat LIFE differently. It was held that LIFE was not state regulated, for reasons which are not relevant to this appeal. The Court went on to consider the principles of fiscal neutrality as considered by the CJEU in that Court's decision in *Rank*:

> **The principle of fiscal neutrality**
>
> [38] The principle of fiscal neutrality is a well-established principle in the jurisprudence of the Court of Justice of the European Union. It is sufficient for present purposes to cite what the Court said in *Rank Group plc v Revenue and Customs Comrs* (Joined cases C-259/10 and C-260/10) EU:C:2011:719, [2012] STC 23, [2011] ECR I-10947:
>
>> 32. According to settled case law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 22; *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03), [2005] ECR I-4427, paras 41 and 54; *Marks & Spencer plc v Revenue and Customs Comrs* (Case C-309/06) [2008] ECR I-2283, para 47, and *European Commission v Netherlands* (Case C-41/09) (3 March 2011, unreported), para 66).

33. According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.

34. Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, *European Commission v Germany* (Case C-109/02), [2003] ECR I-12691, paras 22 and 23, and *Finanzamt Gladbeck v Linneweber; Finanzamt Herne-West v Akritidis* (Joined cases C-453/02 and C-462/02), [2005] ECR I-1131, paras 19 to 21, 24, 25 and 28).

[…]

43. In order to determine whether two supplies of services are similar …, account must be taken of the point of view of a typical consumer (see, by analogy, *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96), [1999] ECR I-973, para 29), avoiding artificial distinctions based on insignificant differences (see, to that effect, *European Commission v Germany* (Case C-109/02), [2003] ECR I-12691, paras 22 and 23).

44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see, to that effect, *European Commission v France (Finland intervening)* (Case C-481/98), [2001] ECR I-3369, para 27, and, by analogy, *FG Roders BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam* (Joined cases C-367/93 to C-377/93) [1995] ECR I-2229, para 27, and *European Commission v France* (Case C-302/00) [2002] ECR I-2055, para 23).

45. In accordance with settled case law, as regards the levying of VAT, the principle of fiscal neutrality precludes any general distinction between lawful and unlawful transactions (see, inter alia, *Mol v Inspecteur der Invoerrechten en Accijnzen* (Case 269/86) [1988] ECR 3627, para 18; *Staatssecretaris van Financiën v Coffeeshop Siberië vof* (Case C-158/98), [1999] ECR I-3971, paras 14 and 21, and *Kittel v Belgium* (Joined Cases C-439/04 and C-440/04), [2006] ECR I-6161, para 50).

[…]

50. […] in certain exceptional cases, the court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (*European Commission v France (Finland intervening)* (Case C-481/98) [2001] ECR I-3369, para 27, and *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* (Case C-357/07), [2009] ECR I-3025, paras 38, 39 and 45)."

149. The Court of Appeal continued as follows:

> [60] Having considered *Kingscrest, Zimmerman* and *Finance and Business Training* the UT held in *UT1* at [55] as follows:
>
> > "Applying [the reasoning of Arden LJ in *Finance and Business Training* at [53]–[56]] to the present case, the conferring of the exemption on a regulated body is plainly a rational choice open to the United Kingdom … It is sufficiently certain, and paragraph 57 of *Kingscrest* demonstrates the acceptability and rationality of regulation as a criterion. There is no way in which LIFE can equate itself with entities which are subject to the sort of regulation regime which is applied to regulated bodies. Those bodies are obliged to conform to certain standards. For LIFE that is optional, even if it chooses for the time being to do so."
>
> [61] Counsel for LIFE advanced two main criticisms of this reasoning. First, he submitted that the UT had been wrong to rely on *Finance and Business Training* because, to put it shortly, the structure of art 132(1)(i) was materially different to that of art 132(1)(g), and therefore the reasoning of the Court of Appeal concerning the former was inapplicable to the latter. Secondly, he submitted that the UT had failed to ask itself the right question, which was whether regulation made any significant difference to the consumer. I accept the second submission, and therefore it is unnecessary to consider the correctness of the first submission.
>
> [62] At the second hearing, the UT was referred to, and discussed in *UT2* at [58], a quartet of cases in which the Court of Justice has accepted in other contexts that differences in the regulatory framework or legal regime governing the supplies of goods or services may create a distinction in the eyes of the consumer: *EC Commission v French Republic (Republic of Finland intervening)* (Case C-481/98) EU:C:2001:237, [2001] ECR I-3369; *Solleveld and Van den Hout-Van Eijnsbergen v Staatssecretaris van Financiën* (Joined cases C-443/04 and C-444/04) EU:C:2006:257, [2006] ECR I-3617; *R (on the application of TNT Post UK Ltd) v Revenue and Customs Comrs* (Case C-357/07) EU:C:2009:248, [2009] ECR I-3025; and *Staatssecretaris van Financiën v Fiscale Eenheid X NV cs* (Case C-595/13) EU:C:2015:801,. The first and third of these were cited in *Rank* at para 50.
>
> [63] In *Commission v French Republic* France charged VAT at a lower rate on medicines that were reimbursable under the French social security system than on medicines that were not reimbursable. The Court held that this was not a breach of the principle of fiscal neutrality because the two categories of medicinal products were not in competition with each other. Inclusion on the list of reimbursable products meant that those products had, as the Court put it at para 27, 'a decisive advantage for the final consumer'.
>
> [64] In *Solleveld* a psychotherapist and a physiotherapist complained that their supplies were not exempted under the Dutch legislation exempting medical care from VAT. So far as the principle of fiscal neutrality was concerned, the Court stated:
>
> > "40. In order to determine whether medical care is similar, it is appropriate to take into account, concerning the exemption laid down in art 13A(1)(c) of the Sixth Directive and having regard to the objective pursued by that provision, the professional qualifications of the care providers. In fact, where it is not identical, medical care can be regarded as similar only to the extent that it is of equivalent quality from the point of view of recipients.

> 41. It follows that the exclusion of a profession or specific medical care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption from VAT laid down in art 13A(1)(c) of the Sixth Directive is contrary to the principle of fiscal neutrality only if it can be shown that the persons exercising that profession or carrying out that activity have, for the provision of such medical care, professional qualifications which are such as to ensure a level of quality of care equivalent to that provided by persons benefiting, pursuant to that same national legislation, from an exemption."

[65] In *TNT* TNT complained that its postal services were not exempt from VAT whereas the Royal Mail's services were. The Court held that this was not a breach of the principle of fiscal neutrality because, as the provider of a universal service, Royal Mail supplied postal services under a substantially different legal regime to TNT, which was not the provider of a universal service.

[66] In *Eenheid* the issue was whether a collective investment in real property could qualify as a 'special investment fund' so as to benefit from an exemption from VAT for such funds given that the collective investment in real property was not regulated by the UCTIS Directive, whereas other kinds of investment fund were. The Court held at para 48 that 'only investment funds that are subject to specific state supervision can be subject to the same conditions of competition and appeal to the same circle of investors'. It went on to hold at para 63:

> "In so far as investments, whether composed of transferable securities or immovable property, are subject to comparable specific state supervision, there is direct competition between those forms of investment. In both cases, what matters for the investor is the interest he derives from those investments. According to settled case law, the principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes …"

[67] The UT held in *UT2* at [59] that this quartet of cases showed that, 'although in general the consumer is not interested in the regulatory regime which governs a supplier of services, there can be particular contexts where the regulatory framework or legal regime governing the supplies in question may create a distinction in the eyes of the consumer'. Counsel for LIFE did not take issue with this statement of principle, although he stressed the CJEU's statement in *Rank* at para 50 that such cases are 'exceptional'.

[68] The UT went on at [60]:

> "We accept that in the case of welfare services, which are necessarily personal, services provided by regulated providers are of their nature different from services provided by unregulated providers, because the system of regulation provides a system of protections and guarantees which is absent in the case of unregulated services. We therefore consider that the UT in the first appeal in the LIFE case was right to say that providers such as LIFE (and TLC) cannot be equated with regulated providers. This is so even though (i) they may in fact be providing similar services to those that would be provided in Scotland and Northern Ireland by regulated bodies; and (ii) they in fact provide services to the same standard of care as would be required if they were regulated. They are not subject to the same level of state supervision. Nor is it an answer to say that the local authorities (Havering and Gloucestershire) with whom they respectively deal inspect and monitor the quality of service.

> This is no more than one would expect a responsible local authority to do, but this cannot be regarded as the equivalent of a statutory system of regulation."

> Point (i) relates to LIFE's third submission which is considered below.
>
> [69] Neither of the criticisms which counsel for LIFE made of the UT's reasoning in UT1 applies to this reasoning. Although the UT did not use the word 'consumer' in [60], it is clear from what the UT had said in [59] that it was considering the matter from the perspective of the consumer.
>
> [70] Counsel for LIFE submitted that this assessment was not open to the UT because there was no evidence to support it. There is no indication in any of the judgments of the CJEU in this field, however, that a national court requires evidence such as a consumer survey or expert report in order to determine whether services are regarded as similar by consumers for these purposes. While the case law does not rule out such evidence being admitted in cases of difficulty, it is clear that in most cases the national court is expected to make an assessment using its own experience of the world.

**OTHER SOURCES – KPMG REPORT TO EU COMMISSION**

150. In addition to the report of the EU's VAT committee, to which we made reference above, we were also referred to a report dated 10 December 2018 §ed by the EU Commission from KPMG on the operation of the AIFMD. KPMG was a previous employer of Ms Patterson, and she is cited in the report as responsible for "quality assurance".

151. In the report's "Executive Summary" it states:

> The general objective of AIFMD is to create an internal market for EU and non-EU AIFs, and a harmonised and stringent regulatory and supervisory framework for AIFMs. Specifically, it seeks to ensure that all AIFMs are subject to appropriate authorisation and registration requirements; that there is proper monitoring of macro- and micro-prudential risks and a common approach to protecting professional investors; that there is greater accountability of AIMFs holding controlling stakes in non-listed companies; and the development of the Single Market in AIFs.

152. Mr Donmall put to Ms Patterson the position that UCITS are intended for retail investors and AIFs are intended for professional investors (although Mr Donmall acknowledged that AIFs can be adapted for marketing to retail investors – but in their generic form they are not). Ms Patterson's response was that the essence of the EU regulation relating to UCITS and AIFs was not about limiting the kinds of clients permitted to invest in a particular kind of fund, but rather was about "passporting" - namely the marketing of these funds across the EU. So, the UCITS regime, from the outset, was designed to have a passport for retail investors anywhere in the EU and that therefore the rules relate to that. Her evidence was likewise with AIFs: the passport given is only in relation to professional investors and the associated requirements are not as detailed as for UCITS. However, Ms Patterson's evidence was that professional investors can, and do, invest in UCITS. In addition, although the AIFMD provided a passport to allow AIFs to be marketed throughout the EU to professional investors, Member States have discretion under Article 43 of AIFMD to allow retail investors to invest in AIFs, and that NURS were an example of this.

**THE SUBMISSIONS OF THE PARTIES**

153. The parties dispute what is meant by "specific state supervision" as decided by the CJEU in *Fiscale Eenheid*. HMRC's case is that "state supervision" requires direct regulation of the fund by the FCA (or its predecessors) because the supervision needs to be of a form that is substantially and functionally equivalent to that of a UCITS. In contrast CCLA

submits that state supervision needs only to be "sufficiently comparable" to that which applies under the UCITS Directive, and that the criterion of comparability, when combined with the requirement of fiscal neutrality, requires functional rather than formal equivalence.

**HMRC's submissions**

154. HMRC's case starts from the point that not all collective investment schemes are SIFs. This, Mr Donmall submits, follows from the jurisprudence of the CJEU as summarised in the VAT Committee's Working Paper 936. He then goes on to note that Article 4 of the AIFMD defines AIF to mean those collective investment undertakings that are not UCITS – so that the universe of AIFs are all collective investment funds that are not UCITS. If (as CCLA submits) the requirement for state supervision is met by the fact that the AFM and the Depository are regulated – then it would follow that all AIFs would meet this requirement (as mandated by the AIFMD), and all AIFs would benefit from the SIF Exemption. This is, he submits, plainly wrong.

155. Mr Donmall asks, if not all collective investment schemes are SIFs, what are the criteria which determine those which are? When considering whether funds are comparable with UCITS, Mr Donmall submits that the comparison has to be undertaken with the objective of the SIF Exemption in mind and state supervision is one of the relevant elements of comparison with UCITS. Mr Donmall submits that the SIF Exemption requires specific state supervision comparable to the supervision of UCITS – and not merely any kind of state supervision. He submits that this is implicit in the decision of the CJEU in *Fiscale Eenheid* where the court referred at [63] to the fund being "subject to comparable state supervision".

156. Mr Donmall submits that the language of "specific" state supervision of a fund imports a requirement that the fund must itself be specifically authorised by the state (in distinction to some kind of indirect supervision through the regulation of its manager).

157. Further, the substantive content of the state supervision must have the effect of regulating the fund in a manner comparable to a UCITS fund, so that it appeals to the same circle of potential investors as a UCITS fund – namely retail investors. Mr Donmall submits that the regulatory position is that all UCITS can be marketed to retail investors, whereas AIFs (with limited exceptions) can only be marketed to professional investors. It follows that for a fund to be sufficiently comparable with UCITS for the purposes of exemption, the fund must be authorised by the competent national authority, such that level of protections in the fund are appropriate for retail investors. When asked by us what he meant by "level of protections", Mr Donmall referred to the product regulation features required for UCITS, such as (but not limited to) the requirements for diversification of investments and limits on borrowings. Mr Donmall gave the example of a hedge fund which chose to invest in a wide range of listed securities – merely because in practice it had a similar investment portfolio to a UCITS fund, the hedge fund would not be comparable to a UCITS fund.

158. Mr Donmall referred us to *Abbey National* at [62] in support of his submission that the overarching purpose of the SIF Exemption is to help small investors, because small investors are unable in practice to have a diversified portfolio through making direct investments. This point is made elsewhere in the jurisprudence of the CJEU, for example by Advocate General Kokott in her opinion in *Claverhouse* at [30] and [46] and by Advocate General Cruz Villalón in *ATP* at [40].

159. In considering *Claverhouse*, Mr Donmall submits that the decision of the CJEU makes only passing reference in paragraph [15] to the regulation of ITCs by the FSA (the predecessor of the FCA) in its capacity as UK Listing Authority. The decision of the Court does not address the question raised by Advocate General Kokott in her opinion at [49] whether the level of investor protection afforded by ITCs is comparable to that of UCITS.

Instead, the decision appears to assume that the supervision of ITCs by the FSA as UK Listing Authority is comparable, and the decision is focussed on whether a closed-ended fund is capable of benefiting from the SIF Exemption because of the form that it has taken. He submits that the nature of state supervision was not articulated by the CJEU in *Claverhouse* as a decisive element in reaching its decision. He submits that the CJEU's jurisprudence on state supervision did not stop with *Claverhouse*, but continued to be developed in *Fiscal Eenheid*. Mr Donmall notes that the exemption in UK domestic law for management fees incurred by ITCs[7] makes no reference to any requirement for specific state supervision (beyond the requirement that the ITC's shares are listed on the FCA's official list), and submits that to that extent the incorporation of the SIF Exemption into UK domestic law has gone further than EU law requires.

160. Mr Donmall referred us to the Court of Appeal's decision in *LIFE* in relation to the application of the EU principle of fiscal neutrality. We were referred to paragraph [32] of the decision (citing paragraph [33] of the CJEU's decision in *Rank*), which makes the point that the similar nature of the supplies means that they are in competition – rather than the fact that the suppliers are in competition means that they are similar. "Similarity" is defined at paragraph [43] of *Rank* as being supplies which have similar characteristics and meet the same needs from the point of view of consumers.

161. Mr Donmall also cites *LIFE* as authority for distinguishing between suppliers who are subject to a standard because they are regulated, and suppliers who voluntarily choose to subject themselves to that standard. Mr Donmall submits that a supplier cannot bring themselves within a VAT exemption on the grounds of fiscal neutrality by voluntarily choosing to meet similar requirements to those applying to a regulated supplier, in circumstances where the VAT exemption applies only to suppliers who are subject to a statutory scheme of regulation (see [67] to [68]).

162. Mr Donmall submits that the language of the CJEU is in terms of providing small investors with access to investments. He submits that this dovetails with the use of UCITS as the touchstone, because it is UCITS that are the primary class of fund that may be marketed to retail investors. He submits that this shows that the underlying purpose of the SIF Exemption is not merely the supply of the management of collective investment, but of collective investment with protections for the small investor – which is why there is a requirement for state regulation and supervision of the fund itself.

163. For a fund to be authorised by the FCA, the application for authorisation has to be accompanied by the relevant fund documents - these are scrutinised by the FCA and compared with the regulatory requirements. So, submits Mr Donmall, an investor acquiring an interest in an authorised fund has the comfort that the FCA have undertaken the tedious job of checking the fund's documents and making sure that it fulfils the regulatory requirements. In contrast, an AIF, by its very nature, cannot offer that same degree of reassurance. The existence of the regulatory framework may of itself create a distinction in the eyes of a consumer (see *LIFE* at [62]).

164. Mr Donmall contrasts the nature of the regulation of UCITS in the UK with the regulation of AIFs:

> (a) In the case of a UCITS fund, the directive requires (Article 5) that the fund itself must be authorised by the competent authority (the FCA in the UK). This requires the FCA to have approved the application of the fund manager to manage the fund, the choice of depositary, and the fund documentation;

[7] Item 10 of Group 5 (Finance), Schedule 9, VAT Act

(b) At its core, the UCITS regime regulates the product. The regulatory requirements of the directive in Chapters VII and X (investment policies, borrowing and dealing) are implemented in Chapter 5 of COLL. These impose restrictions on the investments that can be made by the fund and impose borrowing limits;

(c) Requirements are imposed on information to be provided to investors in a UCITS fund;

(d) The UCITS Directive imposes regulation of UCITS fund managers; and

(e) The Depositary not only has custody of the fund's assets, but also has a compliance role.

165. In contrast, Mr Donmall submits, state supervision under the AIFMD is not substantially and functionally equivalent to that under the UCITS Directive, as the regulation of a fund by the state is indirect. Under the UCITS Directive, it is the fund that it regulated, whereas, under AIFMD, it is the AIFM that is regulated and not the fund itself. This is, at least in part, a consequence of the diverse nature of non-UCITS funds, and the fact that they are intended for professional investors (see, for example, EU VAT Committee's working paper 936 at 2.2.2). Because AIFs are for professional investors, there is not the same need for prescriptive regulation.

166. Mr Donmall pointed out the following aspects of AIF regulation:

(a) The AIF is not itself regulated, unlike a UCITS;

(b) AIFMD does not involve any product regulation. There are no restrictions on eligible investments, or anti-concentration rules. The AIFMD does not prescribe an investment strategy, instead portfolio composition is left to the AIFM's complete discretion; and

(c) AIFs can only be marketed to professional investors (although there is a discretion for certain AIFs to be marketed to retail investors, but such AIFs are subject to additional restrictions – an example would be NURS in the UK).

167. For these reasons, an AIF is not subject to *specific* state supervision, as the fund is not itself regulated by the state. Mr Donmall submits that the indirect regulation of an AIF through the regulation of the AIFM and Depositary is not equivalent to regulation under UCITS – as an AIF is not intended for retail investors, cannot be marketed to retail investors, and does not have the level of product regulation which is the hallmark of a UCITS fund.

168. Prior to the enactment of AIFMD, non-UCITS funds were unregulated. Mr Donmall submits that such funds were plainly not comparable or in competition with a UCITS fund. They were not authorised or regulated in any way by the FCA or its predecessors, there was no product regulation, and such funds could not be promoted to the general public.

169. When considering the application of these principles to the Funds, Mr Donmall submits that none of them are entitled to the SIF Exemption:

(1) The LAPF is an unregulated open ended collective investment scheme approved by HMT. Since 2014, LAPF has been classified as an AIF. It cannot benefit from the SIF Exemption as:

(a) It is not subject to specific state supervision as it is not authorised by the FCA, and it is not disputed that HMT has not undertaken any ongoing supervision;

(b) It cannot be marketed to retail investors. Most local authority investors have to "opt-up" in order to be treated as professional investors, with a few investing through independent financial advisors;

(c) There is no product regulation comparable to UCITS regulation – borrowing is allowed up to 25% of the fund value (maximum 10% under UCITS), and the 25% limit is not prescribed by regulation. It is not subject to the additional requirements imposed on NURS. Mr Donmall submits that for the funds to qualify as SIFs, their similarity to a UCITS fund must come about as a function of statutory regulation, rather than as a self-imposed restriction. UCITS and NURS are subject to the COLL sourcebook, which is much more prescriptive than FUND; and

(d) The fact that the fund manager is itself authorised by the FCA is not equivalent to the fund itself being subject to specific state regulation comparable to UCITS.

(2) The CBF Funds are established under the 1958 Measure. The CBF Funds are not subject to the oversight of the Charity Commission. As HMT does not regard the CBF Funds as collective investment schemes within the scope of FSMA, they are not regulated as AIFs. The trustee of the CBF Funds is not regulated by the FCA or its predecessors. The CBF Funds cannot benefit from the SIF Exemption as:

(a) They are not subject to specific state supervision as they are neither authorised by the FCA, nor are they charities subject to the supervision of the Charity Commission. They are not regulated as AIFs;

(b) They are unregulated and cannot be marketed to retail investors. Marketing to Church bodies is only permitted by a specific exemption in COBS; and

(c) There is no product regulation comparable to UCITS regulation. The Schedule to the 1958 Measure permits the funds (other than the Deposit Fund) to be invested at the discretion of the Central Board in the purchase of any investments or property of any sort, and borrowing powers are unrestricted. Whilst the CBF Funds include in their terms provisions which are similar to those required by UCITS funds (such as provisions relating to investment diversification and borrowing), Mr Donmall submits that for the funds to qualify as SIFs, their similarity to a UCITS fund must come about as a function of statutory regulation, rather than as a self-imposed restriction. The protections accorded to investors under COLL and the UCITS Directive (such as the prescriptions relating to investment policies) are not required to be observed by any of the CBF Funds. Whilst the terms of the CBF Funds include investment restrictions, investors would not have benefited from the review that the FCA would have taken on an application for authorisation. Further CCLA has a greater degree of freedom to amend these restrictions than for a UCITS fund.

(3) The COIFs are CIFs and CDFs established by Charity Commission schemes under English charity law. They are not authorised funds and cannot be marketed to retail investors. Since 2014 they have been classified as AIFs. Whilst the COIFs are subject to the oversight of the Charity Commission, the Commission's regulatory role is solely under charity law, it is not a financial regulator. The fact that the constitution of the COIFs follows a Charity Commission "model scheme" does not amount to state supervision. Although the terms of the COIFs and the requirements of the Charity Commission's model scheme mirror in many respects the requirements of the UCITS Directive and COLL, the trustee of the COIFs has the power to amend these provisions

(in 2014, for example, the board of the COIF Charities Ethical Investment Scheme Fund amended the provisions of its scheme). Mr Donmall submits that the COIFs can be distinguished from the CAIFs (which benefit from the SIF Exemption), because the CAIFs are specifically authorised as a fund by the FCA, and therefore benefit from regulatory protection comparable to a UCITS. The COIFs cannot benefit from the SIF Exemption as:

(a) They are not subject to specific state supervision as they are not authorised by the FCA. Whilst they are subject to the supervision of the Charity Commission, the Commission is not a financial regulator, and its supervision is not equivalent to that of a national competent authority;

(b) They are unregulated and cannot be marketed to retail investors. Marketing to charities is only permitted by a specific exemption in COBS;

(c) There is no product regulation comparable to UCITS regulation, and the COIFs are able to adopt investment strategies that would not be allowed for a UCITS. Whilst the COIFs include in their terms provisions which are similar to those required by UCITS funds (such as provisions relating to investment diversification and borrowing), Mr Donmall submits that for the funds to be regarded as SIFs, their similarity to a UCITS fund must come about as a function of statutory regulation, rather than as a self-imposed restriction. The same comments as made above in relation to the CBF Funds apply in the case of the COIFs; and

(d) The COIFs are not comparable to the CAIFs, as they do not benefit from the regulatory oversight of the FCA that apply to CAIFs structured as UCITS or NURS.

(4) Prior to 2014 the COIFs and the LAPF were unregulated, and therefore not subject to state supervision of any kind.

**CCLA's submissions**

170. Mr Scorey submits that the Funds benefit from the SIF Exemption under the principle of fiscal neutrality as the Funds are (from the perspective of consumers) in competition with UCITS.

171. The parties agree that the funds satisfy conditions (a) to (c) of paragraph 4 of the EU VAT Committee's guidelines. CCLA's case focuses on conditions (d) and (e) of paragraph 4 of the EU VAT Committee guidelines – namely that for the SIF Exemption to apply, the fund must be subject to specific state supervision, and the fund must be subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS.

172. Mr Scorey submits that for the SIF Exemption to apply to a fund:

(a) the fund in question must be subject to state supervision – this is a necessary prerequisite in the light of *Fiscal Eenheid* without which the fund could not be in competition with a UCITS; and

(b) the fund must be equally attractive to investors in UCITS in terms of purpose and objective, such that it can properly be treated as in competition with UCITS.

173. Mr Scorey submits that the application of the SIF Exemption must be consistent with the principles of fiscal neutrality. This means that businesses must be able to choose the form of organisation which from a strictly commercial perspective best suits them without running the risk of their transactions being excluded from the exemption (see *Abbey National* at [68]).

174. Whilst HMRC take the position that "specific state supervision" requires direct regulation of the fund by the FCA, CCLA's position is that this approach is too narrow and formalistic. Rather, Mr Scorey submits that the state supervision of non-UCITS funds need only be "sufficiently comparable" to that which applies to UCITS. This is because it is "comparability" and "fiscal neutrality" that underpins the CJEU's jurisprudence, and the requirement is for functional rather than formal equivalence. Mr Scorey submits that the test is not whether the Funds are directly regulated by the FCA, but rather whether their regulation is sufficiently comparable to the regulation of UCITS. The jurisprudence of the CJEU, says Mr Scorey, is that to be treated as a SIF, a fund needs to be subject to regulation which is akin to that governing UCITS – it does not require the same form of regulation. In other words, the test requires the Tribunal to look at the function and effect of the regulatory regime, and not the particular form of regulation. Mr Scorey submits that HMRC are wrong to insist that comparability can only arise if the fund itself is regulated. Even if the fund is not regulated as such, the overall regulatory regime may qualitatively be comparable to that applicable to UCITS.

175. CCLA's position is that since July 2014, the COIFs and the LAPF satisfy the "specific state supervision" requirements as they are subject to regulation under the AIFMD. As with the UCITS Directive, the AIFMD provides for regulation as regards:

(a) Risk management; liquidity management; and investment concentration;

(b) The requirement to appoint a Depositary;

(c) Regular reporting to investors; and

(d) Disclosure of the fund's investment strategy and objectives.

176. Whilst the scheme of regulation under AIFMD is not identical to that applying to UCITS, it imposes a regime for the authorisation, structure and activities of investment funds, and a requirement for the provision of information in order to protect investors.

177. A key difference emphasised by HMRC is that in the case of UCITS, the fund itself is regulated and authorised, whereas in the case of AIFs, it is the fund manager (rather than the fund) which is regulated. Mr Scorey submits that the fund is regulated, albeit indirectly. This is not a material distinction, rather a change in the mechanics or approach to regulation.

178. Mr Scorey submits that UCITS are not a closed category of funds that are entitled to benefit from the SIF Exemption. He pointed to NURS as an example of a non-UCITS fund that benefits from the exemption. A NURS is an AIF. Under UK regulatory rules, it is regulated through the FUND sourcebook in addition to parts of COLL. The jurisprudence of the CJEU in *Fiscal Eenheid* provides that funds investing in real property can potentially benefit from the SIF Exemption. As such funds are investing in property, the requirements of the UCITS Directive and COLL regulating investment in securities are irrelevant. This shows that it is not the case that there is a requirement for the regulation of the fund itself. A similar argument can be made in respect of ITCs. What is critical for the SIF Exemption is that the fund has characteristics that are similar to UCITS and that there is regulation to ensure compliance with those features. Whether that regulation is of the fund itself or is indirect (through the fund manager) is irrelevant.

179. The Scheme Documents for the COIFs and the CBF Funds substantially mirror the requirements that apply to UCITS. Where there are differences, Mr Scorey submits that they are immaterial in determining whether the COIFs and the CBF Funds are comparable to UCITS for SIF Exemption purposes. He referred us to COLL 5.7.7 R (governing FAIFs, a form of NURS) which relaxes some restrictions. He submitted that this shows that an exact

mirroring of the restrictions in COLL is not required, given that COLL itself allows for some flexibility.

180. Mr Scorey submits that the fact that the COIFs and the CBF Funds choose to adopt substantially all of the obligations that apply to UCITS (notwithstanding that they are not under a regulatory requirement to do so) makes those funds comparable to UCITS - it does not matter that the funds have chosen to apply them, because that application by choice is not by a whim. Once the funds choose to shackle themselves with these obligations the COIFs are required by the FCA Handbook to comply with them unless and until they are changed. Whilst in a parallel universe CCLA could have adopted practices and procedures that departed significantly from those applicable to UCITS, it did not.

181. Further, Mr Scorey submits that the Funds were always subject to state supervision, even before the enactment of the AIFMD. Mr Scorey submits that because CCLA, the manager of the funds, is regulated by the FCA, that is sufficient to meet the requirement that there is state supervision of the Funds. Mr Scorey makes this submission based upon the nature of the regulation of ITCs. Historically, these were supervised by the FCA only in its capacity as UK Listing Authority – and not under COLL – this was certainly the case at the point in time when the CJEU decided *Claverhouse*. It was only following the introduction of the AIFMD that ITCs have been treated as AIFs and have had to appoint an AIFM and Depositary.

182. As regards the COIFs, they have always had a regulated fund manager (in the same way as ITCs) prior to the introduction of the AIFMD. In addition, they were (and are) subject to the supervision of the Charity Commission. This is because the COIFs have charitable status and are subject to the supervision of the Charity Commission. They were subject to the Commission's model scheme document, which substantially mirrors the requirements of COLL. They were managed by CCLA, which was subject to the FCA's (and its predecessors') authorisation, regulation, supervision, and enforcement. The COIFs had an independent authorised trustee (which acted as the equivalent of the Depositary) (since 2000 for the CIFs, and for the CDF from 2008 and 2014).

183. Mr Scorey referred to the submissions made by HMRC in relation to CAIFs. Mr Scorey submits that the only relevant distinction between CAIFs and the COIFs is the fact that CAIFs are directly regulated by the FCA through COLL, rather than being AIFs subject to FUND. CAIFs exist alongside CIFs and CDFs. The COIFs are marketed directly in competition with CAIFs operated by competitors, and Mr Scorey submits that they provide a compelling example of a fund which benefits from the SIF Exemption which is subject to comparable regulation and is in competition with the COIFs.

184. Similarly, the LAPF and the CBF Funds (although not regulated by the Charity Commission) have always been operated and managed in accordance with the FCA's Handbook.

185. In addition to being subject to state supervision, Mr Scorey accepted that for the principle of fiscal neutrality to apply, the Funds must be in competition with funds that are SIFs or are equally attractive to potential investors. Mr Scorey referred to the evidence of Mr Hugh Smith, which demonstrated that all of the Funds were in competition with SIFs.

**DISCUSSION**

186. There is substantial common ground between the parties on the legal framework within which this appeal has to be resolved. We need to determine whether the Funds have characteristics which are equivalent to those of UCITS, or whether the Funds are sufficiently comparable to UCITS so as to be in competition with them.

187. The guidelines issued by the EU VAT Committee were treated by both parties as a useful summary of the requirements for the application of the SIF Exemption. It is not disputed that the Funds satisfy the conditions set out in sub-paragraphs (a) to (c) in paragraph 4. The questions which we have to address are (i) whether the Funds are subject to specific state supervision, and (ii) whether they are subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS.

188. Mr Donmall submits that for a fund to be subject to specific state supervision, the fund itself must be regulated by the FCA (as the UK's financial regulator). As none of the Funds are UCITS or NURS, they do not meet this requirement, and therefore cannot benefit from the SIF Exemption.

189. Mr Scorey submits that HMRC's approach is too formalistic. What is required is supervision that is sufficiently comparable to the supervision of a UCITS.

190. We find that for the SIF Exemption to apply, it is not necessary that the fund itself is regulated by the FCA. We base this finding on the jurisprudence of the CJEU in its following decisions:

(1) Mr Donmall submits that *Claverhouse* is primarily about whether closed-ended funds are capable of benefiting from the SIF Exemption, and that the Court does not address the regulatory environment governing ITCs. We disagree with that assessment. In her opinion at paragraph [49] Advocate General Kokott says that it is for the national court to establish whether the level of investor protection [provided by the regulatory environment] is comparable to that afforded to UCITS. At paragraph [15] of its decision, the Court notes that although ITCs are not directly regulated by the FSA under FSMA, they were regulated by the FSA acting as listing authority, and that the UCITS Directive cannot be relied upon to derive a restricted meaning of the term "special investment fund" (at [31]). The Court went on to give guidance at [50] and [51] to the national court in reaching its eventual determination;

(2) In *Wheels* the Court said at [24] that "funds which […] display features that are sufficiently comparable for them to be in competition with [UCITS] must also be regarded as special investment funds";

(3) In paragraph [47] of *ATP* the Court referred to funds which "display features that are sufficiently comparable for them to be in competition with [UCITS]";

(4) In *Fiscal Eenheid* the Court referred at paragraph [37] to funds which "display features that are sufficiently comparable for them to be in competition with [UCITS]"; and

(5) None of the cases make any reference to a need for a fund to be directly regulated by the relevant national competent authority in order to be treated as being in competition with UCITS.

191. From this we find that direct regulation of the fund by the FCA (as national competent authority) is not required for a fund to be eligible for the SIF Exemption. Indeed, we note that where a UCITS is constituted as an ACS there is no fund entity that is capable of being authorised, and it is the AFM that is in fact the subject of the authorisation.

192. We do not accept Mr Donmall's submission that Item 10 of Group 5 (Finance), Schedule 9, VAT Act (the exemption in UK law for management fees incurred by ITCs) goes further than EU law requires. Exemptions are interpreted strictly, and it would be inconsistent with the requirements of the PVD for the UK to enact an exemption which extends further than is required by EU law. In this context we note that no enforcement action has been taken

by the EU in relation to the extent of this exemption. We find that ITCs are SIFs, although (as they have the benefit of Item 10 of Group 5) they do not need to rely on the direct effect of the SIF Exemption. In the case of ITCs, we note that they are required to have a published investment policy (both as a matter of the Corporation Tax Act 2010 and under LR 15). However, neither the Corporation Tax Act 2010 nor LR impose limits on the investments it can make or on the level of borrowings. We also note that ITCs are also subject to the regulatory oversight of HMRC and its predecessors in addition to the regulatory oversight of the FCA as the UK Listing Authority. In order to obtain and maintain approved investment trust status, an ITC must satisfy HMRC that it meets the requirements of s1158, including the requirement that "all or substantially all of its business consists of investing its funds in shares, land or other assets with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds"[8].

193. We find that for a fund to be treated as a SIF it must be subject to regulation which is *sufficiently comparable* to the regulation of UCITS. We find that regulation pursuant to the AIFMD meets this requirement. Although an AIF is not itself directly regulated by the FCA, it is indirectly regulated through the regulation of the AIFM and the Depositary. The AIFMD and FUND impose regulatory requirements relating to risk management, liquidity management and investment concentration. AIFMs are required to report regularly about the AIF to investors and the FCA, and regulatory requirements are imposed to require disclosure of the fund's investment strategy and objectives. An AIF is required to have a Depositary, which is under an obligation to report regulatory and scheme/prospectus breaches to the FCA. The evidence before us is that the approach taken to the enforcement of regulatory requirements by the FCA is similar for UCITS and for AIFs (in circumstances where the AIF's investors are not "per se" professional clients). We find that these are sufficiently comparable to the regulation of a UCITS for the purposes of the SIF Exemption. We are supported in this finding by the opinion of Advocate General Kokott in *Fiscal Eenheid* at paragraph [40] where she refers to the:

> the current AIFM Directive, which constitutes at EU level a further step in the harmonisation of *specific state supervision* of investment funds. (our emphasis)

194. We make the following further observations.

195. First, whilst regulation under the AIFMD may meet the requirements of specific state supervision, it does not of itself mean that an AIF is eligible for the SIF Exemption. The fund must in addition meet the other conditions of paragraph 4 of the EU VAT Committee's guidelines. In particular, the fund must be sufficiently comparable to UCITS and must be subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS. This will require that the investment policy and objectives of the fund must not only be sufficiently comparable to UCITS, but must also appeal to the kinds of investors who would use UCITS – in other words retail investors. As the guidelines state, whether an AIF qualifies as a SIF will need to be determined on a case-by-case basis. In particular, if an AIF does not target the same circle of investors as UCITS - because of the characteristics of its investment portfolio or because of the conditions under which the investors are allowed to participate in that fund - that AIF cannot be treated as a SIF. In consequence, some of the more esoteric varieties of AIFs (such as commodity funds, hedge funds, infrastructure funds, and private equity funds) are unlikely to appeal to retail investors, and so would not be treated as SIFs. Further, such investments are unlikely to be sufficiently comparable to the investments undertaken by UCITS. This is the answer to Mr Donmall's concern that all AIFs could benefit from the SIF Exemption.

[8] s1158(2) Corporation Tax Act 2010

196. Second, we distinguish the circumstances of the COIFs and the LAPF from the circumstances in *LIFE*. In *LIFE*, the trader was not subject to any scheme of statutory regulation, but voluntarily chose to provide its services to the same standard as that of a regulated trader. In this case the COIFs and the LAPF have been subject to a statutory scheme of regulation under the AIFMD since July 2014, and we have found that the statutory scheme is sufficiently comparable to the regulation of UCITS.

197. In contrast, the CBF Funds are not subject to a statutory scheme of regulation, and we find that the circumstances of these funds are similar to the circumstances discussed in *LIFE* in that they have voluntarily chosen to apply similar requirements to those found in COLL and the UCITS Directive. We find that the CBF Funds are not similar to SIFs.

198. For completeness we place no weight on the fact that the CBF Funds have chosen to appoint an independent regulated entity to act as if it was a depositary. Ms Patterson's evidence was that Depositaries are considered by the FCA and other European regulators as a core feature of investor protection. We find that the Depositary has a key regulatory function. As the entity is not appointed in accordance with the requirements of COLL or FUND it is not under any regulatory obligation to report regulatory breaches to the FCA, and is therefore not in a similar position to a Depositary of a UCITS or an AIF.

199. Third, we had no evidence from investors as to the competitive nature of the market in which the Funds operate and whether a consumer would regard the Funds as similar to SIFs. The jurisprudence of the CJEU, and the authority of the Court of Appeal in LIFE (at [70]) is that a national court does not require consumer evidence for these purposes, and we are expected to make an assessment using our own experience of the world, whilst not ruling out evidence of consumer surveys or experts in cases of difficulty. The evidence that we have is from Mr Hugh Smith, and limited documentary evidence (including some journalism and surveys of the charity investment sector). Although the terms of the scheme documents relating to the COIFs and the CBF Funds do not exactly mirror the requirements of COLL and the UCITS Directive, based on the evidence and our own experience of the world we find that they are sufficiently similar to appeal to the kinds of investors who would invest in UCITS, and are therefore in competition with SIFs. However, we find that the LAPF is not similar to, and is not in competition with, SIFs.

200. Fourth, whilst we note the concern raised by Mr Donmall that the Funds have discretion to amend their investment policies, the evidence before us is that they have not done so to any material extent – and that to do so requires a process to be followed. The evidence of Mr Hugh Smith was that once a Fund had adopted policies, there was in practice only a very limited ability to depart from them. We note that this is very similar to the position of ITCs, which are required under the Corporation Tax Act 2010 and LR to have and to publish an investment policy, and then to stick to it.

201. Finally, we find that supervision by the Charity Commission does not amount to specific state supervision. The CJEU's jurisprudence requiring specific state supervision is clearly intended to refer to financial services' regulatory supervision. The policy of the Commission (at stated in their 2014 policy paper) is that it only regulates CIFs and CDFs "as charities with regard to their compliance with charity law" and that it is "not a financial advisor or regulator". We find that this is a statement of what has always been the case. The Commission does not have the expertise to undertake regulation of financial services and there is no evidence that it has ever done so.

202. We find that HMT did not exercise any regulatory supervision of the LAPF. Whilst the scheme establishing the LAPF was approved by HMT, its involvement with the LAPF

thereafter ceased. There is no evidence that HMT undertook any regulatory supervision in relation to the LAPF after it approved the scheme.

203. We also find that the fact that CCLA and CCLAFM are regulated by the FCA and its predecessors is not of itself sufficient to meet the requirement for specific state supervision. In the case of the CBF Funds, the regulatory relationship between CCLA and the CBF Funds is the same as the regulatory relationship with any client who has given CCLA a discretionary investment mandate. This would also be the case for the COIFs and the LAPF prior to July 2014 and the enactment of AIFMD. This is not the regulation of an investment fund, but the regulation of the same kind as applies to any discretionary investment mandate in place between a private client and a wealth manager. We find that this does not meet the requirement for specific state supervision.

204. We agree with Mr Scorey that the only relevant distinction between CAIFs and the COIFs is the fact that the CAIFs are directly regulated by the FCA. We have found that this is not a necessary requirement for a fund to benefit from the SIF Exemption. We also agree with Mr Scorey that the fact that CAIFs are marketed directly in competition with the COIFs supports his submission that the COIFs are in competition with funds which benefit from the SIF Exemption.

**CONCLUSIONS**

205. We find that with effect from July 2014, with the introduction of the AIFMD, the COIFs were subject to specific state supervision. We find that from July 2014 at the latest, the COIFs were subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS. We find that that the terms of the scheme documents relating to the COIFs are sufficiently similar to the requirements of COLL and the UCITS Directive that they appeal to the kinds of consumers who would invest in UCITS, and are therefore in competition with SIFs. We therefore find that with effect from July 2014, the COIFs were entitled to benefit from the SIF Exemption.

206. However, we find that prior to July 2014, the COIFs were not entitled to benefit from the SIF Exemption as they were not subject to specific state supervision.

207. We find that the CBF Funds were at no time subject to specific state supervision, and are not therefore entitled to benefit from the SIF Exemption.

208. We find that with effect from July 2014, with the introduction of the AIFMD, the LAPF was subject to specific state supervision. We find that it was not subject to specific state supervision prior to this date. However, we find that the LAPF was not subject to the same conditions of competition and appeal to the same circle of investors who would use UCITS. We therefore find that the LAPF is not entitled to benefit from the SIF Exemption.

209. As this hearing addresses solely the principle of whether CCLA is entitled to the benefit of the SIF Exemption in respect of supplies made by it, the quantum of the refund to which it is entitled remains to be determined. If the parties are unable to reach agreement on the amount of the refund, they have liberty to apply to the Tribunal to determine quantum.

**COSTS**

210. This appeal was made to the VAT and Duties Tribunal, and was transferred to the First-tier Tribunal (Tax Chamber) on 1 April 2009 pursuant to Article 6, Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). Because this is appeal transferred to this Tribunal, rather than was started in this Tribunal, it has not been, and cannot be, categorised. Had Rule 23 (categorisation) in fact applied, the present case would, it seems likely, have been categorised as a complex case, but CCLA would have had a right to opt out of the costs shifting regime – and Mr Scorey submits that CCLA would have

opted-out (as they did in respect of at least one of the appeals that has been consolidated into this appeal).

211. The question arises as to whether the appeal is subject to the costs provisions of Rule 10, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, or to the costs provisions of Rule 29, Value Added Tax Tribunals Rules 1986. If Rule 10 of the 2009 Rules applies, there is no costs shifting, as the appeal has not been categorised as complex. If Rule 29 of the 1986 Rules applies, the Tribunal has full discretion to make an award of costs.

212. Paragraph 7 of Schedule 3 to the Transfer Order gives this Tribunal discretion to make a direction disapplying Rule 10 and applying Rule 29 of the 1986 Rules. Whether it should do so was addressed by the Upper Tribunal in *HMRC v Atlantic Electronics Ltd* [2012] UKUT 45 (TCC). Warren J (Chamber President) decided that the default position (absent any direction by the Tribunal) was that Rule 10 applied - and that it was incumbent on a party who wished to operate in a costs shifting regime to make an application to disapply Rule 10, and apply (old) Rule 29 within a reasonable time of the transfer. As no application to disapply Rule 10 has been made, and as this appeal has not been categorised as complex, we have no discretion to make an award of costs, and do not make one. Even if an application had been made to disapply Rule 10, given the length of time that has passed since the transfer of the appeal to this Tribunal, we would have declined to make a direction to that effect.

### RIGHT TO APPLY FOR PERMISSION TO APPEAL

213. 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.

**NICHOLAS ALEKSANDER**
**TRIBUNAL JUDGE**

**Release date: 15th JULY 2024**

**Cases referred to in skeletons but not in the decision:**

*Stichting Uitoerign Financiele Acties v Staatssecretaris van Financien* (Case C-348/87) [1989] ECR 1737
*The Expert Witness Institute v CCE* [2001] EWCA Civ 1882
*HA Solleveld and JE van den Hout-van Eijnsbergen v Staatssecretaris van Financien* (Cases C-443/04 and C-444/04) [2007] STC 71
*HMRC v Insurancewide.com Services Limited, Trader Media Group Limited* [2010] EWCA Civ 422
*RCC v Rank Group plc* (joined cases C-259/10 and C-260/10) [2012] STC 23
*GfBk Gesellschaft fur Borsenkommunikation mbH v Finanzamt Bayreuth* (Case C-275/11) [2016] STC 1899
*Blackrock Investment Management (UK) Limited v RCC* (Case C-231/10) [2020] STC 1445
*K and anr v Finanzamt Osterreich* (joined Cases C-58/20 and C-59/20) [2021] STC 1762
*Greenspace (UK) Ltd v RCC* [2023] EWCA Civ 106
*NewsCorp UK & Ireland Ltd v RCC* [2023] UKSC 7
*Target Group Ltd v RCC* [2023] UKSC 35