



TC02320

Appeal numbers: LON/00/0653, LON/01/0762, LON/01/0805, LON/00/1333

Value Added Tax – Taxable person – Local authority – Provision of off-street car parking – Impact of exemption on relevant market – Distortion of competition – Whether local authorities taxable persons in respect of provision of such parking – Questions referred to ECJ for determination – Application of ruling of ECJ (Case C-288/07) – EC Council Directive 77/388, art 4(5) (now art 13 of Directive 2006/114)

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**(1) ISLE OF WIGHT COUNCIL
(2) WEST BERKSHIRE COUNCIL
(3) MID-SUFFOLK DISTRICT COUNCIL
(4) SOUTH TYNESIDE METROPOLITAN BOROUGH COUNCIL Appellants**

- and -

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

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
NICHOLAS PAINES QC
PHILIP GILLET FCA**

Sitting in public in London on 14-18 and 21-22 May 2012

Julian Ghosh QC and James Henderson and Jonathan Bremner, counsel, instructed by Rowel Genn, solicitors, for the Appellants

Christopher Vajda QC and Ben Rayment and Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to the Commissioners of HM Revenue and Customs, for the Respondents

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DECISION

1. The issue in these proceedings is whether the Appellant Local Authorities were wrong to account to the Commissioners of Customs and Excise (now HMRC) for value added tax on their charges for parking in Local Authority-operated off-street car parks and can rely on article 4(5) of the Sixth VAT Directive (now article 13 of Directive 2006/112) in order to reclaim VAT previously paid and avoid liability for VAT in the future. The appeals are against the rejection of voluntary disclosures covering periods between 1997 and 2001. However, these four appeals are in the nature of test cases; many other Local Authorities have made voluntary disclosures and appealed against the rejection of them. We were told that the voluntary disclosures made by these and other Local Authorities cover the entire period since 1 January 1978, the date by which the United Kingdom was required to comply with the Sixth Directive.

2. The evidence that was put before us related to current and recent conditions in the off-street car parking market. The parties recognised that it was impossible to reconstruct at this juncture a picture of the market as it has been over all of the past 34 years, and invited us to reach our decision by reference to current circumstances; we do, however, have historical information on two matters relevant to our decision, namely the legal framework governing Local Authority provision of and charging for off-street car parking and the rate of VAT. Our information on the off-street car parking market is less complete than the information that would be obtained, for example, by the Competition Commission if it were conducting a market or merger investigation; we do not, for instance, have precise information on operators' market shares. But we consider that we have sufficient information to answer the question posed by article 4(5).

3. Article 4(5) has been replaced by article 13 of Directive 2006/112. Article 13(1) contains provisions equivalent to the first three unnumbered subparagraphs of the former article 4(5); they are still unnumbered. Article 13(2) contains the equivalent of the fourth unnumbered subparagraph (which is irrelevant to the issues before us and we omit it). We shall continue to refer to article 4(5) rather than to the current provision and shall continue the practice of notionally numbering the subparagraphs. With numbering added, article 4(5) provides so far as material as follows:

1. States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.
2. However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

3. In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.

4. The litigation has a long procedural history, dating back to the year 2000 and involving a number of decisions of the Tribunal, the High Court and, on reference to it by the High Court of questions of EU law, of the European Court (ECJ). In a preliminary Decision released in 2004 concerning the appeal of the Isle of Wight Council, the VAT and Duties Tribunal (Sir Stephen Oliver QC and Kenneth Goddard MBE) held that Local Authorities provide off-street car parking under a ‘special legal régime’ within the meaning of the ECJ case-law on article 4(5): see VAT Decision 19557, reported at [2004] V & DR 69. On appeal in *C & E Comrs v Isle of Wight Council* [2205] STC 257 Pumfrey J held that, although article 4(5) had not been implemented in national law in the United Kingdom, the Tribunal could not accede to the Local Authorities’ claim for non-taxable treatment under the first subparagraph without investigating whether non-taxable treatment was liable to give rise to a serious distortion of competition.

5. A further Decision of the Tribunal in 2006 ([2006] UKVAT V19427) allowed the appeal of the four Appellant Local Authorities against HMRC’s refusal to refund the VAT previously accounted for by them. HMRC appealed to the High Court; Rimer J (as he then was) referred questions of interpretation of article 4(5) to the ECJ: [2007] EWHC 219 (Ch). It is common ground that the Tribunal must now consider the case afresh in the light of the ECJ’s judgment (Case C-288/07 [2008] ECR I-7203).

6. The parties still differ on some aspects of the interpretation to be placed on the ECJ’s judgment. It is, however, common ground that the court’s answer to the first question referred to it means that we must consider the question of distortion of competition by reference to the activity of providing off-street car parking in the United Kingdom as a whole, rather than focussing on the circumstances obtaining in each individual Local Authority’s area. This makes the enquiry a very different one from the enquiry that the Tribunal conducted in 2006; the four Appellant Local Authorities’ areas are to a large extent rural ones, whereas the national picture that we must assess includes urban along with rural areas. This makes a considerable difference because charged-for off-street car parking – and thus the potential for competition between Local Authority and commercial providers – occurs in the larger towns and cities. The Tribunal found in 2006 that there were no commercial car park operators at all in Mid Suffolk; today the only apparent changes are that the station car park at Stowmarket is now operated by National Car Parks Ltd (NCP) and a temporary commercially operated car park has opened on a site in the town awaiting development. The Appellants helpfully adduced evidence about the situation in Birmingham, which unsurprisingly has a large volume of charged-for car parking in and around the city centre, provided by the City Council and commercial providers.

7. Disagreement about the implications of the ECJ’s judgment turns on the issue of ‘causation’. HMRC have previously argued that, once it is established that Local

Authority and commercial providers compete in the provision of off-street car parking, the distortion of competition referred to in article 4(5)(2) is necessarily present in the event of non-taxation of Local Authorities and it is superfluous to investigate as a distinct issue whether the difference in tax treatment that would flow from the first subparagraph of article 4(5) would distort competition. This is a proposition for which HMRC contended unsuccessfully before the High Court and before this Tribunal (Sir Stephen Oliver QC and Nicholas Paines QC) in March 2009 and May 2010.

8. In the High Court Rimer LJ rejected a submission by HMRC that he should dismiss the Local Authorities' appeals in the light of the ECJ judgment: see [2009] EWHC 5923 (Ch); instead he remitted the appeals to the Tribunal for re-hearing. At the interlocutory hearing before the Tribunal in May 2010, HMRC maintained that the only relevant evidence for the purposes of the enquiry mandated by the ECJ judgment was evidence of the scale of provision of off-street parking nationwide, of the degree to which off-street parking is provided by Local Authorities and "at a high level of abstraction – and expressly not at the level of each individual, local economic market" that the provision by private operators is in actual or potential competition with the Local Authority provision. The Appellants accepted that there was competition between Local Authorities and commercial off-street car parks, but maintained that non-taxation would not lead Local Authorities to behave differently as regards their provision of off-street car parking and/or that motorists were not sufficiently price-sensitive to parking charges for the competitive position of commercial car park operators to be affected in any event.

9. The Tribunal gave the Appellants permission to adduce evidence directed to those matters because its members concluded that they were bound to do so by the terms in which Rimer LJ had remitted the case, and also because they did not agree with HMRC's interpretation of the ECJ judgment: see [2010] UKFTT 264 (TC). Before us, Christopher Vajda QC, Ben Rayment and Brendan McGurk developed the argument further and relied in addition upon Case C-259/10 *HMRC v Rank plc* (judgment of 10 November 2011), decided subsequently to the hearings before Rimer LJ and the Tribunal.

10. Following the hearing in May 2010 the Tribunal regarded themselves as constrained to allow the Local Authorities to adduce the evidence they sought to adduce; if that had not been done, there would have been no hearing, because the propositions upon which HMRC relied (that Local Authority providers of off-street car parking did so in competition with private providers and on more than a negligible scale) were accepted by the Local Authorities; if the Tribunal had ruled that they were all that HMRC needed to establish, they would have brought about the result that Rimer LJ had rejected. It is, however, open to the Tribunal now to consider whether evidence of causation is superfluous in the light of *Rank*, and this issue is considered in paragraphs 23 to 35 below.

11. Our overall conclusions are:
- (1) the ECJ's decision does not permit us to presume that the non-taxation of Local Authority off-street car parks would distort competition; but
 - (2) we find as a fact that it would do so to a more than negligible extent.

Accordingly, we dismiss the appeals.

The ECJ's judgment

12. After referring to the general rule in the Sixth Directive that economic activities are subject to VAT, the ECJ explained the philosophy of article 4(5) in the following terms:

30 It is only by way of derogation from that general rule that certain activities of an economic nature are not to be subjected to VAT. Such derogation is laid down by the first subparagraph of Article 4(5) of the Sixth Directive, under which activities engaged in by a body governed by public law acting as a public authority are not to be subject to VAT.

31 That derogation covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority. In those circumstances, the fact that such bodies are not subject to VAT on those activities does not potentially have an anticompetitive effect, inasmuch as they are generally engaged in exclusively, or almost exclusively, by the public sector.

13. We interpolate that in this country providing off-street car parking is closely linked to 'powers of public authority'. Even in the case of Local Authorities that are not local traffic authorities, it is linked to their power to control on-street car parking, and it has a statutory basis. It is not, however, engaged in anything like exclusively by the public sector. The Court continued:

32 However, even where those bodies carry on such activities in their capacity as public authorities, they are to be considered taxable persons, under the second and third subparagraphs of Article 4(5) of the Sixth Directive, where their treatment as non-taxable persons would lead to significant distortions of competition or again if those activities, provided they are not carried out on such a small scale as to be negligible, are listed in Annex D to that directive.

33 A body governed by public law may, thus, be responsible, under national law, for carrying on certain activities of an essentially economic nature under the special legal regime applicable to them where those same activities can also be carried on in parallel by private operators, with the result that the treatment of

that body as a non-taxable person may give rise to certain distortions of competition.

- 34 It is that undesirable result that the Community legislature sought to avoid by providing, in the third subparagraph of Article 4(5) of the Sixth Directive, that the activities specifically listed in Annex D to that directive (telecommunications, the supply of water, gas, electricity and steam, the transport of goods, port and airport services and passenger transport, etc.) are, 'in any event', unless they are negligible, to be subject to VAT, even when they are carried on by bodies governed by public law acting as public authorities.
- 35 In other words, the treatment of bodies governed by public law as non-taxable persons in respect of those activities is, unless such activities are negligible, presumed to lead to distortions of competition. It is thus clear from the wording of the third subparagraph of Article 4(5) of the Sixth Directive that the treatment of those bodies as taxable persons results from the carrying-on, as such, of the activities listed in Annex D to that directive, irrespective of the question whether or not a particular body governed by public law faces competition at the level of the local market on which it carries on those same activities.
- 36 Furthermore, there may exist, on the national level, other activities of an essentially economic nature, not listed in Annex D to the Sixth Directive, the list of which may vary from one Member State to another or from one economic sector to another, which are carried on in parallel both by bodies governed by public law in their capacity as public authorities and by private operators.
- 37 It is precisely to those activities that the second subparagraph of Article 4(5) of the Sixth Directive applies, in providing that bodies governed by public law, even when they act as public authorities, are to be considered taxable persons where their treatment as non-taxable persons would lead to significant distortions of competition.
- 38 The second and the third subparagraphs of Article 4(5) of the Sixth Directive are, consequently, closely linked since they pursue the same objective, namely the treatment of bodies governed by public law as taxable persons, even when they are acting as public authorities. Those subparagraphs are thus subject to the same logic, by which the Community legislature intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons, so that the general rule stated in Articles 2(1) and 4(1) and (2) of that directive, under which any activity of an economic nature is, in principle, to be subject to VAT, is observed.

14. The Court answered three questions referred to it. The first was whether the existence of distortions of competition was to be ascertained Local Authority by Local Authority or by reference to the whole national territory of the United Kingdom; the second was as to the meaning of the expression "would lead to" significant distortions

of competition; the third was as to the meaning of “significant”. The Court held that the existence of distortions of competition “must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular”. Though the second question had expressly enquired about the degree of probability or level of certainty of distortions of competition that was required, the Court reinterpreted it as asking, “in essence”, whether article 4(5)(2) extended to distortion of potential competition, and held that it did. Finally, it interpreted “significant” as meaning only “more than negligible”.

15. In dealing with the first question, at paragraph 39 the Court held that article 4(5)(2) and 4(5)(3) were to be interpreted as a whole. At paragraph 40 it continued

40 It follows that the treatment of bodies governed by public law as taxable persons, either on the basis of the second subparagraph of Article 4(5) of the Sixth Directive, or on that of the third subparagraph of that provision, results from the carrying-on, as such, of a given activity, irrespective of whether or not those bodies face competition at the level of the local market on which they engage in that activity.

16. The Court went on to find its conclusion to be supported by the principles of fiscal neutrality and legal certainty. As regards fiscal neutrality – described at paragraph 42 as the principle that “precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned” – the Court acknowledged that article 4(5)(2) did not achieve fiscal neutrality insofar as it permitted non-taxation where it would only distort competition insignificantly, but held that the provision must be interpreted in such a way that the least possible damage was done to the fiscal neutrality principle; more damage would be done to the principle by application of article 4(5)(2) on a Local Authority by Local Authority basis, since there would be differences in tax treatment not only as between some Local Authorities and commercial providers but also between those Local Authorities and other Local Authorities.

17. As regards legal certainty, the Court reasoned

49 The argument that distortions of competition, within the meaning of the second subparagraph of Article 4(5) of the Sixth Directive, must be evaluated having regard to each of the local markets on which the local authorities offer off-street parking assumes a systematic re-evaluation, on the basis of often complex economic analyses, of the conditions of competition on a multitude of local markets, the determination of which may prove particularly difficult since the markets’ demarcation does not necessarily coincide with the areas over which the local authorities exercise their powers. In addition, several local markets may exist within the territory of the same local authority.

50 Such a situation is capable, consequently, of giving rise to numerous disputes following any change affecting the conditions of competition prevailing on a given local market.

18. In dealing with the second question, the Court reiterated that article 4(5)(2) restored the general rule of taxation and was not to be construed narrowly; the scope of non-taxation would be enlarged unduly if article 4(5)(2) only operated in circumstances of actual competition. Moreover, the treatment of Local Authorities as non-taxable was “liable by itself” (paragraph 62) to discourage entry into the market. However,

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

19. Mr Vajda relied on the use of the words “liable by itself” in paragraph 62 as showing that, in the context of potential competition, the Court assumed that non-taxation would distort competition. Julian Ghosh QC, who appeared with James Henderson and Jonathan Bremner on behalf of the Local Authorities, relied on paragraph 64 as showing, on the other hand, that the Court contemplated objective evidence of fact and analysis of the market.

20. In answering the third question the Court repeated again that article 4(5)(2) restored the general rule of taxation and was not to be construed narrowly. It referred to article 4(5)(3), which permits non-taxation of activities listed in Annex D to the Directive “provided they are carried out on such a small scale as to be negligible” and repeated that article 4(5)(2) and 4(5)(3) are closely linked, pursuing the same objective and having the same logic. It concluded that the word “significant” in article 4(5)(2) meant that non-taxation could be permitted “only in cases where it would lead only to negligible distortions of competition” (paragraph 76).

21. The Court supported that conclusion with a further reference to the principle of fiscal neutrality, holding that non-taxation of Local Authorities only “in circumstances where it would not lead to any distortion of competition or lead only to negligible distortions, would bring about the least possible damage to the principle of fiscal neutrality” (paragraph 78).

22. As we have mentioned, Mr Vajda repeated the submission that, like article 4(5)(3) (see paragraph 35 of the judgment, quoted above), article 4(5)(2) operates on the basis of a presumption that competition is distorted where public bodies are not taxed and their competitors are. He referred to the Local Authorities’ concession, made in correspondence and repeated at the hearing in May 2010, that there is more than negligible competition between Local Authority-operated and commercial off-street car parks. He submitted that Rimer LJ’s conclusion that the judgment left it open to be determined as a matter of fact whether there would be a distortion of competition could not survive the ECJ’s later judgment in the *Rank* case already referred to. Mr Ghosh disputed that conclusion, pointing out that *Rank* had not altered the understanding of the law as it stood at the time of the decision of Rimer LJ and the

previous interlocutory decision of this Tribunal. We deal first with that issue. We agree with Mr Ghosh, for reasons that we give below.

Does article 4(5) require it to be established that differential tax treatment of Local Authorities and their competitors would distort competition?

23. One of the issues in *Rank* concerned different tax treatment of mechanised cash bingo, according to whether or not the stake and/or prize could exceed a particular value; games falling below the threshold were governed by section 21 of the Gaming Act 1968 and were exempt as falling in item 1 of Group 4 in Schedule 9 to the Value Added Tax Act 1994. Games above the threshold were governed by section 14 of the 1968 Act and removed from exemption by Note 1 to Group 4, which excluded games governed by that section. Since the level of the stakes and available prize money could fluctuate during a game depending on the number of players involved, the tax treatment of a game could alter during the course of the game. This did not, however, affect conditions of competition between suppliers of games, since all suppliers were equally potentially affected. The Court of Appeal referred to the ECJ the question whether the similarity of the games was sufficient to bring the principle of fiscal neutrality into play or whether *inter alia* the existence of competition between games needed to be established.

24. The ECJ noted (paragraph 17 of its judgment) that there was no evidence that the differential tax treatment had affected competition between games. It held, nevertheless, that the differential tax treatment infringed the principle of fiscal neutrality; its reasoning was as follows:

31 By this question the Court of Appeal (England and Wales) (Civil Division) seeks to know, essentially, whether the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for VAT purposes of two supplies of services which are identical or similar from the point of view of the consumer and which meet the same needs of the consumer is sufficient to establish an infringement of that principle or whether such an infringement requires in addition that the actual existence of competition between the services in question or distortion of competition because of the difference in treatment be established.

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*, Case C-481/98 *Commission v France* [2001] ECR I-3369, paragraph 22; Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 *Marks & Spencer* [2008] ECR I-2283, paragraph 47, and Case C-41/09 *Commission v Netherlands* [2011] ECR I-0000, paragraph 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, Case C-109/02 *Commission v Germany* [2003] ECR I-12691, paragraphs 22 and 23, and Joined Cases C-453/02 and C-462/02 *Linneweber and Akritidis* [2005] ECR I-1131, paragraphs 19 to 21, 24, 25 and 28).
- 35 That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition (see, to that effect, Case C-404/99 *Commission v France* [2001] ECR I-2667, paragraphs 46 and 47, and Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraphs 47 to 51).
- 36 Having regard to the foregoing considerations, the answer to Question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established.

25. Mr Vajda fortified his submission by referring to passages in the *Isle of Wight* judgment: first, the Court's observations in paragraphs 60-65, dealing with the second question, that article 4(5)(3) restored the 'general rule' of taxation of economic activities and was thus not to be construed narrowly, that the scope of non-taxation would be enlarged unduly if article 4(5)(3) only restored the general rule in cases of actual competition, and that non-taxable treatment of Local Authorities was "liable, by itself, to discourage potential competitors from entering the market".

26. Secondly, Mr Vajda referred to paragraphs 48-53, in which the Court invoked the principle of legal certainty in support of its rejection of the contention that distortion of competition must be assessed by reference to individual local markets. He pointed out that the Court eschewed "a systematic evaluation, on the basis of often complex economic analyses, of the conditions of competition" on local markets and submitted that it did not intend us to perform a similarly complex appraisal nationally. He submitted that in the light of *Rank* the Court's conclusion at paragraph 53 that "distortions of competition must be evaluated by reference to the activity in question" could only envisage an evaluation of whether the supplies in question were similar. It could not envisage an evaluation of causation which would have many of the problematic features that the Court criticised in the "local markets" approach. He

further submitted that, given that the only investigation that the Court prescribed as regards potential competition was as to the likelihood of entry (and not as to whether differential tax treatment actually discouraged entry) the Court must have taken it for granted that, where there was actual competition, differential tax treatment distorted it.

27. Thirdly, he emphasised the Court's espousal at paragraphs 44 and 78 of a construction of article 4(5)(2) that did the least damage to fiscal neutrality; he submitted that such a construction was one that assumed, as the fiscal neutrality principle does, that differential tax treatment distorted competition.

28. Mr Vajda supported his submission by referring to other areas of EU law. In the field of direct taxation, he referred us to *Trustees of the BT Pension Scheme v HMRC* [2011] UKFTT 392 (TC), a decision of Sir Stephen Oliver sitting with Mr Ghosh in a case engaging the former article 56 EC, which prohibits restrictions on the free movement of capital; the Tribunal held that "the test for breach is applied on the basis of *a priori* reasoning and inference and not as part of any fact-finding or consideration of evidence" (paragraph 46).

29. In the field of state aid, Mr Vajda cited article 107(1) of the Treaty on the Functioning of the EU, which prohibits aid granted by a Member State "which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods". He pointed out that exemptions from taxation could amount to state aid (a topic on which there is a considerable body of case-law holding that foregoing tax revenue by selectively granting a tax exemption is equivalent to using state resources to aid the exempted undertakings). He submitted that if the non-taxation of Local Authority off-street car parking resulted from domestic law it would potentially amount to a state aid and the question whether it did so would be answered in part by considering whether it was liable to distort competition.

30. In that connection Mr Vajda showed us Case C-387/92 *Banco Exterior de España* [1994] ECR I-877 in which a tax exemption given by Spanish law to public credit institutions was held to be a state aid and Case T-214/95 *Flemish Region v Commission* [1998] ECR II-717 concerning a modest interest-free loan granted to an airline. Rejecting an argument that the foregoing of interest was insufficiently beneficial to strengthen the airline's position vis à vis its competitors, the Court of First Instance concluded that "Where a public authority favours an undertaking operating in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted ..." (paragraph 46). In reaching that conclusion the Court cited previous authority to the effect that "aid which ... is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities, in principle distorts competition" (paragraph 43).

31. We agree with Mr Vajda that the way in which the Court dealt with potential competition in the present case makes it likely that the Court did take it for granted that differential tax treatment would distort competition in the off-street car parking

market; differential tax treatment of similar offerings generally does distort competition, as the Court observed at paragraph 35 of *Rank*. The fact that we have been driven to conclude as a matter of fact that differential tax treatment would distort competition in the off-street car parking market, despite the particular features of the market urged upon us by Mr Ghosh, gives us a considerable degree of confidence in the suggestion that differential tax treatment of similar offerings will distort competition in any market. But if that is correct, it is a proposition of fact. We agree with Mr Ghosh that what Mr Vajda is contending for amounts to a presumption of law. We also find it salutary to remember that the presumption will only make a difference in a case in which distortion of competition cannot be established. Like Rimer LJ and the members who gave the interlocutory decision of this Tribunal, we are all unpersuaded that it is possible to spell out of the ECJ's judgment a proposition of law that differential tax treatment of competing suppliers amounts to distortion of competition without more.

32. The Tribunal mentioned in the interlocutory decision the frustrating aspect of the way in which the Court dealt with the second question. But the terms in which the Court answered the third question are in our view inconsistent with Mr Vajda's submission: it is clear from paragraphs 78 and 79 of the judgment that the Court interpreted article 4(5)(2) as permitting non-taxation in circumstances in which it would lead to no or only negligible distortion of competition and thus requiring taxation in the converse situation. Deciding which is the case necessarily involves an enquiry into the existence as well as the scale of any distortion. That enquiry could only be conducted compatibly with Mr Vajda's presumption if the enquiry were only into the scale of Local Authority (or conversely commercial) provision of the goods or services in question. However, the Court did not say that it was. Whilst in paragraph 75 it noted that article 4(5)(3) uses the scale of provision by public authorities as the criterion of a significant distortion and said that article 4(5)(3) assumed that the distortions of competition resulting from an activity conducted on a negligible scale would themselves be negligible, paragraph 76 does not say that article 4(5)(2) works in exactly the same way; it says that the criterion is more than negligible distortion of competition.

33. At all events we do not consider that the *Rank* judgment has altered the understanding of the law in a way which could entitle us to depart from the view taken by Rimer LJ. To the extent that *Rank* has clarified the law, it has clarified the principle of fiscal neutrality by confirming that demonstrating a distortion of competition is not an ingredient in establishing a breach of that principle. We agree with Mr Ghosh that the ECJ's decision in our case is premised upon article 4(5) not conforming to the principle of fiscal neutrality; paragraphs 78 and 79, which we have just discussed, indicate the extent of the non-conformity.

34. We have noted Mr Vajda's reliance upon the Court's dicta to the effect that article 4(5)(2) must be interpreted so as to do the least damage to the principle; we also agree that less damage would be done if establishing a distortion of competition were not an ingredient in applying article 4(5)(2), just as *Rank* confirms that it is not an ingredient in establishing a breach of the fiscal neutrality principle. But paragraph 78 of the ECJ decision in this case tells one what interpretation of article 4(5)(2) does

the ‘least *possible* damage’ (our emphasis) given the terms in which the article is drafted.

35. We do not find it possible to transpose the approach taken to the former article 56 EC or to article 107 TFEU to article 4(5)(2). Article 56 is about restrictions on movement of capital, not distortions of competition; it is correct that the case-law relating to it applies a test of whether a national measure tends to restrict free movement rather than requiring proof of reduced capital flows, but we cannot apply ECJ case-law in a different field in preference to its case-law on article 4(5)(2). Article 107 expressly catches aid that threatens to distort competition as well as aid that does so. We agree with Mr Vajda that Local Authorities are undertakings for the purposes of the state aid rules; it may well be (we do not express a concluded view) that if non-taxation of Local Authority off-street car parking derived from a purely domestic legislative provision it would amount to a state aid. But no authority was cited for the proposition that tax treatment required of all Member States by a Directive can amount to state aid for the purposes of article 107, nor for the proposition that the Directive must be interpreted so to avoid requiring the granting of something that would or might be state aid if it were not required at EU level.

Other aspects of interpretation and application of article 4(5)(2)

36. We now state our conclusions on some other aspects of the application of article 4(5)(2) to this case. First, Mr Ghosh submitted in his Skeleton argument that

the question is not how local authorities might respond to a “change” in the VAT treatment. Thus the Tribunal is not asked to assess the reaction of local authorities to a situation where in year 1 local authorities are treated as taxable persons in relation to supplies of off-street car parking for VAT purposes but in year 2 it is decided that they should not be so treated. Rather, the comparison is between a world where local authorities are treated as taxable persons in relation to supplies of off-street car parking for VAT purposes (on the one hand) and a world where they are not (on the other).

37. We agree. If the criterion of distortion of competition were not met, Local Authorities would have been entitled to non-taxable treatment since 1978. A conclusion on how Local Authorities or others might respond to a decision in 2012 that the previously accepted position was wrong is only of, at best, indirect assistance in determining the question that article 4(5)(2) poses to us. Mr Vajda did not seriously quarrel with this as a principle but submitted that considering the likely reaction to a change in the perceived requirements of article 4(5) was a helpful way of constructing the ‘parallel universe’ in which VAT had not been chargeable. We agree with that, subject to reminding ourselves that we must not consciously or unconsciously substitute that in our minds for the actual question that article 4(5)(2) requires us to answer. Some of the points made during the hearing – such as that Local Authorities would respond to public pressure to pass on the VAT ‘windfall’ –

seem to us (whether or not true, which was debated) to be of little assistance in answering that question. Accordingly, in this Decision we generally refer to the effect of article 4(5)(1) as ‘non-taxation’; the parties used the term ‘disapplication’, which we have tended to avoid, except when summarising their submissions, because of its possible overtones of a change in tax treatment.

38. We have considered whether, had we been sitting in 1978, it would then have been correct to take a different approach. Article 4(5) had no counterpart in the Second Directive; Local Authority off-street car parking would in any event have been taxable from 1973 to 1977. It is arguable that a tribunal sitting in 1978 would have been correct to consider the effect of putative non-taxation pursuant to article 4(5) on the footing that it represented a change in the legislation. We incline to the view that, even in 1978, the statutory question would still have been whether distortions of competition would result from a situation of non-taxation rather than from a change to non-taxation. But the question is academic: we have next to no information on the off-street car parking market as it stood in 1978 and are not in a position to make findings about it except at an extremely high level of generality. Even if, contrary to our preferred view, we should be approaching this case by asking what would have been the effect of a change in 1978 to non-taxation followed by the maintenance of non-taxation, we are confident that any effects produced by the phenomenon of the change 34 years ago would long since have ceased to have any effect.

39. There was no discussion before us specifically of the meaning of the expression ‘distortion of competition’; we do not consider that any was required. Mr Ghosh’s formulation of the two alternative negative propositions that, if accepted, would bring his clients success (see paragraph 8 above) implicitly accepts that there would be distortion of competition if (1) a situation of non-taxation would lead Local Authorities to behave differently on the market from the manner in which they would behave in circumstances of taxation and (2) the commercial position of private operators of car parks would be affected as a result. We consider that that is correct.

40. The ECJ’s repudiation at paragraph 49 of the judgment of the approach of looking individually at local markets generated only a small amount of debate. Mr Ghosh defended the decision of the Local Authorities’ expert, Ms Rosewell, to gauge price-elasticity of demand at market level rather than as between Local Authority and commercial car park operators (a topic we deal with in paragraphs 224 to 246 below) on the basis that to do otherwise involved looking at local markets, contrary to the injunction in paragraph 49. Otherwise, the parties implicitly accepted that we needed to have information about circumstances affecting off-street car parking and that this necessarily involved concrete information about actual towns and areas.

41. Mr Vajda submitted, however, in connection with his submission that distortion of competition was to be presumed, that the exercise that the Court of Justice had entrusted to us involved looking at the issues with a high degree of abstraction; he pointed out that we are a tax tribunal and not the Competition Commission and that the test which the ECJ judgment required national courts and tribunals to apply was one designed for tax tribunals and not competition authorities.

Though we have rejected his submission that distortion of competition is to be presumed, we find these points to be well made. We add that we do not have either the resources or the information-gathering powers of the Competition Commission and that the question that we are required to answer is more difficult to answer with precision than the questions faced by the Competition Commission. The Commission is required to reach conclusions about circumstances in actual markets that can be investigated; in a merger case it is also faced with the more difficult task of predicting the consequences of a future event (namely the proposed merger). We have to answer the even more abstract question, not of the consequences of an event, but of the consequences of a different order of reality.

42. On the basis of the various considerations discussed in this section of our Decision, we consider that the question that article 4(5)(2) requires us to answer is whether, in the event that Local Authority off-street car parking were not taxable, there would be in the United Kingdom as a whole a degree of distortion of competition that could not be dismissed as negligible. In doing so we are simply to compare a situation in which the activity is non-taxable with the situation in which it is taxable. The question is in our view a question of fact; it is, however, a question of secondary or inferential fact to be judged on the basis of conclusions of primary fact.

43. In answering the question, we consider that we are entitled to have regard to the evidence that was led before us, to matters that are notorious and in a general way to our knowledge of motoring in the United Kingdom, though we do not consider that it would be right to base our decision on specific instances of off-street car parking arrangements that are, inevitably, known to one or another of us as motorists but have not been discussed with the parties.

44. The question that we have to answer is one upon which the assistance that we can derive from the evidence of witnesses of fact is limited: the witnesses can help us reach our conclusions of primary fact, but cannot lead us directly to a conclusion one way or the other on the inferential question. The witnesses of fact were quite rightly not asked, as an issue of fact, at what level Local Authority car parking charges (for example) would be if the provision of Local Authority off-street car parking had been regarded as non-taxable since 1978; that is not a question that can be answered by a witness of fact. Some of the Local Authority witnesses offered us their opinions on issues of that sort (though more directed to the consequences of a change to non-taxation), and we have no objection to that, but we remind ourselves that their answers were expressions of opinion, informed by immersion in the world of Local Authority finance or traffic management, but as to a matter on which the final judgment must be ours.

The witnesses

45. The Local Authorities adduced evidence from: Mr Nigel Foster, a transport specialist and Director of Ove Arup and Partners with responsibility for the Arup Transport Consulting business in, among other places, the United Kingdom; Mr

Christopher Haynes, the recently retired former Head of Transportation Strategy at Birmingham City Council; Mr Stephen Hughes, the Chief Executive Officer of Birmingham City Council; Mr John Metcalfe, Deputy Director of Economy, Tourism and Leisure in the Isle of Wight; Mr Stuart Reid, Head of Finance at South Tyneside Council; and Ms Bridget Rosewell, an economist and Chief Economic Adviser at the Greater London Authority.

46. HMRC adduced evidence from: Mr Robin Aaronson, an expert forensic economist; Mrs Joanne Cooper, Chief Executive of National Car Parks Ltd (NCP); and Mr Paul Gallagher, Property Director of Britannia Parking Ltd (Britannia).

47. HMRC complained of the fact that no evidence had been adduced from any elected councillor. The Local Authorities repudiate the criticism, pointing to the specialist expertise in finance and transport of the council officers who gave evidence. We do not regard the absence of evidence from a councillor as a weakness of the Local Authorities' case. Given what we have just observed in paragraph 44 above, we do not consider that evidence from a councillor would have illuminated further the question that we have to decide.

The legal framework surrounding Local Authorities' provision of off-street car parking

48. Local authorities are creatures of statute and only have the powers that statute confers on them. Those powers have widened since the coming into force of the Local Government Act 1972 (which by section 111 gave them power to do anything calculated to facilitate, or conducive or incidental to, the discharge of any of their functions); we were referred to section 2 of the Local Government Act 2000, sections 93 and 95 of the Local Government Act 2003, section 95 of the Local Government Act 2003 and section 1 of the Localism Act 2011. None of those later pieces of legislation affects the legal framework governing Local Authorities' powers regarding the provision of and charging for off-street car parking of a sort capable of benefitting from article 4(5).

49. There is extensive legislation on traffic management. For example, the Transport Act 2000 requires local traffic authorities to draw up Local Transport Plans including policies for safe, integrated, efficient and economic transport and to have regard to guidance from the Department for Transport. In England and Wales local traffic authorities are, in London, Transport for London and the Borough Councils and, outside London, the County or Metropolitan District Councils; in Scotland they are the local roads authority. District Councils other than Metropolitan District Councils are not local traffic authorities, but are empowered to regulate on-street and provide off-street car parking by the Road Traffic Regulation Act 1984. Birmingham City Council, South Tyneside Council and the Isle of Wight Council, from which we received witness evidence, are all unitary authorities, combining the functions of a County Council and a District Council, and thus are both the local traffic authority

and the provider of off-street car parking in their respective areas, but this is not generally the case in the country as a whole.

50. Specific provision as regards on and off-street car parking in the period since 1978 has been made first in the Road Traffic Regulation Act 1967 and now in the 1984 Act, section 32 of which provides so far as material as follows:

- (1) Where for the purpose of relieving or preventing congestion of traffic it appears to a local authority to be necessary to provide within their area suitable parking places for vehicles, the local authority, subject to Parts I to III of Schedule 9 to this Act—
 - (a) may provide off-street parking places (whether above or below ground and whether or not consisting of or including buildings) together with means of entrance to and egress from them, or
 - (b) may by order authorise the use as a parking place of any part of a road within their area, not being a road the whole or part of the width of which is within Greater London.

51. Section 35 provides

- (1) As respects any parking place—
 - (a) provided by a local authority under section 32 of this Act
the local authority, subject to Parts I to III of Schedule 9 to this Act, may by order make provision as to—
.....
 - (iii) the charges to be paid in connection with its use (where it is an off-street one)

52. Since 1993, an inserted section 35C has provided, so far as material:

- (1) Where an order under section 35(1)(iii) of this Act makes provision as to the charges to be paid in connection with the use of off-street parking places, the authority making that order may vary those charges by notice given under this section.
- (2) The variation of any such charges by notice is not to be taken to prejudice any power to vary those charges by order under section 35 of this Act.

53. Section 122 provides, so far as material

- (1) It shall be the duty of every local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act

as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland, the road.

- (2) The matters referred to in subsection (1) above as being specified in this subsection are—
- (a) the desirability of securing and maintaining reasonable access to premises;
 - (b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;
 - (bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);
 - (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
 - (d) any other matters appearing to the local authority to be relevant.

54. Local Authorities are not obliged to set their off-street car parking charges by order; they need to do so if they wish to impose penalty charges, which they can now be empowered to enforce civilly. The procedure for making an order is governed in England and Wales by the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 and involves consultation. Once set by an order, charges can now be varied, temporarily or indefinitely, by a notice under section 35C, to which the 1996 Regulations do not apply. We were provided with an example of such a notice issued by the Isle of Wight Council.

55. In the case of charges for on-street car parking, section 55 of the Act, amended by the Traffic Management Act 2004, limits the purposes for which any surplus can be applied; no statutory limitation of that sort applies to any surplus generated from off-street car parking, which falls into the Local Authority's general fund. It was, however, part of the case advanced by Mr Ghosh on behalf of the Appellants that the power of a Local Authority to make a surplus is constrained by the principle that a Local Authority may not set charges with a view to raising revenue as such; to do so would be to misuse the power to charge in order to impose a disguised tax on car park users for the benefit of the Local Authority's general budget. In this connection Mr Ghosh cited *Cran v Camden LBC* [1995] RTR 346, which was a decision concerning prospective on-street car parking charges in a proposed controlled parking zone; McCullough J noted at page 365 that "the Act of 1984 is not a revenue raising Act"; his conclusion was that "it was the intention of Parliament that local authorities, in determining charges to be made in pursuance of the designation of parking places, should not have regard to the manner in which section 55(4) of the Act of 1984 would permit any resulting surplus to be spent". Earlier he had accepted that parking and

enforcement charges could be set at a level such as to discourage undesirable forms of motoring and illegal parking, with the result of generating a surplus greater than would be required to cover costs with a prudent margin of excess.

56. Mr Ghosh argued by analogy that a Local Authority could only set off-street car parking charges by reference to their traffic management policies; they could legitimately set charges at a level higher than breakeven with a view to discouraging certain types of motoring behaviour – for example setting high rates of charge for stays of long duration in town centre car parks in order to discourage commuting by car or to encourage commuters to park in car parks further out, leaving the town centre spaces for shoppers – but they could not budget for a surplus with a view to raising money to spend elsewhere.

57. Mr Ghosh also cited paragraph 12-34 of Cross on *Local Government Law*, dealing with Local Authority charges generally, for the proposition that

“the level of a charge must be related to the cost of provision. The maximum sum to be recovered must be the total cost of provision of the service being provided, although it may be possible to have differential rates within the overall scheme. The deliberate making of a profit would take the activity into the realm of trading.”

R v Manchester City Council ex p King (1991) 89 LGR 696, a case concerning charges for street selling permits, is cited as authority for the proposition. We accept it as a general proposition, subject to the proviso that charges higher than breakeven can be set for policy reasons of the sort referred to by Mr Ghosh.

58. We do not consider that the rule operates with such strictness as to preclude Local Authorities setting off-street car parking charges with a view to raising income for other traffic management purposes, at least where they are also local traffic authorities. We observe in passing that, in a report on Local Authority charging powers published in 1999, the Audit Commission described the legislation on Local Authority charging as complex and confusing to councils. The further legislation that has been enacted since 1999 does not apply to off-street car parking; nevertheless, the Audit Commission’s 2008 report *Positively Charged*, a copy of which was provided to us, asserts that “councils can make surpluses on charges for car parking ... but are restricted to cost recovery in other areas” (paragraph 42). The publication *Parking Strategies and Management* produced by the Chartered Institution of Highways and Transportation (CIHT) says under the heading “Tariff setting and review” that

In setting parking charge levels factors that should be taken into account include:

- Price elasticity of parking demand;
- Competition between areas; and
- Incentives for the use of off-street parking

The price of parking can be set to influence parking activity in order to serve policy objectives. The level and structure of prices can influence:

- The level of usage, and hence the traffic generated;
- The type of user; and
- The length of stay

.....

Pricing levels can also be set in order to:

- Secure sufficient income to cover the cost of operating, maintaining and enforcing car parking facilities;
- Raise general income, though this practice is not generally supported in Government Guidance;
- Raise income for the improvement of parking and other transport facilities; or
- Maximise revenue, as is often the case with privately owned public car parks where there is no local authority control.

59. The evidence of Mr Haynes of Birmingham City Council included the results of his perusal of annual parking reports. We accept his evidence that improvement of stock, subsidy of public transport, traffic management and highway maintenance commonly feature among the purposes for which car parking surpluses are applied. These are among the purposes for which on-street car parking revenue may be applied and we consider it likely that the law allows off-street car parking charges to be set at a level such that they too make a contribution to the costs of traffic management. It was not suggested that a legal requirement to break even applies to each individual car park, though Mr Haynes told us that a case had to be made for operating any car park at less than breakeven; Local Authorities must in our view be permitted to set charges in charged-for car parks with a view at least to covering the cost of operating loss-making or free of charge car parks.

60. It seems to us likely that they are permitted to set charges with a view to their contributing to other costs of traffic management; many of them do so, as will be seen later in this Decision. We do not need to reach a concluded view on this for the purposes of our decision: if it were the case that Local Authorities could not lawfully make any surplus on off-street car parking save to the extent that the surplus derived from charges set at a deterrent level (as discussed in paragraphs 55 and 56 above), it would follow even more strongly that non-taxation would lead to charges lower than would prevail in circumstances of taxation; that would be so because the law would require Local Authorities to set all of their non-deterrent charges at a level that

avoided their contributing to a surplus and the non-incidence of VAT would make that level a lower one than if the charges were taxable.

61. We accept, however, that Local Authorities provide off-street car parking as part of the government of their areas and not as a business. Local Authorities also have functions in relation to car parking in their capacity as local planning authorities. Central government guidance in England and Wales on planning issues relating to parking was formerly contained in Planning Policy Guidance Note 13 and is now in the National Planning Policy Framework. The relevant objectives set out in PPG 13 were to integrate planning and transport so as to promote more sustainable transport choices, to promote access to jobs, shopping, leisure facilities and services by public transport and to reduce the need to travel, especially by car, whilst the Guidance acknowledged that the motor car would have an important part to play and in rural areas would remain the only real option for travel. It enjoined Local Authorities to set maximum numbers of car parking spaces for which planning permission would be given, not to require more parking provision than a developer proposed and to control on-street parking in the vicinity of developments that have limited on-site parking and generate significant numbers of journeys. PPG 6, dealing with Town Centres and Retail Development, advised that good quality secure parking was important to maintain the vitality and viability of town centres and to enable retail and leisure uses to flourish.

62. The new National Framework aims to balance the transport system in favour of sustainable modes of transport, while recognising that opportunities to maximise sustainable transport solutions will vary from urban to rural areas. Local Plans should support patterns of development that facilitate sustainable modes of transport where it is reasonable to do so and should aim for a balance of land uses so as to minimise lengths of journey for employment, shopping, leisure, education and other activities. Parking standards for development should take into account the type of development, its accessibility, the availability of public transport and local car ownership levels. Paragraph 40 requires local planning authorities to seek to improve the quality of parking in town centres so that it is convenient, safe and secure and to set appropriate parking charges that do not undermine the vitality of town centres.

63. Scottish Planning Policy 17 promotes maximum parking standards for new developments. It encourages short-term off-street car parking in towns in order to support accessibility and vitality but the reduction of long stay parking in order to discourage commuting by car, coupled with policies to promote the availability of high quality public transport, park and ride schemes and parking at railway stations. Scottish guidance to local traffic authorities sees parking as a key element in managing demand for the use of cars and enjoins the authorities to develop and integrate strategy covering both planning policies and the use of transport management powers so as to encourage alternative modes of travel.

64. Income from car parking forms part of what is termed the 'discretionary income' of a Local Authority – that is to say, income from activities in respect of which local government law gives Local Authorities a discretion, to be exercised in accordance with statute and policy, as to the scale on which they engage in them. It

can be contrasted with, say, planning control, where the Council has a duty to consider any valid application made to it.

The off-street car parking market

65. We now embark upon recording findings of relevant primary fact about the off-street car parking market.

66. Off-street car parking began to become a significant feature of the landscape in the 1960s and 1970s, with the growth in car ownership and the move towards the construction of urban and out of town shopping centres. Mr Haynes told us that it was in those decades that private off-street car parks were able to expand, while Mr Gallagher referred to the number of shopping centres built in the same period. Many of the country's multi-storey car parks date from those decades and in the last twenty years have come to require renovation or refurbishment after some 25 years of use.

67. Both parties' experts used data on off-street car parking collected by Parking Data Research International (PDRI), an organisation that collects data about car parking. It was apparent from what the experts told us that PDRI had been co-operative in providing information, and we are grateful to them for that.

68. PDRI define a publicly accessible car park for these purposes as

A car park which is open for use by the public provided they comply with the terms and conditions of the operator; this usually relates to payment and/or duration of stay.

69. We were initially unsure precisely which car parks are included in this definition. Clearly it covers car parks available to the general public, whether or not for payment and whether provided by Local Authorities or commercial operators. Clearly it does not include staff car parks provided by employers. It is not clear to us to what extent PDRI include car parks provided for the customers of businesses, which one knows from general knowledge are very common and range in size from large supermarket or railway station car parks to small public house car parks of the sort most commonly found in rural areas, small towns and suburbs. Businesses do not generally charge their customers for parking, for obvious reasons. Mr Aaronson told us that there are very few supermarket car parks on the PDRI database. We infer that the data do not include car parks provided exclusively for customers of businesses. Railway station car parks are not generally forbidden to non-travellers and some supermarket car parks are open, for a fee, to non-shoppers; this is sometimes achieved by charging a parking fee which is recoverable against the cost of purchases in the supermarket. We would expect the PDRI data to include those; Mr Aaronson refers to railway car parks being included in the data.

70. We do not consider that it matters for our purposes precisely which car parks are included; the PDRI data are in any event not complete, relying to a large extent on

voluntary provision of information. Mr Aaronson told us that the data are more complete for Local Authority car parks; PDRI still had progress to make in obtaining commercial car parking data. The 2011 data only cover eight Britannia car parks, whereas Mr Foster told us that Britannia operates 230. Mrs Cooper of NCP had not heard of PDRI; NCP do not supply information to them. She said, and we agree, that PDRI probably obtain information on NCP car parks from NCP's website.

71. PDRI have estimated that there are some 16,000 publicly accessible car parks in the United Kingdom, of which PDRI have data for slightly over 13,500. These contain between them some 1.8 million car parking spaces, indicating an average car park size of some 130 spaces. Mr Foster said that car parks classified as being in 'public ownership' account for 65% of these spaces, with privately owned car parks accounting for the balance. Mr Aaronson said that nearly 80% of the car parks in the 2011 PDRI dataset were Local Authority car parks, and that this was not necessarily inconsistent with Mr Foster's figure since commercial car parks might on average be bigger. We consider that commercial car parks will on average be bigger than Local Authority car parks, in particular since the Local Authority category will include small rural car parks. We also infer that the great majority of car parks in 'public ownership' are Local Authority car parks.

72. We accept the PDRI estimate of 16,000 car parks as the best available. The total number of car parking spaces they account for is probably of the order of 2 to 2¼ million. Mr Foster told us that 22% of car park spaces are supplied free of charge; that would amount to approximately 500,000 spaces. 65% of these are in publicly owned car parks – the same proportion as of the total estimated number of spaces. This suggests that privately owned car parks provide approximately 150,000 to 200,000 free parking spaces; Mr Aaronson told us that one third of the privately owned car parks in the PDRI dataset are classified as free of charge. We find these figures surprisingly high, but take a large part of the explanation to be that (as Mr Aaronson told us) railway station car parks are classified as privately owned. Those that are free of charge – and the evidence was that a number are – will tend to be in rural or suburban areas; Mr Foster and Mr Haynes told us, and we accept, that parking is free of charge at 37 railway stations in the West Midlands providing more than 6,000 spaces, in pursuit of the integrated transport authority's policy of encouraging motorists to park and travel into towns by train.

73. The extent to which Local Authorities provide free car parks and periods of parking free of charge in charged-for car parks is something that was stressed in the Local Authorities' evidence to us as reinforcing the point that, for Local Authorities, the provision of car parking is not a commercial activity. It is common knowledge that Local Authorities provide car parks at which no charge is made in small country towns, suburbs and some villages. It is self-evidently impractical to charge where uncontrolled parking is available in surrounding roads. Commercially operated public car parks are not generally found in such areas.

74. Car parks that do not seek to charge are not affected by the value added tax régime and we can leave them out of account. We are concerned with car parks open to the general public at which charges are levied some or all of the time. References

in this Decision to car parks or public car parks refer to those car parks unless otherwise indicated. We estimate them as accounting for something of the order of 1.5 to 1.75 million spaces nationwide, of which around two thirds are in Local Authority car parks. On the basis of Mr Aaronson's evidence that 80% of the 13,500 car parks in the PDRI database are Local Authority car parks, we estimate the number of (free and charged-for) Local Authority car parks nationally as around 11,000, with the balance of the estimated 16,000 being accounted for by about 5,000 commercial car parks. Mr Aaronson also told us that about half of the Local Authority car parks in the PDRI dataset are described as free of charge. This is in our view consistent with 22% of the spaces being free of charge, since free of charge car parks will tend to be in rural areas and generally smaller.

75. On the basis of Mr Aaronson's evidence we find that there are around 5,500 charged-for Local Authority car parks (half of the 11,000); on the basis of the evidence of Mr Aaronson and Mr Foster that one third of privately owned car parks and 22% of privately provided spaces are free of charge, we find that there are some 3,000-4,000 charged-for commercial car parks. Mr Vajda told us that the output VAT generated by Local Authority off-street car parking currently amounts to £150 million per annum, indicating an annual Local Authority off-street car parking turnover of some £900 million including VAT.

76. We do not have information enabling us to break down the market shares very much further. According to Mr Aaronson, the PDRI data cover six commercial car park operators and slightly more than 800 commercial car parks, of which just over 600 are operated by NCP. In response to a question from us, Mr Aaronson gave as a rough estimate that NCP have a market share of about half of the commercial car park market. He thought there were about eight to ten commercial car park operators in total. Mr Gallagher of Britannia estimated that there were ten to twelve commercial operators of reasonable size. Given that Britannia operate around 230 car parks, we suspect that Mr Aaronson's estimate of NCP's market share may be too high, but are unable to offer an alternative figure.

77. The usage of off-street car parking has, we find, declined in recent years, as both Mrs Cooper and Mr Gallagher testified. One illustration of this is that, whilst the KPMG Car Parking Options Appraisal of July 2002 said that demand for parking spaces in Birmingham city centre remained high, weekday usage is currently about 60% of capacity. This is in our view the result partly of policies of discouraging commuting by car and, to a greater extent, of the recent economic recession and the increase in the price of motor fuel. We think it more probable than not that there has been a similar level of decrease in other large cities and some decrease even in smaller centres where less has probably been done to discourage car usage: see for example Bournemouth Borough Council's report referred to at paragraph 90 below.

The local position in areas about which we received evidence

78. We received witness evidence about Birmingham, the Isle of Wight and South Tyneside and have some written material on certain other places. As already mentioned, our knowledge of the off-street car parking market is far from comprehensive, but we record some local details that contribute to our understanding of the national picture. Additional factual details will emerge in later sections of this Decision.

Birmingham

79. Birmingham has a population of slightly over one million. In 2001 62% of households had one or more cars, an increase from 55% in 1991, but below the national average. The figure was estimated to be closer to 70% in 2010. The City Council maintains 30 off-street car parks in the central area of the city – within the ring road that encircles the city centre about 2½ miles from it – providing 8,000 parking spaces, and 38 off-street car parks, providing 2,450 spaces, elsewhere in the city. The City Council's annual income from off-street car parking is about £8 million and expenditure approximately £4 million, generating a surplus of £4 million. The majority of off-street car parking in the city centre is operated commercially, with around 50 car parks operated by a number of commercial providers. There are in addition a substantial number of car park spaces provided by local businesses to their staff; when last measured in 2001, the number of staff car parking spaces in central Birmingham, some 40,000, amounted to twice the public off-street car parking capacity in the city. There is currently overcapacity of parking in the city centre; on average, 60% of commercial and Council car park spaces are occupied in the middle of a weekday morning.

80. The City Council operates a simplified pricing structure, dividing the city into inner, intermediate and outer zones. In the inner and intermediate zones, Council car parks are priced at similar levels, the level of charges in the intermediate zone being lower in order to encourage their use in preference to driving into the city centre. In the outer zone, charges are determined car park by car park according to the circumstances of each. We accept Mr Haynes's evidence that simplified pricing structures of this sort are commonly used by Local Authorities as they increase public awareness of the different levels of charge, increasing the effectiveness of the differential pricing. In addition, charges for off-street car parking are set at a level relative to those for on-street car parking that encourages the use of car parks; this in order to reduce the amount of cruising by motorists looking for on-street spaces who, surveys indicate, account for up to 20% of motorists in city centres. We return to the topic of motorists' price-sensitivity in paragraphs 224 to 246 below.

81. It is the view of Mr Haynes, and we accept, that commercial car park operators in Birmingham tend to set their charges by reference to those of the City Council, with a margin of excess. That commercial car park operators should behave in this way is consistent with the evidence of the commercial sector witnesses, Mrs Cooper and Mr Gallagher, and the findings of Mr Aaronson, all of which we describe later in

this Decision. Mr Haynes accepted that Local Authority off-street car parking charges act as a constraint on commercial charges, a view with which we also agree.

The Isle of Wight

82. The Isle of Wight has 79 Local Authority car parks. Most are open air car parks; none are multi-storey. Fifty-seven are charged for. The annual maintenance budget is approximately £250,000. Off-street car parking charges generate revenue of approximately £2 million, while a further £2 million are generated by charges for on-street parking. This revenue meets about 35% of the Council's gross budget for highways and transportation. The Council has estimated that less than 10% of charged-for off-street car parking on the Island is provided commercially. Mr Gallagher of Britannia (which operates an off-street car park in Newport) said that the Council were the price leader in off-street car parking as a result of controlling the majority of the stock.

83. In evidence that we accept, Mr Metcalfe of the Isle of Wight Council said that the Island, whilst containing large designated Areas of Outstanding Natural Beauty, was economically deprived and that in such an area a Local Authority would focus its policies on promoting or at least not damaging growth. Off-street car parks reduced road congestion, improving the logistical arrangements that support local businesses and possibly attracting businesses to an area. He described making adequate car parking provision to support retail and entertainment businesses as "important". The lack of adequate car parking in the principal towns could damage the sustainability of businesses. Smaller settlements contained small businesses and retailers that provided an important local service, reducing the need for longer journeys to the principal towns. Car parking provision was necessary in these settlements also; it was provided free of charge, as charging would encourage shoppers to travel to the larger towns to enjoy a greater choice of services at a similar parking cost. He also described the provision made for commuters, particularly at the ferry ports to support those who commuted to jobs on the mainland and brought money into the Island.

84. When the rate of VAT rose to 20% in 2011, the Council members decided to absorb the increase rather than raising charges because they considered that raising charges would conflict with the policy objective of encouraging the economic wellbeing of the towns.

South Tyneside

85. South Tyneside has a population of about 150,000. The Council operate 38 off-street car parks, providing almost 3,800 spaces. Parking is charged for at 21 Council car parks in South Shields and is free elsewhere. The Council have income-sharing arrangements in respect of the two of the car parks they operate; these car parks exist pursuant to planning obligations. There is one commercial public car park, also in South Shields. It exists pursuant to a planning obligation; the operator's agreement with the Council, pursuant to section 106 of the Town and Country Planning Act 1990, requires the operator to maintain 90 spaces and to charge in such a way as to discourage parking for in excess of four hours during the day. In addition

there are two 'pay and display' supermarket car parks which are open to the general public, with a refund if a certain amount is spent in the supermarket.

86. The Council's off-street car parking generates a surplus; Mr Reid told us in his witness statement that this represents about 0.2% of the Council's budget; in oral evidence he estimated that the annual revenue from off-street car parking provision was about £350,000-£400,000 and the cost of its provision about half that amount. The amount contributed to the Council's budget by all its charges for services is about £25 million.

87. South Tyneside appoints independent commissions from time to time to look at aspects of the Council's functions. In late 2009 South Tyneside appointed a commission of five local businesspeople to report on car parking charges in the Borough. In their report of what the Council had explained to them about car parking provision in the Borough the commission said

The Council explained how the supply and pricing of car parking (both public and private) has a big influence on the way people travel, particularly into town centres and that it is necessary to ensure the right balance is maintained between promoting the vitality of an area and managing demand for car travel to ensure that congestion is minimised.

The Council also told us that it has a commitment to provide safe car parking facilities in all of the pay and display car parks and to keep the car parks at this high standard requires regular maintenance and patrols and the Council needs to generate income to help pay for this service.

We bear in mind that these are the Commission's rather than the Council's own words. The adjective 'big' possibly over-states the influence that car park pricing (as opposed to provision) has on usage of public transport; however, a questionnaire survey attached to the report recorded that 63% of respondents had said that car parking charges deterred them from using South Shields town centre, though 31% had said they did not.

88. The Council's policy is to review their car parking charges annually; they did not reduce them when the rate of VAT was reduced to 15% nor increase them when it returned to 17.5%; in January 2011, when VAT rose to 20%, the Council left the short term parking rate unchanged but increased the all day rate from £2.40 to £3.

Some other areas

89. According to the website of Banbury Town Council, the town has a population of about 45,000. Three commercial car park operators operate in the town, which has six Local Authority car parks, two NCP car parks, a shopping centre car park (which, Mr Aaronson told us, is managed by the Local Authority) and a multi-storey car park operated by another commercial operator.

90. Bournemouth Borough Council operate 46 car parks offering 8,644 spaces. One car park is free. In the year 2010/2011 off-street car parking charges and penalty

income of some £5.4 million generated a surplus of about £2.9 million; we infer that the income is stated net of VAT where applicable. The Council reported that the current economic climate together with changed shopping habits had had an impact on car park use and income; parking charges had been held unchanged for two years despite the increase in VAT.

91. Brighton and Hove City Council operate 14 of the 27 off-street car parks in their area, providing just under 2,500 spaces. Their Annual Parking Report does not give any financial information regarding their off-street car parking, but our attention was drawn to some correspondence between NCP and the Chief Executive of Brighton and Hove in early 2010. In response to a claim by NCP of predatory pricing by the Council, the Chief Executive wrote “The Council’s car parks are operated on a commercial basis with a view to making a profit and are in fact an important source of revenue for the authority.” We accept that this statement is to be read in context: the letter went on to say that the pricing could not be predatory in competition law terms because it was above cost; it nevertheless supports the conclusion that, whilst not using car park charging as disguised taxation, the Council intentionally generate a surplus from off-street car parking.

92. Cambridge has 14 car parks operated by the City Council; eleven are charged for. There are no commercial off-street car parks in the city. It is well known that Cambridge offers ‘park and ride’ parking and seeks to limit motoring into the city centre. We were provided with a copy of an article from the magazine *Traffic Engineering and Control* published in May 2002. According to it (and we treat it with some caution, recognising that it is not written in the City Council’s own words), the City Council commissioned a ‘best value’ review of its off-street car parking operation in 2001. The Council’s objectives for the service were said to be to provide access to the city by car for those who need it, to support the vitality and viability of the city centre, to provide a high quality service, to minimise queuing and to run a cost effective and profitable service.

93. The Council’s consultants conducted a customer survey which was said to have found that customers were willing to pay approximately 10% more than they were then paying in return for quality improvements; HMRC rely on the statement in the article that the high capital cost of the improvements needed “could be difficult to justify in the absence of enhanced contributions from users”. The article goes on to say that a 10% increase in charges would enable the investment to be made without a net draw on Council resources. The study is also reported as finding that, if given appropriate information, motorists would “trade between parking price and convenience” as between central and more peripheral car parks, but that price-elasticity of demand for parking in Cambridge was low: a step change in pricing was required in order to achieve a significant change in demand. The article reported that the improvement programme was under way and that car parking charges had been altered, setting charges at central locations at up to twice the level at more peripheral car parks.

94. East Hampshire District Council are reported in the Audit Commission’s report *Positively Charged* as having introduced in 2006 a scheme of removing car

parking charges in Alton and Petersfield on certain days in December. The scheme was reportedly designed to support local traders by encouraging local shopping rather than travelling to larger centres. The Council's research found high levels of satisfaction among the local community and traders. The report also notes that, while most charge-setting decisions in East Hampshire are delegated to officers, "charging for some services, for example, car parking and cemeteries, are sufficiently sensitive to require all charging decisions to be reviewed by councillors" (paragraph 63).

95. Liverpool City Council provide approximately 1,600 off-street car parking spaces in the city, with commercial operators providing about 13,500. In written material the Council have told us that they are happy for the private sector to provide the majority of the off-street car parking within the Council's policy objectives. Documentation provided to us included the Liverpool city centre parking strategy attached to the 2006 version of the Merseyside local transport plan; the parking strategy is described as 'flowing from' the City Centre Movement Strategy adopted in 2000, whose objectives were: to improve access to the city centre; to aid economic regeneration; to create a safe, clean attractive and people-friendly city centre; to make best use of the city centre's public transport facilities and car parks; to improve the townscape; and to ensure that measures could be funded and implemented. A balanced approach to car use was taken, involving pedestrianisation, public transport corridors and a traffic circulation and parking plan. The parking plan included a strategy of limiting the number of off-street car parking spaces to 16,500 and shifting the balance of parking provision from long to short stay to assist visitors and discourage commuting by car.

96. The 2006 strategy noted that in January 2004 there were some 15,400 spaces but that by early 2008 (when the city would be the European Capital of Culture) the number would have reduced by 4,500 owing to construction work and that after 2008 there would be a permanent loss of some 2,000 spaces. The 2006 strategy was to provide more park and ride spaces in the short term and to make up the lost 2,000 spaces after 2008 by providing new city centre car parks focussed on serving short stay shopping, visitor and business needs. In addition, there would be more emphasis on the existing policy of expanding short stay parking, including at the expense of long stay. Because the Council only provided 13% of the car parking spaces, it would be necessary to work in partnership with the private sector, agreeing the areas where additional off-street car parking was required and the appropriate tariffs. (We assume that the Council would have some control over tariffs by virtue of a section 106 agreement.)

97. The 2006 strategy document also records that charges had been set for each Council car park at a level to compete effectively with the private sector in the vicinity and to provide a cheaper alternative to on-street parking. Charges had last been increased in 2000. Careful monitoring of usage and income levels was constantly carried out. We have been provided with examples of the surveys of capacity utilisation and tariffs in Council and commercial car parks which the Council commissions twice a year. We are hesitant to draw any firm conclusions from these without guidance, but they seem to mirror the declining trend in capacity utilisation referred to by some of the witnesses. The Council's off-street car parking income in

the last three years has been around £2.7-£2.8 million. We do not appear to have a breakdown of its expenditure between on and off-street parking.

98. The Council's response to a questionnaire prepared by HMRC indicates that the data collected on tariffs within Liverpool are benchmarked against other core cities and locations in the north west. It says that tariffs take into account a number of factors but that whilst financial considerations come into play, "the over-arching policy decision is one which supports the sustainable and economic agenda", adding that VAT is not relevant to setting tariffs, which are fixed so as to manage traffic and in response to inflation, albeit that the Council have often let them fall behind the RPI. The Council did not alter their tariffs in response to the changes in the rate of VAT for this reason and also because of the cost of altering signage. The response reiterates that charges are set so as to discourage commuter parking, promoting a higher turnover of available spaces in areas of high demand. At some of their car parks the Council offer free parking or reduced charges in the period leading up to Christmas; this is said to be done in order to encourage shoppers into the city centre in pursuance of the City Council's aim to promote a thriving economy.

99. Manchester City Council entered into a joint venture arrangement with NCP in 1999, pursuant to which the day to day operation of 12 car parks is undertaken by NCP. It appears that at the outset NCP contributed 27 car parks previously run by it and the Council 19 car parks previously run by them. Off-street car parking charges are promulgated by the City Council, sometimes by an amending order pursuant to section 35 of the 1984 Act and sometimes by a notice under section 35C, following Councillors' approval of a proposal made by the board of the joint venture company. Various reports to Councillors reported that a 'pricing optimisation tool' had been used to create prices that would encourage movement from oversubscribed sites to sites with availability, adding that the tool had previously been used successfully, "its volume and elasticity predictions proving accurate". Some reports say that the pricing was also designed to "encourage modal shift between different transport classes".

100. The joint venture agreement gives NCP a majority on the joint venture company's board, but certain matters require unanimity. The joint venture agreement provides that the business of operating the car parks is to be conducted in the best interests of the joint venture company on sound commercial profitmaking principles so as to generate the maximum achievable maintainable profits available for distribution. There is a formula for allocating the profits between the parent entities. The joint venture's parking charges would remain taxable even if the Local Authorities had succeeded in this appeal.

101. In Mid Suffolk, as we have already mentioned, the only commercially operated off-street car parks appear to be the station car park at Stowmarket, now operated by NCP, and a temporary car park. The District Council operate 19 off-street car parks, of which 12 – all of those in Stowmarket – are charged for. (Mr Aaronson told us, on the basis of the PDRI information, that one Council-owned car park is commercially managed, but the Council's written material provided to us does not refer to this and we are not persuaded that the operation of that car park is not

under the Council's control.) The Council did not raise car parking charges between 2004 and 2010.

102. In late 2009 the Council consulted 130 stakeholders and key partners upon options for increasing and/or restructuring the car parking charges. The consultation generated some 30 responses, of which 18 related to the proposal to introduce Sunday charges in Stowmarket and 12 to the options for increases/restructuring of Monday to Saturday charges. Councillors had previously resolved in favour of Sunday charging but, against a background of unanimous opposition to it among those responding to the consultation, officers recommended against introducing it at that time. Whilst supporting the principle of Sunday charging, the Council's Corporate Director considered that the impact on the regeneration of Stowmarket and retail trade of introducing it while the financial recovery was still fragile was potentially too detrimental.

103. Respondents to the consultation had expressed the view that Sunday charging would be detrimental to the retail sector, shoppers and other visitors. The respondents to the consultation on Monday to Saturday charges included the Parish Councils of two of the surrounding villages, of which one was unanimously opposed to any increase "as they feel this will drive people away from Stowmarket town centre" and the other unanimously considered that charges should be removed or dramatically reduced to encourage the use of the town, rather than out-of-town locations with free parking, in the interests of the town's small businesses and the environment. The Chairman of the Parish Meeting of another village expressed the view that the car parks should give two hours' free parking, which would encourage shoppers whilst not allowing commuters to park free of charge.

104. New charges were introduced by the making of a fresh order under section 35 of the Road Traffic Regulation Act. Describing car parking charges as an important and essential income stream, the Corporate Director recommended that they be reviewed at least every two years in future.

105. Poole Borough Council operate over 40 off-street car parks providing some 8,250 spaces; in 2010/2011 charges of £4.6 million net of VAT generated a surplus of £2.3 million, all of which was applied to transportation services. The foreword to their Annual Parking Report describes parking charges as a particularly sensitive issue in the current difficult economic times, potentially having an impact on people's decisions to come to Poole. Income from parking charges is described as an important part of the Council's finances, enabling it to deliver the services which the community require. The paragraph concludes by saying that "getting the correct balance in this area is essential". The Council are developing a parking strategy, the framework of which is appended to the Report. It includes meeting financial pressures and rebalancing the deficit, increasing charges and introducing new charges at high demand locations and competitive pricing at under-used locations.

106. West Berkshire Council provide some 2,300 off-street car park spaces in some two dozen car parks, all but three of which are charged for; in 2009/2010 on-street and off-street car parking together generated income of some £2.3 million (of which

some £260,000 was from penalty charge notices) and incurred about £1.4 million of expenditure. Newbury has in addition three privately operated car parks as well as a supermarket car park and a car park at a retail centre. Some other towns have supermarket and station car parks. Written material provided to us indicates that the Council see their parking strategy as relating to priorities of the Council which include improving traffic management and road safety, providing ample parking for shoppers and visitors and managing business servicing needs.

107. The provision of car parks and the levels of charges are said to support the overall theme in the Council's strategic plan of supporting thriving town centres. Though the Council Plan 2007-2011 does not appear to refer to car parking, it noted that the market towns of West Berkshire were important 'capitals' for the local community, whilst the economies of some, notably Newbury and Thatcham, had come under increasing pressure from surrounding towns in recent years. The Council aimed to increase the numbers of residents and visitors using town centres.

108. Car park charges in West Berkshire do not appear to have been comprehensively reviewed as frequently as annually before 2008. A further general increase was made in 2009 "in order to generate additional income to help meet the overall pressure on the Council's budget and help keep council tax increases to a minimum". No further increase was proposed in 2010 and the Council said that the changes in the VAT rate in 2008, 2010 and 2011 were not taken into account in setting parking charges.

109. The City of Westminster has for many years had policies of traffic restraint, designed to reduce commuting into central London by car and to reduce pressure on on-street parking spaces. Written material provided to us indicates that the Council's car parks were operated within that policy framework so as to provide parking for those who had good reason for parking in the City, including residents and business users. The City Council's policy was that off-street car parking should at least break even, so as to avoid a drain on the general fund. In setting tariffs the Council had regard to the tariffs of other off-street car park operators as well as on-street parking charges, to ensure that pricing was consistent with the Council's policy aims and encouraged long stay parking to move off-street. The prices tended to be high, as a result both of the Council's policies and of the property values and costs of operating in Westminster. The Council's marketing strategies were always designed to maintain and improve the financial performance of the car parks. We were also told that in the Council's experience there was little or no elasticity of demand in relation to off-street car parks; customers were influenced by convenience rather than price.

110. In recent years the City Council have implemented pricing initiatives designed to stimulate usage of the car park and/or enhance the trade of City businesses. These have included: 'yield management pricing' in some car parks, under which tariffs were automatically raised or lowered depending on the degree of utilisation of capacity within the car park; a Chinatown promotion and a theatreland promotion, where discounted parking was available to diners and theatregoers; and Christmas price promotions where free or discounted parking was available in the West End in the evenings and on Sundays. Following the terrorist attacks in central London in

2005 and the consequent decline in visitors to the West End, a ten-point strategy to rebuild confidence appears to have included a 'Shoppers' Saturday' promotion, by which reduced parking charges applied on four Saturdays in August and September of that year.

111. The City Council historically owned 21 off-street car parks, the day to day management of which had for many years been outsourced in order to take advantage of what the Council saw as the greater experience of the private sector. Until the introduction of the London congestion charge in 2003, surpluses were healthy; they then became modest; no surplus was being generated by 2010. The City Council have also had for many years a strategy of disposing of their car parks; seven were disposed of, either for redevelopment or to private operators, prior to 2011. In June 2010 officers recommended disposing of the remainder to a private operator who could take advantage of economies of scale; they were expected to be attractive to a 'top-flight' operator. In January 2011, after a bidding process, the Council disposed of its remaining off-street car parks by way of a long lease to Q-Park Ltd.

112. A proposal to introduce an on-street overnight parking charge of £4 in the City with effect from January 2012 was abandoned in the face of public opposition; in response to the proposal, NCP had announced a reduced overnight charge of £4 in its car parks in Westminster; Mrs Cooper told us that that rate had been maintained despite the Council's abandonment of overnight on-street charging.

113. Some Local Authorities operate at a loss; Mr Haynes instanced Local Authorities in Cumbria, Denbighshire, Derbyshire, Herefordshire and parts of Lancashire and Staffordshire. He told us that they justify their levels of charges, if any, as supporting tourism or the local economy. It was his view, which we accept, that Local Authorities in major urban areas can be expected to generate a surplus from off-street car parking.

114. This brief survey of a number of localities indicates that the split between Local Authority and commercial provision varies markedly in different places – Liverpool, for example, presents a striking contrast with the Isle of Wight or Mid Suffolk and quite a contrast with Birmingham. We have estimated that Local Authorities provide roughly two thirds of the off-street car parking nationwide, but we do not find that Local Authorities set out to be the provider of the whole or even the lion's share of off-street car parking in their areas. There are, however, good reasons for their providing at least a proportion, so as to act as a constraint on commercial car park charges, as Mr Haynes noted.

115. We do not currently detect great eagerness on the part of Local Authorities to provide off-street car parking. As the Chartered Institute of Highways and Transportation have noted in the publication referred to at paragraph 58 above, the recent trend has been towards disposal or outsourcing where elderly car parks have required upgrading or refurbishment and, as we have already observed, Mrs Cooper and Mr Gallagher agreed that Local Authorities have not been active in bidding for car park sites in recent years. Current planning legislation enables Local Authorities, in their capacity as planning authorities, to require provision of off-street car parking

as part of retail development and to give the Local Authority a degree of control over its charging structure and availability to the general public. The redeveloped Bull Ring is an example of that in Birmingham, a city in which the balance of Council and commercial provision has tilted towards the commercial sector. Mr Haynes told us that from a traffic management perspective it would be beneficial for the City Council to control more of the off-street car parking, but the necessary funding was simply not available.

116. As far as Local Authorities' own off-street car parking charges are concerned, we consider that the majority probably make a surplus; as will be seen when we explain our reasons for concluding that non-taxation would lead to lower Local Authority off-street car parking charges, we do not find it necessary to decide what is the precise pattern of surplus, loss or breaking even, a matter on which we in any event have insufficient material to form a view. We state our conclusions on the factors that influence Local Authority charges and the effect of non-taxation of them later in this Decision, after reviewing the parties' submissions.

NCP and Britannia

117. Mrs Cooper told us that NCP operates 647 sites, including 394 urban off-street car parks as well as railway and airport sites. Its business is divided into regions, areas and 'clusters' of between five to ten car parks managed locally by a cluster manager. This reflects the different supply and demand factors affecting off-street car parking in different localities. While NCP's evidence to the Tribunal in 2005 had been that there was insufficient off-street car parking to meet demand in most town centres, Mrs Cooper told us that the balance of supply and demand had altered in the meantime. A number of further sites have been developed, though not by Local Authorities, and demand for off-street car parking has reduced owing to the recession and higher fuel prices. Mr Gallagher of Britannia agreed, also citing the growth of temporary car parks on land whose redevelopment had been delayed owing to the economic recession. Mrs Cooper told us that motorists had as a result become more price-sensitive. Another change since 2005 was that Local Authorities were not currently a significant competitor of the commercial operators in bidding for the leases of newly developed sites. She agreed with Mr Haynes that Local Authorities were not at present interested in developing new car parks themselves. We accept the various witnesses' evidence on these points.

118. NCP's local staff monitor pricing and volumes at NCP's and competing sites, including on-street car parking; competing sites are identified by the local staff on the basis of their understanding of the competitive dynamics affecting car parking in the area. In all but one of the clusters, the competing sites include Local Authority off-street car parks. NCP keeps its pricing under review and carries out a formal review of pricing at least every quarter. Mrs Cooper estimated that over half of tariffs were changed at each formal review and also told us that tariff changes were made at two thirds of NCP's car parks in the second half of 2011. We accept this. In Mrs Cooper's opinion, while customers were sensitive to price, their choice of car park

was also influenced by factors such as location, quality and ease of access, with the result that NCP was in competition with Local Authority car parks despite NCP's higher tariffs. We agree with these propositions, which accord with other evidence.

119. As regards location, Mrs Cooper estimated that a motorist might pay a premium of 50 pence to £1 to avoid a 15-minute walk, enabling more centrally located car parks to charge more. As regards quality she said, and we accept, that NCP car parks are generally of a higher standard as regards lighting, upkeep and service than Local Authority car parks; they are generally manned, which enhances customers' sense of security, and sometimes offer advance booking facilities at times of high demand. We accept that all these things can enable an NCP car park successfully to operate higher charges than Local Authority car parks in the same locality. We also find that there is nevertheless a limit to the amount of price premium that such an NCP car park can sustain, for the reasons we give in paragraphs 224 to 246 below.

120. Mrs Cooper also gave various instances of volumes of demand rising or falling in response to tariff decreases or increases at NCP sites and of occasions on which NCP had had to reduce charges in response to loss of volumes following a Local Authority price reduction. We discuss this also at paragraphs 224 to 246 below.

121. 10-15% of NCP's revenue derives from the sale of season tickets, about three quarters of which are sold to businesses, which typically seek bids for the supply of annual blocks of season tickets, and a quarter to individuals. Mrs Cooper maintained that Local Authorities now compete aggressively for season ticket business; she gave instances of NCP losing season ticket business to Local Authorities.

122. Mrs Cooper also drew our attention to the report of the Directors of the group to which NCP belongs for the year to March 2011, which described NCP's main competitors as being Local Authorities, Q-Park, Apcoa and Vinci, and to the exchange of correspondence between NCP and a Local Authority Chief Executive that we have referred to in paragraph 91 above.

123. Britannia has been trading since 1989. It operates multi-storey car parks and also temporary car parks on sites awaiting redevelopment; it operates something over 200 sites, to a large extent in the smaller towns; this compares with 120 car parks in 2005. Only eight of them are in the PDRI dataset used by Mr Aaronson. Britannia also manages car parks on behalf of their owners. It is not involved in any fully fledged joint ventures with Local Authorities, but Mr Gallagher told us it would be interested in doing so.

124. Mr Gallagher maintained that non-taxation of Local Authority off-street car parks would lead to lower Local Authority off-street car parking charges, more Local Authority investment in car parks, more instances of Local Authorities bidding successfully for leases of car parks and fewer instances of Local Authorities transferring their car parks to the private sector or engaging in joint ventures with commercial operators. He told us that Local Authority and commercial off-street car parks compete primarily on price and expressed the view that motorists, especially

commuters, were very price-sensitive, though local factors such as location affected motorists' preparedness to switch car park on grounds of price. He suggested that in a town where town centre car parks charged £5 for a day's parking, car parks half a mile away would charge £2.50; in Manchester, he said, city centre car parks charged around £15 and car parks situated a ten minute walk away would charge £5.

125. Mr Gallagher said that Local Authorities had become far more commercially minded with regard to their off-street car parks in recent years, and accused them of entering into price wars with commercial operators. He instanced the reduction in the all day rate at a Local Authority car park in Chesterfield from £7 to £3 in February 2009; in cross-examination he accepted that the Local Authority had not further reduced its price in response to Britannia's consequent price reduction. We discuss this aspect of his and Mrs Cooper's evidence in paragraphs 196 and 197 below.

126. According to Mr Gallagher, Local Authorities tended not to undertake the upgrading of their car parks themselves, but tended instead to lease the car park to a commercial operator on condition that it effected the improvements; he said that Britannia had been involved in a number of such schemes. We accept this general proposition, which is corroborated by other evidence that we discuss in the next section of this Decision. Mr Gallagher maintained that in these cases non-taxation of Local Authority off-street car parking would alter the balance of financial advantage in favour of the Local Authority undertaking the upgrade work itself. Relief from VAT would also, he said, increase the amount that Local Authorities could afford to bid for car parks, but in cross-examination he accepted that Local Authorities had not been active in bidding for car parks in recent years.

Outsourcing, public/private partnerships and transfers of car parks between Local Authorities and commercial operators

127. Mr Hughes of Birmingham City Council told us that if an existing car park required investment, the Council might invest in it if it was still needed from a transport policy point of view, but would first consider a range of options, including leasing it to a private operator. In oral evidence he said that obtaining an injection of outside capital was a less potent reason for outsourcing now that Local Authorities had power to engage in what is termed 'prudential borrowing'. He considered that if VAT did not apply to Local Authority car parking charges, outsourcing would probably be structured in such a way that the contractor managed the car park, with the income stream remaining with the Local Authority. Birmingham had done a similar thing with their golf courses, though not, he said, for VAT-related reasons. Generally, he said that outsourcing would be structured so as to maximise the benefit to the Local Authority, and we accept that.

128. We received evidence of a number of what we loosely call 'joint ventures' or 'partnerships' between Local Authorities and commercial undertakings relating to off-street car parks. NCP is involved in such partnership arrangements with a number of Local Authorities under which NCP operates Local Authority car parks. The legal

structure of them varies. In Manchester there is a 25-year joint venture agreement, already mentioned in paragraphs 99 and 100 above; a joint venture company is jointly owned by the two parties, who have each leased their car parks to that company; it is a member of NCP's VAT group. NCP has operated Reading Borough Council's car parks since 2006. The Council receives a guaranteed minimum payment and its consent is required for tariff changes. Mrs Cooper produced an extract from the Council Cabinet minutes of April 2006 referring to the Local Authorities' success before the Tribunal in 2006 and legal advice that the Tribunal's favourable findings applied to Reading also. The Cabinet resolved to authorise officers to ensure that the contractual arrangements with NCP "facilitate the enablement of car parking continuing to be treated as a non-business activity for VAT purposes" in line with the Tribunal's ruling. In the result, and because of the possibility of a successful outcome in this litigation, an agency arrangement was adopted to ensure that the Council remained the supplier. In St Albans, NCP has acquired a long-term lease of the Council's car parks; NCP receives the car parking charges and pays the Council a fixed annual sum plus a performance-based element. NCP also has partnership arrangements in Bolton and Worthing but we do not know their structure.

129. A different form of arrangement was made between South Tyneside District Council and a developer, under which the developer (not a commercial car park operator) agreed to construct a car park and grant the Council the right to operate it in return for a 50% share of the surplus arising after deduction of costs.

130. We learned from Mr Gallagher that a car park in Newport had been managed by the Isle of Wight Council on behalf of the owner. In 2000 the owner approached Britannia (and, Mr Gallagher suspects, other commercial off-street car park operators) offering a long lease of the site, which Britannia successfully negotiated. Mr Aaronson drew our attention to an agreement between the Council and a retailer pursuant to which the Council operated a car park in Cowes owned by the retailer, as well as to some 30 further examples of Local Authority/commercial arrangements in other Local Authority areas, involving the management by Local Authorities of privately owned car parks or by commercial operators of Local Authority-owned car parks. He observed that the information available to him did not always show how the arrangement was structured; we conclude, nevertheless, that partnerships of this sort, in whatever form, are relatively common.

131. In 2000 Birmingham City Council were approached by NCP, then the only other large car park operator in central Birmingham, with a proposal to discuss forming a joint venture to include the Council and NCP car parks situated in the city centre. Mr Haynes told us that several of the Council's city centre car parks were by then of some age and in need of refurbishment. Outline terms were agreed and KPMG were commissioned by the City Council to appraise them financially in comparison with various options for funding their refurbishment by the Council without a joint venture. KPMG's first appraisal, carried out in October 2001, was unfavourable to the joint venture option. Further negotiations took place, as a result of which the proposed terms of the joint venture became more favourable to the City Council. These terms were appraised by KPMG in July 2002. Two matters covered in the appraisal and the officers' report to Cabinet were focussed on before us: the

effect of VAT upon the venture and the assumptions that were made about price-elasticity of demand in response to envisaged tariff increases. We deal with that second matter in a section devoted to price-elasticity of demand at paragraphs 224 to 246 below.

132. In the July 2002 appraisal KPMG compared (i) the proposed joint venture with NCP, involving NCP contributing fourteen car parks and the Council twenty-eight, (ii) a joint venture with another commercial operator, not including the NCP car parks and (iii) refurbishment of the City Council car parks by the Council on its own, raising the money either by selling two car parks or by an allocation from the capital budget. By KPMG's calculations, the net present value to the Council of the joint venture with NCP slightly exceeded the NPVs of the other options.

133. HMRC submit that if non-taxation had increased the NPV of the in-house options by 20% (the current rate of VAT), the balance of advantage would have swung to the in-house options. We are unsure whether non-taxation would produce exactly that mathematical result, but there is other evidence that non-taxation of Local Authority off-street car parking would have made the joint venture the less attractive option. The risk register prepared by officers for the Council's Cabinet included among the risks "a VAT test case to be heard in relation to the Isle of Wight". The potential impact was rated as high and the effect was said to be "If found against Customs, would make in-house scheme the most favourable". The draft Heads of Terms between the Council and NCP contained a clause (referring to an older article 4(5)(2) case and probably lifted from an earlier document) providing that there would be a mechanism to adjust the joint venture in the event that Local Authority off-street car parking were held to be non-taxable and that, if this resulted in its termination, the Council would provide NCP with reasonable compensation.

134. In the result, a change of management occurred within NCP before anything was finalised, and the new management wished to alter the provisionally agreed terms in a manner unfavourable to the Council. In consequence, a report to Cabinet in December 2003 recommended retaining the car parks and funding the refurbishment through 'prudential borrowing' which was about to become a possibility by virtue of the coming into force of the Local Government Act 2003. It is of some interest that the previously considered funding option of disposing of two car parks was rejected, not only because of the sites' potential redevelopment value but also "because the sale of such an asset to a competitor would not be a good business move"; also, the increased prices proposed were thought to be achievable and would "remain below those of the Council's competitors". The accompanying risk register noted the risk of reduced demand as a result of the proposed tariff increases. The strategy for managing the risk was set out as follows: "The tariff increase assumed in the business case have regard to competitors' prices (mainly NCP car parks). The investment in improved lighting, CCTV, and security measures will make car parks more attractive to users and thereby help to maintain expected income streams. Empirical evidence nationally shows that customers are prepared to pay higher charges for improved facilities."

The experts' comparisons of charges

135. Both sides presented evidence that Local Authority car parking tariffs are lower than those of commercial operators. Mr Foster produced a table calculated from the 2010 PDRI data, giving the averages of the Local Authority and commercial car park tariffs for 1 hour's and 8 hours' parking. The mean average for Local Authorities was close to £1 for 1 hour and £5 for 8 hours; for commercial car parks it was close to £3 for 1 hour and £9 for 8 hours. The modes (the most frequently occurring values) were for Local Authorities £1 and £4 and for commercial operators £1 and £5. In the one hour tariff band, the fact that the modes coincide while the means diverge indicates to us a considerable degree of variation in commercial pricing in this tariff band, giving support to Mr Aaronson's findings which we discuss below. Mr Aaronson presented 2011 data, in which the mean average tariffs in Local Authority car parks were slightly higher but still close to £1 and £5 for 1 and 8 hours; he gave the mean average for 2 hours, which was close to £1.60. In commercial car parks he found the averages for 1, 2 and 8 hours to be slightly over £3, £4 and £5.

136. For the purposes of further analysing the PDRI data the experts used postcode sectors. A postcode sector is an area in which the postal addresses share the same first part of a postcode and initial digit of the second part, for example AB1 2**. There are 7,623 postcode sectors in England and Wales. A postcode sector contains around 3,000 addresses, though the sectors vary in size. In a rural area a postcode sector can cover more than one village, but areas of that sort will not generally contain charged-for car parks affected by this case. A town can comprise a number of postcode sectors. At our request Mr Aaronson counted the number of postcode sectors in Banbury; he found seven.

137. After eliminating car parks labelled as free of charge, entries with plainly incorrect data and airport and railway car parks, Mr Aaronson analysed PDRI data for 2011 relating to 870 commercial and 3,871 Local Authority car parks. Of the 870 commercial car parks, 316 (36%) were in the same postcode sector as one or more Local Authority car parks; this was the case in 228 postcode sectors. 429 of the commercial car parks were classified by PDRI as 'structures' (multi-storey, rooftop or underground car parks); 332 of the Local Authority car parks were classified as structures.

138. Mr Aaronson also calculated the mean average tariff charges in commercial car parks, distinguishing between commercial car parks with a Local Authority car park in the same postcode sector and those without. He used the tariffs for 1 hour's, 2 hours' and 8 hours' parking. The results were as follows: in 554 commercial car parks without a Local Authority car park in the same postcode sector, the average of the tariffs was 1 hour: £3.74, 2 hours: £4.72 and 8 hours: £11.75; in 316 commercial car parks with one or more Local Authority car parks in the same postcode sector the average of the tariffs was 1 hour: £2.72, 2 hours: £3.38 and 8 hours: £7.73. Where there was a Local Authority car park but no commercial car park in the same postcode sector (246 out of the 316 cases) the average of the tariffs was in two out of three cases slightly higher, at 1 hour: £2.91, 2 hours: £3.54 and 8 hours: £7.71. The presence of a Local Authority car park in the same postcode sector was associated

with markedly lower commercial car park charges, whether or not a commercial rival was present in addition.

139. Mr Aaronson performed a similar exercise for commercial and Local Authority 'structure' car parks, reasoning that they would be situated in prime locations in which land was more expensive, an assumption which Ms Rosewell found valid. He compared postcode sectors in which a car park (whether or not a structure one) operated by the other type of operator was present with postcode sectors where one was not. He found that, in 165 commercial structure car parks with a Local Authority car park in the same postcode sector the mean average charges were 1 hour: £2.12, 2 hours: £2.88 and 8 hours: £9.56. In 264 cases where there was no Local Authority car park in the same postcode sector the averages were 1 hour: £3.86, 2 hours: £5.33 and 8 hours: £16.61. Again these figures indicate an association between the presence of a Local Authority car park in the same postcode sector and markedly lower commercial car park charges.

140. The average of the tariffs for Local Authority structure car parks showed less variation. Where a commercial car park existed in the same postcode sector (91 cases) the averages of the Local Authority tariffs were 1 hour: £1.29, 2 hours: £1.98 and 8 hours: £6.93; in the absence of a commercial car park in the postcode sector (241 cases) the averages were 1 hour: £1.21, 2 hours: £1.94 and 8 hours: £7.61. The presence of a commercial car park is thus associated with a slightly higher level of Local Authority tariff, save in the case of 8 hours' parking.

141. Using the 2011 PDRI data and population data from the 2001 census, Ms Rosewell calculated the average population density across the areas in which commercial operators and Local Authorities respectively provided off-street car parks. She found that on average Local Authorities provide car parks in areas of lower population density. She also analysed a total of 495 postcode sectors containing at least one 'structure' car park, among which there were 44 sectors containing both commercial and Local Authority structure car parks. She found the Local Authority charges for 1 hour, 2 hours and 8 hours to be similar in all the sectors, whilst in the 44 sectors with a Local Authority structure car park also present the commercial charges averaged 1 hour: £2.33, 2 hours: £2.94 and 8 hours: £9.35, compared with averages across all the 495 sectors of 1 hour: £2.78, 2 hours: £3.90 and 8 hours: £12.40. She concluded that "Local Authorities maintain similar prices regardless of the presence of a private operator in the same postcode sector. By contrast, private operators seem to charge less in the 44 postcode sectors where they are in the presence of at least one LA operator", while adding that the competition was in a limited number of locations and might come from other commercial operators as well.

142. Ms Rosewell also considered the population density and percentages of residents with employment in the postcode sectors containing the structure car parks. She found that the average population density across all the postcode sectors containing a commercial structure car park (47.4 residents per hectare) was higher than the average across all the sectors containing a Local Authority structure car park (29.6 residents per hectare). The same was true of the average percentages of residents in employment (47.6% as against 45.8%). The 44 sectors containing both

Local Authority and commercial structure car parks had a relatively high population density, confirming that they were prime locations, but the average population density (29.2 residents per hectare) was lower than the average across all 495 sectors containing a structure car park (38.9 residents per hectare). Ms Rosewell concluded that the greater concentration of commercial structure car parks in high density/high income areas was a contributory cause which informed pricing decisions in local markets.

143. Ms Rosewell performed a similar analysis of 2,110 postcode sectors containing surface car parks. Here, population densities (22.8 residents per hectare on average) were lower than in the structure car park postcode sectors, indicating non-prime locations, but still higher on average across the sectors with a commercial car parks than across the sectors with Local Authority car parks (31.3 residents per hectare as against 20.7). Local Authority car parks predominated in these sectors: 877 as against 303 commercial car parks. Local Authority charges were slightly higher in the 231 sectors with both commercial and Local Authority surface car parks than in all 2,110 sectors, as were the commercial charges, except in the 8 hour tariff band; Ms Rosewell described the differences as not statistically significant. The absence of a statistically significant difference in the commercial charges showed, she concluded, that commercial operators did not always change their pricing whenever a Local Authority car park was present. She concluded overall that Mr Aaronson's work, omitting factors such as population density and levels of employment, did not reflect the actual extent of competition from Local Authorities in the national off-street car parking market.

144. She also told us that the PDRI data showed 3,385 postcode sectors containing one or more off-street car parks, of which approximately 2,248 postcode sectors contained one or more charged-for off-street car parks, but only 267 contained both Local Authority and commercial car parks; this was only 7.8% of all postcode sectors containing off-street car parks, whether or not charged-for; it was not possible, she said, to draw inferences about competition in the national market on the basis of such a low percentage; nor in her view could any effects of tax treatment upon competition in the country as a whole to be said to be significant on the basis of the data.

145. Mr Aaronson responded that the population density and employment figures used by Ms Rosewell related to the residents of a postcode sector. Contrary to what Ms Rosewell supposed, town and city centres – the prime locations for off-street car parks – would not, he said, be the areas with the highest population density. As regards percentages of residents in employment, he said that the various differences in percentages that Ms Rosewell had referred to were not statistically significant. We explain our reasons for preferring Mr Aaronson's evidence in paragraphs 224 to 246 below.

The parties' submissions on the effect of non-taxation

146. For the Local Authorities Mr Ghosh submitted that it was necessary to establish that non-taxation would cause a distortion of competition and that the burden of doing so fell upon HMRC. HMRC did not dispute that they bore the burden of proof and we have already recorded our agreement with the remainder of his submission. We have also recorded Mr Ghosh's submission to the effect that the enquiry is into the effect of non-taxation rather than of a change to non-taxation and our agreement with that. It is therefore sensible to begin by considering HMRC's factual case.

147. HMRC's case was that disapplication of VAT would significantly reduce Local Authorities' operating costs and give them much greater pricing flexibility, ability to invest in improving their car parks and ability to operate loss-making car parks for social reasons. It would also discourage forms of outsourcing of car parking that would entail a loss of non-taxable status.

148. HMRC pointed to the Local Authority policy objective of supporting the local economy, something that tended to constrain car parking charges, and to the sensitivity of car parking charges, coupled with the fact that they are set by elected councillors. Mr Vajda disputed the proposition that anything in the legal or regulatory régime prevented Local Authorities from "reducing prices, or re-investing savings from the disapplication [of VAT] into their car parks". He relied on Mr Aaronson's work as demonstrating that there was 'intense competition' and that Local Authority competition constrained commercial off-street car parking charges considerably. He drew our attention to passages in the oral evidence and the written materials in which Local Authorities referred to commercial car parks as competitors and/or had regard to local commercial car park pricing and to the evidence of Mrs Cooper and Mr Gallagher of the effect of Local Authority pricing on their own companies. The thrust of his submission was that non-taxation would enable Local Authorities to compete more assiduously on price or by improving the quality of their car parks.

149. In that connection HMRC noted the desirability of Local Authority off-street car parking being self-funding and the need to apply for a capital allocation from the capital budget to fund investment or improvement. They submitted that "in the event of complete disapplication, an obvious source of revenue savings/additional funding would be the 20% saved on VAT". They drew attention to the amount of the VAT saved as a result of non-taxation as a proportion of Local Authorities' off-street car parking expenditure: 40% in Birmingham, according to Mr Hughes's evidence, up to 50% in South Tyneside on Mr Reid's evidence and more than 100% in the Isle of Wight according to Mr Metcalfe.

150. HMRC submitted that the Local Authorities' evidence that VAT did not feature in their decision-making related to small recent variations in the rate in circumstances where liability for VAT was accepted as the norm. A permanent reduction in the rate of VAT from 20% to zero would amount to a significant proportion both of off-street car parking turnover and of the revenue generated net of expenditure. This step change in revenue could not but feature in decision-making,

giving Local Authorities much greater pricing flexibility either to reduce charges or to maintain them where they would otherwise have risen. HMRC instanced the proposed introduction of Sunday charging in Mid Suffolk, which had been intended to meet a shortfall in revenue; they suggested that, had VAT been disappplied, the unpopular proposal would not have needed to be made, the shortfall being filled by the VAT saving. Other local examples were given. HMRC pointed to instances where Local Authorities had taken note of, and/or responded to, the recent decrease and increase in the VAT rate, and submitted that it followed *a fortiori* that full disapplication of VAT would be considered in setting charges. We were invited to reject as implausible the evidence of Local Authority witnesses to the effect that it would not be. We were invited at the lowest to agree with Mrs Cooper's prediction that disapplication of VAT would at least lead to Local Authority charges not increasing in line with inflation.

151. In summary, HMRC submitted that, given the huge cost saving to which disapplication of VAT would give rise, the policy of promoting local businesses and the political pressure to reduce or not increase prices in circumstances where it was public knowledge that the cost of providing the service might have halved, there was a real possibility that at least some Local Authorities would reduce prices or not make increases that would otherwise have occurred.

152. Further, if the disapplication of VAT were not passed on in pricing, there was in HMRC's submission a real possibility that it would be used in whole or part for the purpose of investing in car parks. Many car parks were in need of refurbishment and Local Authorities' policy objectives could lead them to invest in car parks. Disapplication of VAT would give them greater resources with which to do so more quickly or to a higher specification. Local examples were given: for example, the suggestion in Cambridge that the cost of a proposed improvement programme was high and could be difficult to justify in the absence of enhanced contributions from users (discussed in paragraphs 92 and 93 above); disapplication of VAT would be likely to mean that more of the capital cost would be funded by the Council or that tariff increases would be lower than otherwise. It would also assist in the provision of further car parking spaces in Liverpool (referred to in paragraph 96 above). Reference was also made to capital expenditure required in Birmingham and the Isle of Wight. HMRC submitted that in a world where VAT was disappplied, Local Authorities would have more money to fund projects of this sort leading to more capital projects being undertaken than would otherwise be the case and/or less pressure to increase charges in order to pay for them.

153. More improvement of car parks would, HMRC submitted, in turn give Local Authorities a competitive advantage; HMRC cited the recognition in Birmingham that customers were prepared to pay higher charges for improved facilities (paragraph 134 above), as well as Mrs Cooper's evidence that an NCP car park in Brighton had suffered lower volumes of usage following the refurbishment of a nearby Local Authority car park.

154. In the area of outsourcing, HMRC cited various examples of existing arrangements as well as the joint venture that had been proposed in Birmingham ten

years ago, together with the evidence that non-taxation of Local Authority off-street car parking would have tilted the balance of financial advantage against the joint venture (we have set out this evidence in paragraphs 131 to 134 above); Mr Vajda also reminded us of the apparently tax-driven decision of Reading Borough Council to enter into an agency arrangement (paragraph 128 above).

155. As regards motorists' price-sensitivity, HMRC stressed the distinction between market elasticity and firm elasticity (discussed at paragraphs 225 to 229 below) and observed that Mr Foster and Ms Rosewell had sought to gauge market elasticity, which was not a reliable guide to whether lower Local Authority charges would affect motorists' choice of car park; it was a nonsequitur, they submitted, to say that because the ECJ had stipulated a nationwide test of distortion, only market elasticity could properly be measured. In support of the proposition that price does affect car parking choices, they relied on the CIHT *Parking Strategies and Management* Guidance, which said that "the demand for [parking] will be influenced by the prices charged. Tariff setting is therefore of crucial importance" as well as various statements in Local Authority and local transport authority documents and in the academic literature and studies surveyed by Mr Foster, the evidence of Mrs Cooper and the acceptance by some of the Local Authority witnesses and by Ms Rosewell in cross-examination that pricing affects demand. HMRC rejected Ms Rosewell's approach of calculating the VAT on car parking charges as a proportion of the total cost of an average car journey, suggesting that motorists would not approach their car parking decisions in that way.

156. As to the significance of the distortion of competition that would be produced by Local Authority non-taxation, HMRC rejected Ms Rosewell's approach of focussing on the small proportion of postcode sectors that contained both a Local Authority and a commercial off-street car park. They pointed out that the incompleteness of the PDRI data as regards commercial off-street car parks meant that Mr Aaronson would not have been able to identify all the relevant postcode sectors: 267 was almost certainly an underestimate; moreover, this approach did not capture the effect of non-taxation on potential competition. What mattered, HMRC submitted, was the proportion of the market, rather than the proportion of territory, in which competition was affected.

157. HMRC invited us to have regard to the extent to which Local Authorities provide charged-for off-street car parking – the matter that would be relevant under article 4(5)(3) – or alternatively the proportion of charged-for off-street car parks affected by competition, which on Ms Rosewell's figures was not insignificant at over 10%, or to apply the value threshold of €200,000 over three years, below which state aid is disregarded as *de minimis* pursuant to EU Regulation 1998/2006. The value of non-taxation to Birmingham and the Isle of Wight would on the evidence be millions of pounds over three years and in South Tyneside it would be some £225,000 to £300,000.

158. For the Local Authorities, Mr Ghosh submitted that non-taxation would not lead Local Authorities to reduce prices, alter their investment decisions as regards off-street car parking or alter their approach to outsourcing, joint ventures or partnership

agreements with the private sector. He referred to the legal framework within which Local Authorities operate, their objective of furthering a transport and/or parking strategy rather than making profits, their indifference to whether off-street car parking were provided by themselves or the private sector, with which they acted in co-operation, and the tiny portion of Local Authority activity represented by the provision of off-street car parking.

159. He submitted, first, that non-taxation could not have those effects because the legislative and policy régime under which Local Authorities operate demanded of them an attitude to pricing, investment and outsourcing that ignored the incidence or non-incidence of VAT. In this connection he referred to McCullough J's conclusions in the *Cran* case that we have cited at paragraph 55 above. Local Authorities could not, he submitted, lawfully set car parking charges with a view to generating a surplus in their general fund; and decisions, whether as to pricing, investment or outsourcing, were primarily driven by policy considerations; it was only after the decision in principle had been taken that the financial case would be considered.

160. As a separate matter, Mr Ghosh accepted, Local Authority charges needed to have a relationship to expenditure. But 'expenditure' here meant the Local Authority's financial outlay in providing a particular service – the money spent in acquiring particular goods or services, for example. The level of such expenditure was unaffected by whether the Local Authority's charges bore VAT; output VAT accounted for on the proceeds deriving from the Local Authority's supply was distinct from and not part of the expenditure incurred in providing car parking. If policy considerations required a Local Authority to charge, say, £100 for a particular service, the Local Authority would be required to charge £100 whether or not the charge bore VAT. Further, whilst charges might legitimately be set in some instances in order to deter certain forms of behaviour, the appropriate level of charge in those cases too would be related to its effect on the payer, which would generally be unaffected by whether the charge included VAT. Except in those instances, the level of a Local Authority's expenditure operated as a ceiling upon its charges. Moreover, he submitted, Local Authorities were obliged to ensure that competition was not adversely affected by their decisions about the exercise of charging powers; this meant that they must ensure that disapplication of VAT on off-street car parking charges non-taxation did not affect competition.

161. Mr Ghosh summarised HMRC's case on charging as being that non-taxation would lead to lower charges because it would mean that Local Authorities had more money, one of a Local Authority's objectives was to support the local economy, reducing car parking charges would have that effect and there would be political pressure on them to do so. He described this as betraying a misunderstanding of Local Authority decision-making. Off-street car parking charges, he repeated, went into the general fund and none of that fund was earmarked in any way; the consequence of non-taxation would simply be that the general fund was larger than it would otherwise have been. The general fund could be expended in any area of the Local Authority's discretionary services and what happened to the money in it would depend on complex decisions taken by the Local Authority, balancing competing priorities of which off-street car parking was not a high one.

162. Nor, Mr Ghosh submitted, did HMRC assist their case by referring to political pressure and public opinion. Local Authorities faced political pressure across all spheres of their activity and it could not be assumed that because there was more money in the general fund owing to non-taxation of off-street car parking, public pressure would lead to the money being used for car parking. He referred to the evidence of Mr Hughes and Mr Reid that Local Authorities had higher spending priorities than improving car parks or reducing car parking charges. Moreover, he pointed out, this part of HMRC's argument considered, inappropriately, the consequences of a change in VAT treatment of car parking rather than simply a world in which Local Authorities were not treated as taxable in respect of off-street car parking.

163. In addition, the Local Authorities stressed the wider framework of local government legislation, transport legislation and planning legislation and guidance within which they operate, planning controls being another means by which Local Authorities pursue policies on off-street parking. Governments had emphasised the role of parking pricing and management as a policy tool since the 1970s. The Local Authorities submitted that imposing a charge for off-street car parking could be an effective way of influencing motorists' decisions on where to park and whether to drive. Local Authorities could also influence behaviour by increasing or decreasing their off-street car parking provision. The Local Authorities submitted that they set their off-street car parking charges in order to promote wider policy objectives of this sort and not with a primary objective of raising revenue.

164. This was borne out, they submitted, by the provision of free parking for disabled motorists and passengers, free car parks and the instances that had been given of reduced price evening parking in the vicinity of theatres, for example. Free of charge car parks accounted for over one fifth of spaces and were provided for policy reasons such as relieving congestion in nearby streets or stimulating the use of park and ride schemes or railway transport. Charging decisions were not made with the goal of maximising revenue or increasing market share, both of which would be unlawful purposes, and VAT did not feature in such decisions. Emphasis was placed on the fact that the Local Authority witnesses' evidence to this effect had not been challenged in cross-examination. Pricing was set without any thought being given to VAT and would be the same whether or not Local Authorities had to account for VAT.

165. The Local Authorities invited us to reject Mr Aaronson's opinion that Local Authority car park charges would fall in the event of disapplication: Mr Aaronson had accepted that his opinion was based on his view of how commercial undertakings would react to a common cost saving and we were not in any event concerned with the consequences of a change in tax treatment.

166. HMRC's reliance on the proportion of off-street car parking running costs represented by the VAT that would be saved as a result of non-taxation was, they submitted, misconceived as it again ignored the fact that the money saved would merely augment the general fund; in suggesting to Local Authority witnesses that the high proportion of running costs that the money saved would represent made it more

likely that charge increases would not occur, HMRC fell once again, they observed, into the heresy of considering the consequences of a change in tax treatment. HMRC did so yet again, they submitted, in suggesting that the removal of VAT would have an impact on pricing and the making of promotional offers. That heresy infected the whole of HMRC's argument based upon a cost saving and consequent pressure of public opinion.

167. The Local Authorities also relied, though not as a sole reason, on the practical difficulties of implementing small price reductions: the need for payment by coin to be in round numbers; the cost of altering literature and signage; the need to go through the consultation process required for a new charges order and the need to revise on-street parking charges, to which off-street charges were related. Local Authorities had more pressing priorities.

168. The evidence, relied on by HMRC, that Local Authorities had regard to other car park operators' prices provided no illumination, they submitted, of the question whether there is a causal connection between disapplication of VAT and Local Authorities' pricing decisions.

169. The Local Authorities submitted that there were many higher priorities for the application of a Local Authority's general fund, into which any surpluses on off-street car parking would go, than reducing car parking charges or improving car parks. Any additional revenue attributable to non-taxation of off-street car parking would be applied by Local Authorities to meet those higher priorities. Mr Ghosh reminded us of Mr Hughes's evidence to the effect that, whilst in theory an increase in revenue due to non-taxation could be applied to reduce off-street car parking charges or invested in car parks, this was extremely unlikely: investment decisions were made in accordance with a Local Authority's priorities and off-street car parking was, as Mr Hughes had said, "a long way down the list". The Local Authorities submitted that there would in any event be a presumption against opening a new car park unless it was justified on policy grounds. The same was true of improvements to car parks.

170. Not only would increased revenue as a result of the disapplication of VAT simply augment the general fund and be spent in accordance with the Local Authority's priorities; the Local Authorities relied in this connection on Mr Haynes's evidence that, moreover, that the car parking base budget each year would continue to be based on the previous year's budget. It was wrong, they submitted, to think of the amount saved through disapplication as a fund that was continually available to be applied to car parking. It would be allocated to other priorities and become part of other departments' base budget for future years. HMRC's assertion that disapplication of VAT could have avoided the need for Sunday charging in Mid Suffolk, or the increases of charges to meet inflation or increased running costs of which there was evidence relating to some other areas, fell wide of the mark for this reason and also because it focussed, incorrectly, on a change in tax treatment. The Local Authorities repeated that non-taxation could not lead to reductions in charges or a failure to increase them. HMRC's reliance on a few instances of Local Authorities passing on the VAT saving in 2008 also inappropriately relied on a change in tax treatment, as did HMRC's reliance on evidence of Local Authorities reducing the cost

of parking to assist businesses in the current economic climate as showing that they would pass on the benefit of disapplication.

171. There was no reason to suppose, the Local Authorities insisted, that non-taxation would lead to more investment either in opening or in improving car parks. They accepted that, in the event of disapplication, greater resources would be available to Local Authorities. Nevertheless, the decision whether or not to open a new car park would be governed by policy considerations and by the Local Authority's priorities and not by the existence of those greater resources or the fact that the resulting revenue would not be taxable. HMRC's reliance on 'the additional income stream' to which disapplication would give rise overlooked the fact that how the general fund was spent depended on a Local Authority's overall priorities and policy objectives. Moreover, opening a car park for reasons of its revenue would be unlawful. Decisions on refurbishment would likewise be taken for policy reasons and in accordance with the Local Authority's spending priorities; if they occurred, they would have to be funded from the general fund. The fact that the car park revenue was not taxable would not give rise to any presumption in favour of directing the Local Authority's capital budget towards car park investment or improvements.

172. The suggestion that non-taxation would affect outsourcing decisions was, the Local Authorities submitted, speculation. Decisions on outsourcing were taken for policy reasons. Different Local Authorities had engaged in different forms of outsourcing; the Local Authorities here referred to the Birmingham, Liverpool, Manchester and Westminster evidence that we have summarised earlier. They said that VAT had not played any part in Birmingham City Council's decision not to proceed with the NCP joint venture. More generally, they submitted that decisions such as whether to upgrade car parks were taken on the basis of policy rather than financial considerations. It was only once the decision had been taken in principle that the financial case was considered. Though there may be cases in which the financial result of a project means that it is not appropriate to pursue it, that is not the way in which Local Authorities generally approach their budgeting: they do not budget on a project by project basis but, rather, look at their income and expenditure in the round. HMRC were wrong to characterise the Local Authorities' case here as being that "these decisions are taken without regard to financial considerations"; the position was simply that a Local Authority would only get to consider the financial aspects of an outsourcing arrangement in the event that outsourcing promoted its policy objectives. HMRC's analysis of the effect of non-taxation on the appraisal of the proposed Birmingham joint venture in 2002 therefore missed the point. The Local Authorities defended Mr Metcalfe and Mr Reid's refusal to consider the effect of disapplication on the basis of all other things being equal, on the grounds that in Local Authority decision-making all other things were most unlikely to be equal.

173. Finally they submitted that, even if outsourcing were structured as an arrangement that made the commercial operator the Local Authority's agent in supplying parking, in order to retain the benefit of non-taxation, it could not be assumed that the arrangement would be less profitable for the commercial operator; that would be a matter of commercial negotiation. HMRC had not discharged the burden of proof.

174. In the alternative, the Local Authorities submitted that even if, contrary to their primary case, disapplication of VAT would lead to lower prices, the VAT element of off-street car parking charges was too small to affect consumer behaviour. In that connection the Local Authorities relied on Ms Rosewell's calculation that the VAT element of the car parking charge amounted to less than 1% of the cost of an average car journey. Car parking choices were influenced, they submitted, by the factors referred to by Mr Foster (which we summarise in paragraph 226 below); reference was also made to a Home Office Study in which the factors affecting car parking choices were identified as, along with cost, closeness to the destination, safety, ease of access and of parking and previous knowledge of the car park. The level of price reduction to which disapplication of VAT could give rise would, they submitted, be too small to outweigh those other factors. There was, moreover, limited substitutability between car parks. While price might make a difference if two car parks were equally convenient, in the real world that situation was highly unlikely to arise.

175. Reliance was placed on the academic studies surveyed by Mr Foster in support of the proposition that car parking was relatively price-inelastic. The Local Authorities pointed out that no one had attempted to calculate any form of aggregate measure of 'firm elasticity' and submitted that, in those circumstances, the 'market elasticity' values derived from the literature were useful data from which an economist such as Ms Rosewell could appropriately draw inferences (we explain these concepts below). The price-inelasticity of car parking charges was, they said, further demonstrated by the disparity between lower prevailing Local Authority charges and higher prevailing commercial charges found by Mr Foster. Mr Aaronson's work, examining the position in postcode sectors, suffered from the defect of departing from the nationwide approach mandated by the ECJ and in any event still showed commercial charges to be higher than Local Authority charges, even where both types of operator shared a postcode sector. Ms Rosewell's calculations had demonstrated, moreover, that commercial operators did not invariably charge less when co-located with a Local Authority car park. The PDRI data were sufficiently comprehensive to give validity to Ms Rosewell's work. The Local Authorities also relied on the results of a 1996 Birmingham car parking study referred to at paragraph 232 below, which, they observed, HMRC's submissions had ignored.

176. In relying on Ms Rosewell's calculation which indicated that the VAT element of the car parking charge was less than 1% of the cost of an average car journey, they did not suggest that the ordinary motorist would make that calculation, but submitted that it was further evidence that a price difference amounting to the VAT element of a car parking charge would not play more than a small part in motorists' decisions about parking.

177. Finally, they submitted, any distortion of competition would not be significant, being limited, according to Ms Rosewell's work, to postcode sectors accounting for less than 8% of those containing car parks. Direct competition between Local Authorities and commercial operators was limited to a small number of areas of the country as a whole. They rejected HMRC's approach of considering the proportion of commercial car parks affected; Ms Rosewell's approach provided the best guide to the

impact of disapplication nationally, in accordance with the ECJ's stipulation of a national test. They also rejected HMRC's invocation of the state aid *de minimis* limit, for which there was no basis in law.

Local Authorities' approach to providing off-street car parking

178. The Local Authorities have conceded that there is actual and potential competition between Local Authorities that provide off-street car parking and commercial operators. That is an entirely realistic concession and we would have found that to be the case in any event. For HMRC, Mr Vajda drew attention to what he portrayed as a tension between that concession and assertions by Local Authority witnesses that their Local Authorities did not compete with the commercial sector. In our view the witnesses and the concession were using the expression 'to compete' in different senses. We take the concession to acknowledge that Local Authorities and commercial operators provide car parks that are, in some cases, substitutes for the consumer. The witnesses were stressing that their Local Authorities did not seek to maximise Local Authority profits or volumes at the expense of the commercial operators.

179. We fully accept that Local Authorities do not approach their off-street car parking activities in the same way as commercial providers. A commercial undertaking is usually actuated by the motive of maximising its profit and, generally, expanding its business. Local Authorities provide off-street car parking as part of the governance of their locality. Mr Hughes of Birmingham City Council put the matter succinctly, in evidence that we accept, as follows:

LAs do not operate like private companies. They cannot choose (in most instances) what services they will provide, but are required by national government to provide certain services. They are not driven by profit, but by the desire to provide the best possible services they can and to produce particular outcomes for their local areas. They are therefore completely different from commercial entities, which decide which services they will provide and whose decisions are motivated by profit.

Each LA will produce policies tailored to achieve the economic, social and environmental well-being of their area and these will be set out in its Sustainable Community Plan.

180. Mr Hughes went on to explain that a local traffic authority (or in metropolitan areas an integrated transport authority) will produce a Local Transport Plan setting out transport policies aimed at improving the economic, social and environmental well-being of their area. From such an authority's point of view, providing off-street car parking is one part of an overall traffic strategy and the purpose of providing it is to further strategic objectives, particularly the economic well-being of the area. He described the receipt of parking charges as an 'ancillary consequence'. While adding that it would be wrong to say that they were not something that Local Authorities

thought about at all, he sought to put them in context by contrasting Birmingham's £8.2 million of parking charges in 2009-2010 with the Council's total budget of £3,600 million.

181. Mr Hughes described supporting the local economy as a 'key use' of off-street car parking, which supports city centre employment by its availability to workers who can only access the city by car and stimulating trade by enabling customers to shop by car. Car parking could also help sustain the vitality of smaller local centres in rural areas, for example protecting small shops from being forced out of business by out-of-town supermarkets. Birmingham City Council provided free off-street car parking in Balsall Heath and Sparkbrook, with resulting economic benefits. Mr Haynes, also of Birmingham City Council, referred to Councils' objectives of encouraging economic success and encouraging rural economies. The decision to charge for parking in Birmingham city centre, Mr Hughes and Mr Haynes maintained, reflected a strategy of actively encouraging motorists to use other modes of transport, particularly as regards the higher charges in the car parks closest to the centre and the rates for stays of over 4 hours.

182. Decisions on charging would, Mr Hughes said, be based on consistency with the City Council's policy goals. Where charging did not damage a car park's contribution to achieving traffic policy goals, a charge would be made with a view to contributing towards a balanced overall budget. He accepted that one reason why off-street car parking charges might be increased was to generate additional revenue. Local Authorities have a statutory obligation to maintain balanced budgets, with the consequence that "those in charge of the Transportation portfolio might face a choice between raising prices or making cuts to the department and the service it provides".

183. To similar effect, Mr Reid of South Tyneside told us that complex policy considerations were involved in determining the appropriate balance between the two sources of funding represented by charges on the one hand and taxation on the other. He said that, given the overriding objective of a Local Authority of improving the environment of the local area and the quality of the lives of the people living there, decisions as to pricing were complex and often focused on encouraging (or, where appropriate, discouraging) the use of the services provided by the Local Authority.

184. We accept that Local Authorities' decisions on provision of car parks, permitted parking periods and charging are influenced by national and local policies, and that reducing commuting by car and discouraging motorists who do commute by car from using town or city centre car parks are among them. The policy in Birmingham has been to reduce the availability of, particularly, long stay car parking in the city centre, while increasing off-street car parking provision in suburban centres such as Acocks Green, Erdington and King's Heath. The reason for this is to support the economic vitality of those centres and to reduce traffic congestion by reducing the incentive for shoppers to travel into the city centre. Likewise, city centre parking tariffs are commonly higher for all day parking than in car parks further out.

185. Mr Hughes produced a report to the City Council Cabinet in late 2010 on the alteration of car parking charges, including an overall increase in line with inflation

and the introduction of discounted charges in the inner zone of the city for twelve months. The report said that the proposals were consistent with City Council policy and strategies in that income from annual increases and been taken into account in formulating the car park refurbishment strategy and the proposals were in line with the policies of encouraging short stay parking during off-peak traffic periods and the City Council Plan to succeed economically. Risk management issues had been considered; it was not believed that the increases would cause resistance to parking in the Council's car parks.

186. We infer from this that Local Authorities are indeed concerned about the levels of income from off-street car parking, as Mr Hughes accepted. We accept that they do not seek to maximise revenue – the report goes on to say that the option of maximising revenue had been rejected as “contrary to the policy of encouraging short-stay business, shopper and visitor parking and the Council's responsibilities with regard to traffic management” – but, as the example of the refurbishment strategy shows, they plan on the basis of levels of revenue from, among other things, off-street car parking charges and, like the authors of Liverpool City Centre Movement Strategy, are concerned that measures can be funded and implemented. We believe that many, like Brighton and Hove District Council, intentionally aim for a surplus and that Poole Borough Council and the Corporate Director of Mid Suffolk District Council are not alone in regarding off-street car parking charges as an important income stream. Manchester City Council is the only example we have seen of the use of a pricing optimisation tool; it and Westminster's former system of yield management pricing are probably more sophisticated systems than would be found outside major cities, but we have an example of a smaller Local Authority such as Poole planning to rebalance charges as between more and less heavily used car parks.

187. We consider that Local Authorities have become more sensitive to the financial performance of off-street car parking in the recent difficult years – both West Berkshire and Mid Suffolk appear to be reviewing off-street car parking charges more regularly now than formerly – but pressure on Local Authority finances has, we recall, been a feature of life since the coming into office of the Conservative government in 1979.

188. In considering Liverpool's approach of competing effectively with the private sector, we bear in mind that the City Council is very much a minority provider of off-street car parking in the city, unlike the position across the country on average. We consider the typical position to be that the Local Authority is the price leader, as is the case in Mr Haynes's experience in Birmingham, where the City Council provides a substantial share but not the majority of off-street car parking.

189. In cross-examination Mr Hughes accepted that Birmingham City Council wished to provide its car parks in an efficient and customer-friendly way and to keep the costs down, which were points of similarity with commercial operators. He agreed that Local Authorities took account of the costs of operating car parks but said they did not simply set prices to cover operating costs. Mr Hughes also agreed that local councillors, who are elected, are concerned about public opinion; he described car parking charges as an emotive issue for businesses and local residents, envisaging

retailers saying “please provide us with free or cheap car parking, because otherwise we will be put out of business by Tesco’s down the road”.

190. Mr Haynes reviewed the published parking strategies of 16 Local Authorities; twelve of them have a policy of supporting the local economy in their car parking provision; twelve have policies of encouraging the use of public transport and ‘park and ride’ parking; five have a policy of reducing long duration parking, while Edinburgh has a policy of increasing it off-street but reducing it on-street. Some of these policies are not relevant to Local Authorities that are not local traffic authorities, but a policy of supporting the local economy is. Mr Foster also reviewed a sample of local transport plans and district parking policies, representing one quarter of the higher tier authorities (which we understand will also be local traffic authorities) and 10% of lower tier authorities (which are responsible for off-street car parking but are not local traffic authorities). Management of demand was frequently mentioned by both types of authority; the efficiency of the road network was almost universally mentioned in local transport plans as well as in two thirds of local parking policies. Promoting economic vitality was referred to in just over half the local transport plans and in all the local parking policies. We take that policy to be one typically followed by Local Authorities generally. Given the importance generally attached to off-street car parking as a means of promoting local economic vitality, we consider that this policy, and the concomitant need to set charges at a level that does not deter usage will at all times have exerted downwards pressure on pricing, even if the intensity of the pressure has varied.

191. As far as investment decisions are concerned, Mr Hughes told us that any new car park had to be compatible with planning policy and that Local Authorities did not regard car parks as a particularly good use of their land. A Local Authority could secure the provision of car parking through planning conditions or development agreements under section 106 of the Town and Country Planning Act 1990; there were several examples of this in Birmingham, including the rebuilt Bull Ring, where planning controls and a development agreement had been used to require the developer to make a 3,000 space car park available to the general public at charges consistent with overall parking policies. His conclusion, echoed by Mr Haynes, was that Local Authorities would not develop car parks as a means of raising revenue, whether or not VAT applied.

192. We agree, but that is in our view not quite the issue, which is whether non-taxation would lead to different decisions about the opening of or investment in Local Authority off-street car parks. In oral evidence Mr Hughes was not prepared to say that it could never happen that a reduction in VAT might create the opportunity to invest in a car park where providing the car park was a high priority. We agree that non-taxation could in theory make the difference between the viability and non-viability of opening a car park whose creation was in line with traffic policy, but we consider that the number of borderline cases in which taxation or non-taxation of the charges is critical to affordability will be small.

193. Mr Haynes told us, and we accept, that a common way of setting annual budgets for particular Local Authority activities is to take the previous year’s budget

as the base budget – commonly subject, nowadays, to a reduction. Mr Reid of South Tyneside echoed much of what Mr Hughes and Mr Haynes said. He added that departments within a Local Authority would be expected to keep to their budgets, which might mean reducing other expenditure within the budget if an unexpected item of expenditure arose.

194. Mr Metcalfe of the Isle of Wight Council explained that, in setting its annual budget, the Council predicted its income from all sources and its costs; if capital needed to be spent on car parking, as occurred when safety improvements were made in 2010, it would be a matter of seeking an allocation from the Council’s capital budget. Any unforeseen need for substantial expenditure on, say, car parking would first be sought to be met from savings within the allocated budget; if that could not be done, the highways and transportation directorate would need to apply to the Council for a further budget allocation. Mr Metcalfe was adamant that, in considering that, the Council would consider its budget in the round; there would be no presumption in favour of meeting the expenditure through increased car parking charges. We accept his evidence.

195. The evidence of Mr Reid of South Tyneside was to the same effect. He stressed the importance of a Local Authority setting a balanced budget. He agreed that the level of revenue was a factor in decision-making as to how a service would be provided.

196. The Local Authority witnesses tended, understandably, to focus on the respects in which providing off-street car parking forms part of overall traffic management and of the Authorities’ governance of their local areas, whilst the commercial sector witnesses tended, equally understandably, to impute to the Local Authorities the same sort of commercial motives that actuate them. We find that the true position lies somewhere in between. Local Authorities do not act commercially in the sense of seeking to maximise revenue, but they have to run a balanced budget overall and in order to do so they have to set detailed budgets for the different aspects of their operations and, so far as possible, to keep to those budgets both by constraining costs and achieving budgeted revenues.

197. The private sector witnesses described Local Authorities as having become increasingly commercial, accusing them of ‘aggressive’ competition and referring to ‘price wars’. Given the evidence that usage of off-street car parking has decreased since the economic recession began, it is unsurprising if Local Authorities already facing reductions in their funding have also seen their off-street car parking revenues fall, with adverse repercussions on their budgets, and have reduced charges as a way of increasing usage and consequently revenue as well as promoting the economic vitality of their areas. We have seen no evidence of fully fledged ‘price wars’ involving repeated price reductions. In our judgment article 4(5)(2) asks us to consider the effect that non-taxation would have in general terms rather than by reference to (it is to be hoped) temporary phenomena such as adverse fluctuations in the economic cycle. For reasons that we shall explain, we have concluded that non-taxation would tend to produce lower levels of Local Authority off-street car parking charging irrespective of the surrounding economic conditions.

198. The private sector witnesses referred to what Mrs Cooper described as ‘aggressive’ competition by Local Authorities for the supply of blocks of season tickets to local employers; one can well imagine that, in the current climate, winning or losing such business can make a difference to the financial health of a Local Authority car parking operation, albeit that season ticket holders probably account for a relatively small proportion of users (there was evidence that this was so in Birmingham). Mr Ghosh countered this evidence with the observation that non-taxation would put Local Authorities in a worse position vis à vis business purchasers of blocks of season tickets, since the price would no longer contain a VAT element that the purchaser could reclaim as input tax. That observation presupposes that the charge remains the same. It is well arguable that a change to non-taxation would lead to pressure on Local Authorities from business customers to reduce the charge by the amount of the former VAT element

199. But we are not considering the effect of a change in tax treatment; moreover, the impression that we have received from the evidence of Mr Gallagher, the evidence of the Local Authority witnesses as to policies of discouraging commuting by car and Ms Rosewell’s population density calculations is that the commercial sector is involved to a greater extent than Local Authorities in providing commuter parking, generally situated away from town and city centres. The evidence about season tickets has not influenced us one way or the other in answering the question posed by article 4(5)(2).

200. Another area of evidence that we should indicate has not influenced our decision one way or the other is evidence about Local Authorities’ response (or relative lack of response) to recent changes in the rate of VAT. As far as the reduction in December 2008 is concerned, we find that Local Authorities did not generally alter their tariffs in response but that some passed on at least some of the benefit to motorists by offering extra periods of free parking; Mr Haynes countered Mr Gallagher’s evidence of two Local Authorities which did give some free parking by telling us that it was only given on a few days as a gesture to support trade. Mr Gallagher referred to a ‘furore’ generated by this limited response. This has not encouraged us to hold (as we do, for reasons explained below) that charges would be lower in circumstances of non-taxation, both because article 4(5)(2) does not ask us to consider the effect of a change in tax treatment and because of the particular circumstances of the VAT reduction. We recall that it was effected with a view to stimulating the national economy and that the Government had announced its expectation that traders would pass on the benefit. We can see that, while it may have been impractical to reduce the tariffs, some Local Authorities may have felt that they ought to show an example.

201. We think it probable that most Local Authorities did not increase their charges when the VAT rate rose to 20% in January 2011; we have seen examples of them consciously deciding not to, for reasons of supporting the local economy. The Local Authorities countered the evidence that one Local Authority had increased its tariffs by pointing out that the increase had taken account of inflation also, and that the inflation increase was greater than the VAT increase. They also observed, correctly, that that was a response to a change in VAT, which was not what we had to consider.

We find it unsurprising if some Local Authorities absorbed the extra VAT cost and others passed it on. That would simply reflect different balances struck between balancing budgets and other priorities such as sustaining economic vitality. This pattern of response to particular economic conditions has not (we record without implying any criticism) assisted our conclusion on how Local Authorities would behave in a situation of non-taxation.

202. The Local Authorities additionally drew our attention to their provision of parking guidance and management sign systems which direct motorists to car parks in which there are vacant spaces, stressing that these identified Local Authority and commercial car parks equally. There was some dispute, which we do not find it necessary to determine, over whether particular Local Authorities had refused to include NCP in such systems and whether NCP had declined to be included.

Our conclusion on the effect of non-taxation on competition

203. Our conclusion is that non-taxation of Local Authorities would distort competition in the off-street car parking market in the areas, principally, of pricing and outsourcing. We do not consider that it would directly affect, to a more than negligible extent, Local Authorities' decisions on opening new car parks, but we find that Local Authority charges would find a lower level in circumstances of non-taxation than of taxation. This would in turn affect the pattern of provision of off-street car parking in two respects. First, fewer commercial car parks would open or remain open. Secondly, and in consequence, more Local Authority car parks would open or remain open in pursuance of the Local Authorities' duty to seek to ensure adequate off-street car parking pursuant to section 122 of the 1984 Act. In addition, decisions on forms of 'outsourcing' would tend to be distorted in favour of forms that left the Local Authority as the provider of off-street car parking, with the commercial sector providing at most the management.

Effect of non-taxation on Local Authority pricing

204. We begin by considering the effect of non-taxation on Local Authority pricing. We start from the proposition that, in circumstances of non-taxation, each £1 of car parking revenue would contribute (currently) just under 17 pence more to Local Authority funds than in circumstances of taxation. Historically, the additional contribution would have been slightly less than 7½ pence whilst there was an 8% rate of VAT from 1978 until June 1979, approximately 13 pence from then until March 1991 while there was a 15% rate and then approximately 15 pence until the end of 2010 while there was a 17.5% rate apart from in the period comprising December 2008 and the year 2009 when the rate temporarily reverted to 15%.

205. Secondly, we conclude that whatever level of surplus or loss each Local Authority has made and is making on its off-street car parking is the result of all the various factors, the main ones of which we have attempted to summarise above, that affect Local Authority off-street car parking pricing. Comparing the propositions

(a) that in circumstances where the charges were not taxable but all other things were equal, off-street car parking would have generated a contribution to or drain upon Local Authority resources similar to that which it has in fact generated and (b) that in those circumstances off-street car parking would have generated a contribution or drain that was higher or lower than it has historically been by an amount equal to the VAT fraction, we think it reasonable to regard proposition (a) as the more probable. It is implicit in proposition (a) that Local Authority charges would have been correspondingly lower and/or expenditure on off-street car parking higher. Of those two possibilities, we find it is principally the case that the charges would have been lower.

206. We do not suggest that the difference in levels of charging would in every case have corresponded exactly to the amount of VAT not chargeable. It would be eccentric, and where payment is by coin impractical, to set charges otherwise than in multiples of 5 or 10 pence. But we consider that the overall mix of charges would have been lower by approximately that aggregate amount.

207. We find support for that general conclusion in a consideration of the matter in more detail. We find that there is a combination of upward and downward pressures on Local Authority off-street car park charging. The upward pressures are the desire to discourage certain forms of motoring and parking behaviour through pricing and the consideration that off-street car parking should make a contribution to the costs of traffic management or at least break even, so that non-motorists do not subsidise motoring. The downwards pressures are the wish of Local Authorities to contribute to the economic vitality of their areas through charging that does not deter, for example, shoppers and the recognised unpopularity of car parking charges, coupled with the fact that ultimate responsibility for their setting rests with locally elected Councillors.

208. We consider first the downwards pressures. We have already stated, in paragraph 190 above, our finding that promoting the local economy is a policy typical of Local Authorities generally; Mr Hughes described it as a 'key use' of off-street parking, and much of the information we have reviewed on the position in particular areas supports this view.

209. The Local Authority witnesses understandably stressed those aspects of traffic management policy that seek to reduce private motoring or, at any rate, some forms of it such as commuting. But promoting the economic vitality of areas through car park charging involves encouraging motoring (*cf* the Birmingham report quoted at paragraph 186 above), or at all events not discouraging it. In that connection we have noted the acknowledgement in PPG 13 that the motor car had an important part to play in travel and in rural areas would remain the only real option – something that we find to be still true today – as well as the reference in the new National Framework to “appropriate parking charges that do not undermine the vitality of town centres”. Mr Haynes aptly referred in his witness statement to the importance in Birmingham’s case of balancing the need to reduce certain trips with the need to support the economic vitality of the city centre and other local centres where access by car for visitors remains important. Some of the information we have recorded about other

areas of the country shows that the need to strike this balance arises in Local Authority areas generally.

210. We consider that the wish to promote the economic vitality of areas and the unpopularity of car parking charges exert downwards pressure in particular on charges for car parking aimed at shoppers. Shopping by car and visiting towns to receive services are less in official disfavour than commuting by car and there are likely to have been more shoppers than commuters needing public off-street car parking. Mr Haynes reported that, when last measured in 2001, the number of staff car parking spaces in central Birmingham, some 40,000, amounted to twice the public off-street car parking capacity in the city, and it was local retailers rather than employers whom Mr Hughes envisaged as clamouring for reductions.

211. We nevertheless consider that these factors exert some downwards pressure on commuter car parking charges as well. Despite the policy of discouraging commuting by car, Local Authorities do provide commuter car parking, and they do so for the same reasons of promoting economic vitality. Planning policy has accepted that the car is the only travel option in some cases; local businesses cannot function as effectively if staff who can only travel to them by car are unable to park at reasonable rates.

212. The Audit Commission's report *Positively Charged*, to which we have already referred, asserts (with reference to charging generally) that "Councils believe that local public opinion is a major obstacle to making more use of charging" and quote an unidentified councillor as saying "Where people are used to having things for free, like local car parking, there'd be a lot of objection" (paragraph 55). The general thrust of this part of the report is that Local Authorities under-estimate the public's preparedness to accept charging; it refers to an Ipsos MORI survey which indicated that most people who had paid a charge for council services agreed that they had received value for money; the Commission add that "this was true for all services except car parking, but even there opinion was evenly divided, with as many agreeing they had received value for money as disagreeing" (paragraph 58). The greater (albeit not universal) resentment of car parking charges resonates in our ears with Mrs Cooper's description of car parking as a 'grudge purchase'.

213. The report also quotes the Chief Finance Officer of an unidentified Local Authority as complaining of his council not having what he calls "realistic parking charges", adding that "as members see it, they'd all be voted out" (page 33). We accept the Audit Commission's view – which derives some support from that of Mr Hughes (see paragraph 189 above), as well as resonating with the expressions of opinion of Parish Councils in Mid Suffolk – that councillors' perception of the unpopularity of charges has been an obstacle to the introduction or raising of charges. Whilst charges may be an even more sensitive issue in the current economic circumstances, we do not consider this perception to be a new phenomenon.

214. We have concluded that, in circumstances of non-taxation, the interplay of the downwards and upwards pressures on charges would have caused charges to find a level lower than their level in circumstances of taxation by a margin approaching the

VAT fraction. In short, this is because the force of the downwards pressures would not be weakened by non-taxation, whereas that of the upwards pressures would be.

215. Comparing the two forms of pressure, we find first that the downwards pressures tend to affect the absolute level of car parking charges; public resentment and possible damage to economic vitality are related to what it costs motorists to park. By contrast, the upwards pressure deriving from the desire to discourage certain types of motoring or parking tends much more to affect the relative levels of charging in one car park compared to another. The examples that we have been given – such as the zonal charging structure in Birmingham, with higher long stay charges in the city centre – are very largely concerned with the effect upon behaviour of relative levels of car park charging. To the extent that the desire to steer motorists away from one car park towards another is an upward pressure on pricing, it is self-evidently the relative pricing that matters. Upwards pressures on relative pricing would not operate as a force counteracting the downwards effect of non-taxation upon absolute pricing.

216. We accept that, to the extent that the desire to discourage motorists from motoring is an upwards pressure on car park pricing, what matters there is the relative pricing of car parking in relation to other modes of transport; and since the cost of those would be unaffected by non-taxation of car parking, non-taxation would not affect that particular upwards pressure. We find that there is a greater policy imperative to reduce commuting by car than shopping by car. Mr Haynes told us, and we accept, that the policy of reducing commuting by car dates back to the 1970s. It may therefore be that in the mix of charges that would have been reached in circumstances of non-taxation, short term parking charges would have been lower than they have historically been by a slightly greater margin than commuter parking charges but, even if so, we consider that that upwards pressure on commuter parking charges would have been produced in cities such as Birmingham that have a highly developed public transport infrastructure to a much greater extent than in country towns like Banbury, Newbury or Stowmarket, where commuting to work from the surrounding villages by public transport is probably not a realistic option. As we have already indicated, we do not suggest that each rate of car park charge in each car park would have been uniformly lower in circumstances of non-taxation, but we consider that the overall mix of prices would have been at a level lower than it has historically been by a margin approaching or approximately equal to the VAT fraction, for the reasons summarised in paragraphs 205 and 214 above.

217. The other upwards pressure represented by the imperative to break even, to constrain any level of subsidy or to make a particular level of contribution to traffic management costs would likewise not in our judgment counteract the downwards effect of non-taxation upon pricing, because non-taxation would enable the same contribution to be made (or the same level of drain not exceeded) at lower charging levels.

218. In reaching these conclusions we have not overlooked the Local Authorities' argument that the effect of non-taxation (at any rate, at the moment of its introduction) would be to augment the Local Authorities' general funds and that the additional funds would be spent not on off-street car parking but on areas of Local

Authority activity with higher priority, with off-street car parking's base budget being unchanged. We accept that different areas of Local Authority activity may have different degrees of importance in the eyes of councillors or their council tax payers – the welfare of children in care or the library service will probably be regarded by many as having a social or cultural value or importance greater than the value or importance of providing off-street car parking – though this is very much a matter of value judgment. But even if so, that does not mean that off-street car parking does not have value or importance; indeed, the evidence of the Local Authority witnesses was that it does.

219. The relative value and importance of off-street car parking and the Local Authorities' other activities will be reflected in financial terms, in each Local Authority's case, in off-street car parking making a particular level of contribution to or drain upon Local Authority finances, as we have pointed out in paragraph 205 above. There is no reason to suppose that non-taxation of off-street car parking would alter a Local Authority's perception of the relative importance or value or priority of any of its activities. It is therefore reasonable to suppose that that perception would continue to be reflected in the same level of contribution or drain generated by off-street car parking. In circumstances of non-taxation, that would tend to occur at levels of parking charge that were lower by the amount of the VAT fraction. In short, non-taxation would reduce the need to introduce, for budgetary reasons, an unpopular increase, possibly damaging to the local economy, in car parking tariffs.

220. We have mentioned that there was some debate about Local Authorities' likely reaction to a favourable decision of the Tribunal. HMRC suggested to various Local Authority witnesses that Local Authorities would come under pressure to cut parking charges in response. The Local Authority witnesses disagreed, citing the impracticality of reducing individual charges by 16.6%, the fact that car parking revenue goes into the general fund, its insignificance as a proportion of that fund and the many priorities of Local Authorities – for example, its welfare activities such as children's' homes – that are higher than cutting car park charges.

221. In oral evidence Mrs Cooper of NCP gave the realistic view that the Local Authorities would not generally respond to such a decision by cutting the charges, but would tend not to increase them in line with inflation, producing a reduction in real terms over time. The Local Authorities pointed out that in her witness statement she had professed herself unable to comment on whether Local Authorities would pass on the saving, and that she had no experience of Local Authority decision-making. Nevertheless, whilst reminding ourselves that this not the question we have to answer, we have independently come to agree with her prediction. We have also said already that we cannot at this remove decide whether or not Local Authorities would have responded by reducing their charges if non-taxation had been introduced in 1978. Even if they would not have done (which, we speculate, is more likely), we consider that non-taxation would at least have led to the charges falling in real terms over time, in the way Mrs Cooper envisaged, so as to restore the level of contribution to or drain upon Local Authority finances that has historically existed in circumstances of taxation of off-street car parking.

222. We do not accept Mr Ghosh's submission, recorded at paragraphs 158 to 160 above, to the effect that the legislative framework would prevent this happening. He accepted that Local Authorities could have regard to the relationship between their charges and their expenditure; we find his suggestion that they could only look, in that connection, at the costs of providing a service and not at whether charges bore VAT to be artificial. Even accepting, for the sake of argument, that VAT is not a cost of providing charged-for off-street car parking, Local Authorities must in our judgment be permitted, when having regard to the relationship between expenditure and charges, to notice whether the level of revenue from charges is or is not reduced by the need to account for output VAT on the charges. If they are to be blind to this, one might ask rhetorically, are they to proceed as though all their charges are subject to VAT or that none are? They could not sensibly attempt to balance their books if they did not look at the actual position.

223. Accordingly, if VAT had been removed from Local Authority off-street car parking charges in 1978 there would have been no rule of law that prevented Local Authorities from noticing this or from reacting to it, whether consciously or unconsciously, in the way that we find that they would have done.

The effect of car parking charges on consumer behaviour

224. We are entirely satisfied that off-street car park pricing has an effect on motorists' parking choices, a view in which we are fortified by the uncontroversial fact that Local Authorities use charging structures with a view to influencing those choices.

225. There was discussion among the expert witnesses of the concept in economics of 'price-elasticity of demand'. This gauges the likely change in demand for a product or service resulting from a change in its price and is measured by dividing the percentage fall or rise in demand by the percentage increase or decrease in price. If a 1% increase or decrease in price generates a 1% fall or rise in demand, the elasticity value is 1; if that increase or decrease generates a less than 1% fall or rise in demand, the elasticity value is a fraction of 1; for example a 0.5% fall or rise in response to a 1% increase or decrease would correspond to an elasticity value of 0.5. Where the value is greater than 1 the market is said to be price-elastic; where it is less than 1, the market is said to be price-inelastic, though this does not mean that it has no elasticity at all. There is also a distinction between 'market' elasticity of demand and 'firm' elasticity of demand. The former measures the elasticity of demand for a product or service in response to a change in its price, while the latter measures the elasticity of demand for the product or service of a particular supplier (or 'firm', as economists sometimes call an enterprise) in response to a change in its own price or that of a competitor.

226. Mr Foster gave his opinion, based on academic and other literature and his experience of working on car park projects, that motorists' choices of car parking were influenced by a combination of individual attitude (such as dislike, particularly on the part of female motorists, of multi-storey car parks on personal safety grounds), habit and familiarity, convenience, quality (he cited the Cambridge study indicating

that users would pay a 10% premium in order to benefit from safety and quality improvements) and the nature of the journey (for business travellers in particular, punctuality was important and cost relatively unimportant).

227. Mr Foster also surveyed academic literature gauging the price-elasticity of demand for car parking and, using the elasticity values given there for different categories of car parking as regards duration and the purpose of the trip, calculated that the changes in demand that would follow from the passing on in full of the benefit of non-taxation (a 16.6% price decrease) would amount to a 1.8% increase in demand for short-term parking and a 2.67% increase in demand for long-term parking; from this he concluded that even the passing on of the full benefit of non-taxation would not significantly affect competition. Ms Rosewell endorsed this work and also made a calculation showing that the VAT element of the typical charge for one hour's parking (20 pence) amounted to only 0.89% of the cost of an average car journey (£22.45).

228. The price-elasticity values used in Mr Foster's work measure market elasticity – the extent to which price changes across the board deter or encourage the use of car parking facilities. We agree with Mr Aaronson that they are not a measure of the extent to which motorists might change their choice of car park in response to a change in its or a nearby car park's pricing. Self-evidently, motorists will be more ready to move to a different car park in response to a price increase at one car park or a reduction at another than to abandon the car journey in response to a general increase in car parking charges. The correct measure to use would be a form of firm price-elasticity for Local Authorities as a group. Nobody has attempted the calculation, which would be extremely difficult to perform given that, as both Mr Foster and Mrs Cooper said and is self-evident, the effect on behaviour of changes in the relative pricing of car parks will depend on a number of factors, principally proximity.

229. Mr Ghosh defended Mr Foster's exercise on the basis that the ECJ judgment enjoins us not to look at local markets; calculating an aggregate firm price-elasticity could only be done by aggregating the results of a series of local investigations carried out in defiance of the Court's instructions. Given that nobody has attempted the calculation, we do not need to decide whether the ECJ judgment would preclude us from looking at it; we interpret the judgment as precluding the reaching of a series of local answers to the question raised by article 4(5)(2), but not the using of pieces of local information to draw up an overall national picture. Even if we were wrong on that, it would not make Mr Foster's calculations any more illuminating. We find that the relative unpreparedness of motorists to increase or reduce their car parking in response to price changes gives some support to the view that they would also be less ready to alter their choice of car park; but it does not persuade us that they would not do so to a significant extent.

230. As we mentioned in paragraph 120, Mrs Cooper gave various instances of volumes of demand rising or falling in response to tariff decreases or increases at NCP sites. She also produced a graph prepared within NCP for this case, which plotted 80 examples of changes in demand following tariff changes, and five 'case

studies'. Of the 80 instances plotted on the graph there were three in which a reduction in the weighted average tariff was associated with a fall in demand and a further three in which it was associated with a rise in demand. Tariff increases were associated with an increase in demand in 13 cases and with a reduction in demand in 61 cases. The case studies gave slightly more detail, including graphs plotting the tariff levels and usage levels over a six month period surrounding the price change and the distance to the nearest competitor's site, all of which were said to be Local Authority sites.

231. All of this evidence generated a debate about where the lost or gained volume had in truth gone to or come from; maps and aerial photographs were produced and estimates of distance between car parks were disputed. The 'case study' information concerning Edinburgh enabled Mr Ghosh to point out that usage there had increased almost immediately after the tariff increase, which coincided with the Edinburgh Festival (which is the likely explanation of the increase in demand despite the tariff increase). That example, along with the 16 out of 80 instances in which the outcomes plotted on Mrs Cooper's graph are the opposite of what one would expect, demonstrate the potential for factors other than pricing to be in play. Mrs Cooper also accepted in cross-examination that there are no Local Authority off-street car parks in Edinburgh; the 'competitor site' that had been used was the local on-street parking. The Local Authorities insisted that the graph was methodologically flawed: ten of the 80 points plotted on it were in Edinburgh.

232. We have referred in paragraphs 131 to 134 above to KPMG's appraisal in July 2002 of a proposed joint venture between Birmingham City Council and NCP. One feature of the proposal was that car parking charges would be increased, in the case of the formerly Council-run car parks quite significantly: in about a dozen Council car parks the financial model assumed a percentage tariff increase that was in double figures in each of the first four years. In the NCP car parks annual increases of between 5% and 9% were envisaged. KPMG made assumptions about price-elasticity of demand derived from a study carried out for the City Council in 1995 and 1996 which had reportedly found that "if prices at city centre car parks were increased significantly, there would be a resulting loss of trade. The study found that where tariffs are increased by between 20% and 30%, there is approximately a 5% loss of trade, and that where prices are increased by more than 30% the loss of trade is approximately 10%. Where tariffs are increased by less than 20%, there was only minimal loss of trade".

233. We do not know for certain whether the study related specifically to Birmingham (though we find it probable that it did). It is not stated whether the study envisaged a price increase by all operators or by the City Council only, but we consider that it must have referred to a price increase by all operators. The proposed joint venture between the City Council and NCP would have had something close to a monopoly of off-street car parking in the city centre. When KPMG evaluated the hypothetical joint venture with another commercial car park operator – leaving NCP in place as a competitor – they assumed the same price increases as planned for the NCP joint venture but, in the case of four car parks, used elasticity values higher than those found in the 1996 study: they assumed that a 20-30% price increase would

reduce demand by 10% in three cases and 15% in the fourth; an increase exceeding 30% was assumed to reduce demand by 15% in the first three cases and 20% in the fourth.

234. We do not know how these figures were arrived at or the basis upon which the four car parks were chosen, but we assume that the assumptions were agreed between the Council and KPMG, as is stated to have been the case with some other assumptions used.

235. The risk register (referred to in paragraph 133 above) itemised one of the risks of the NCP joint venture as “Tariff increases too high, volume of activity falls”; the probability was said to be medium and the effect to be “reduce income to JVC [joint venture company]”; the impact was rated as low. The register indicated that this risk was to be managed through the parties’ expertise and knowledge of the Birmingham off-street car parking market, together with the fact that elasticity of demand was built in to the KPMG appraisal model. All of this indicates to us an (unsurprising) recognition that excessive pricing could lead to a fall in revenue.

236. We do not find the figures derived from the 1996 study to be of great assistance as we consider that they measure market elasticity. There is no evidence that the higher figures used for four car parks in the assessment of the hypothetical joint venture with another operator were based on any field work; we suspect that they represented the Council’s estimate based on general experience. We do not find it necessary to attempt to gauge their accuracy, nor to resolve the disputes about geography generated by Mrs Cooper’s evidence or to form a view on the representativeness of the 80 examples in her graph or the extent to which the results might be contaminated by other factors – matters on which we have no information other than Mr Aaronson’s agreement with Mr Foster that Mrs Cooper’s data are “not statistically robust”. Nor can we sensibly attempt to arrive at a figure measuring cross-price elasticity between Local Authority and commercial off-street car parking. We accept that motorists’ choice of car park will be affected by the various factors adverted to by Mr Foster, and that prominent among them are local factors, particularly proximity to the destination.

237. The broad trend of Mrs Cooper’s graph is, nevertheless, consistent with demand responding to relative price changes, a phenomenon that one would expect as a matter of common sense and whose existence is supported by the differences in commercial car park pricing, depending on whether the car park has a Local Authority car park in the same postcode sector, that have been found by Mr Aaronson and are set out in paragraphs 138 to 140 above.

238. In our judgment, Mr Aaronson’s data are very strong evidence that the presence of a Local Authority car park in the vicinity of a commercial car park operates as a constraining factor upon the commercial operator’s pricing. Ms Rosewell’s contrary conclusions have not dissuaded us from this conclusion. Her thesis was that lower commercial charges are associated with less ‘prime’ locations, demonstrated by lower population densities and lower percentages of residents in employment. Ms Rosewell thus asserts that prime locations have higher population

densities, while Mr Aaronson has asserted in response that prime town and city centre locations do not have the highest population densities. Neither expert adduced evidence to support their assertion; on this, however, we agree with Mr Aaronson, whose view accords with our general knowledge. We also agree with Mr Aaronson that the differences in percentages of residents in employment cited by Ms Rosewell are not statistically significant – they are indeed slight – and do not support the thesis that higher car park charges are statistically associated with higher levels of employment among local residents.

239. Unlike Mr Aaronson's, Ms Rosewell's work on the data for 'surface' car parks showed, as she pointed out, no statistically significant difference in commercial charges depending on whether the commercial car parks shared a postcode sector with a Local Authority surface car park. She concluded from this that commercial operators did not always operate lower charges when co-located with a Local Authority car park. We find Mr Aaronson's results to be the more compelling. We can see no reason why co-location with a Local Authority car park should be associated with lower commercial charges (as both experts found) in the case of 'structure' car parks and yet fail to be so associated in the case of surface car parks. We also agree with Mr Aaronson that neighbouring structure and surface car parks compete with each other and that an analysis that, like Ms Rosewell's, ignores postcode sectors containing both types of car park is incomplete. Mr Aaronson's analysis does not suffer from this defect.

240. We are therefore driven to reject the suggestion that the commercial charges are explained by the factors put forward by Ms Rosewell. We can see no explanation of the association demonstrated by Mr Aaronson between co-location with a Local Authority car park and lower commercial charges (supported by Ms Rosewell's own calculations regarding structure car parks) other than the effect of Local Authority competition. Both NCP, the largest commercial operator and Britannia, another very large one, have regard to Local Authority charges in setting their own tariffs, and we find that other commercial operators will do likewise.

241. We have borne in mind the note of caution sounded by Mr Aaronson himself as well as by Mrs Cooper that the data relate to tariff rates and not realised prices after discounts. We also bear in mind that coexistence within a postcode sector is not a perfect guide to whether car parks are substitutes for one another, but we do not consider it to be a wholly unreliable guide; if anything, it probably under-states the degree of constraining effect in towns with more than one postcode sector – of which Banbury, a substantial town but not one of the largest, has seven.

242. Mrs Cooper suggested that PDRI pricing data would be out of date; we agree that that is likely to be so. We gained the impression that PDRI data are updated annually, and we accept that NCP tariffs change more frequently than that. We nevertheless consider the data to be robust enough to enable us to rely on the results of Mr Aaronson's calculations. The 870 commercial car parks analysed by Mr Aaronson represent, by our estimate, 20% or so of all commercial off-street car parks and are thus a very adequate sample. The differences in pricing are considerable: the presence of a Local Authority car park in the same postcode sector is associated with

commercial tariff rates markedly lower than elsewhere – approaching 30% lower for the 1 and 2 hour tariffs and 35% for the 8 hour tariff. It would be fanciful to believe that these discrepancies are systematically cancelled out by a higher level of discounting at commercial car parks that do not have a Local Authority car park in the same postcode sector.

243. The only rational explanation of those price differences is that demand would shift from the commercial to the Local Authority car park if the lower prices were not maintained. We are forced to conclude from those figures that there is sufficient cross-price elasticity of demand in the United Kingdom as a whole for Local Authority car park pricing to affect commercial operators' pricing.

244. Moreover, much of the evidence of the Local Authority witnesses supports the view that relative pricing affects the motorist's choice of car park. They themselves testify that prices are set with a view to influencing motorists' behaviour, both as regards choice of car park or between on-street and off-street car parking and, where charges are set with a view to maintaining the vitality of a shopping area, as regards the making or at least the destination of the car journey. Mr Haynes told us that parking management can affect how and when people travel by car and other modes of transport; this is mainly done by limiting the permitted length of stay in city centre car parks in order to prevent their use by commuters, but also through the charging régime. In that connection he said that "imposing a charge on the use of car parks can be an effective way of influencing commuters' and shoppers' decisions on where to park or on whether they drive or use other modes of transport". Mr Haynes described the lower charges in the city's intermediate zone as being to encourage motorists to use the car parks there and then walk rather than driving into the city centre. He also agreed that in Birmingham the City Council's off-street car parking charges offered some constraint upon commercial charges.

245. We do not believe that Local Authorities would adopt policies of this sort unless they believed, correctly, that charging structures do influence behaviour, at least to some extent: the Audit Commission's report *Positively Charged* (2008) quotes an unidentified Authority service manager as saying "Primarily, we see parking charges as a very important control in the overall transport system. It's one of the key levers we can pull to influence behaviour. Our principal interest in it is as a transport tool rather than as an income-generating device", and Mr Hughes agreed with the first of the paragraphs from the report on parking in South Tyneside that we have quoted in paragraph 87 above ("a big influence on the way people travel"); by contrast, Birmingham's Parking Policy refers to a 'limited' ability to influence off-street car parking use through price, as did the journal article concerning Cambridge ("a step change in pricing was required"). We do not need to decide which is the correct adjective; we are satisfied that the ability exists and is used.

246. Mr Ghosh did not dispute that Local Authorities use the price of parking as a means of managing demand. But it did not follow, he submitted, that price was 'elastic' in the sense used by economists; he relied in this connection on Birmingham City Council's 1996 parking study which, we have concluded, measured market elasticity. In any event we cannot agree with Mr Ghosh's proposition; even if the

elasticity value is less than 1, there must be some elasticity: if motorists did not respond to relative price differences, and to some extent to absolute price levels, the pricing of parking would be incapable of managing demand.

The effect of Local Authority non-taxation on commercial off-street car park pricing

247. We find that the lower levels of charging that would be reached in circumstances of non-taxation would lead to correspondingly lower commercial off-street car parking charges where the commercial car park faced Local Authority competition.

248. We have found that commercial off-street car parking charges are higher than, but constrained by, nearby Local Authority off-street car parking charges. The amount of premium that the commercial car park can command depends on relative location, standard of upkeep and other local factors, but it is once again in each case a question of relative pricing. The relationship that has existed between commercial and Local Authority car parking charges reflects the commercial operators' perception of the relationship required to sustain usage of commercial car parks facing Local Authority competition.

249. If Local Authority charges reached a lower level than they have done in circumstances of taxation but everything else remained equal, we find it reasonable to suppose that the commercial charges would maintain much the same relationship to Local Authority charges. The consequence would be that commercial charges in many locations – probably including most of the postcode sectors that have a Local Authority car park in the same postcode sector as well as other sectors with nearby Local Authority car parks across a sector border – would tend to be lower to an extent commensurate with the extent to which Local Authority charges would be lower.

250. We are not dissuaded from this conclusion by the Local Authorities' argument that the reduction of their charges by an amount corresponding at most to the amount of the VAT fraction would be too insignificant to affect motorists' behaviour. We are not concerned here with the effect of a price differential between car parks that is not greater than the VAT fraction, but rather with the effect of a potential *widening*, albeit limited to the amount of the VAT fraction, of the differentials that have existed in circumstances of Local Authority taxation. We are looking at a national picture made up of a variety of localities in which car parks will have different degrees of substitutability, no doubt reflected in different degrees of premium commanded by the commercial sector; those will in turn reflect, as we have said, each commercial operator's perception of the price relationship required, in each set of local circumstances, to sustain the usage of its car park in the face of Local Authority competition. We see no reason to suppose that the fact of non-taxation of Local Authority car parks would of itself alter that perception on the part of commercial operators; that being so, we would expect that the same average monetary relationship would have existed between Local Authority and commercial tariffs, but with both sets of tariffs at an overall level lower than has historically been seen.

The effect of non-taxation upon Local Authority investment

251. We consider that the primary outcome in circumstances of non-taxation would be lower Local Authority off-street car parking charges rather than higher levels of investment in opening or improving car parks. We accept that it would be unlawful for a Local Authority to open a car park for the sake of its contribution to revenue, so that potential greater profitability would not of itself lead directly to more Local Authority car parks. We also consider that the number of cases in which non-taxation would be critical to the affordability of a needed new car park would be small.

252. Nor do we consider that non-taxation would of itself lead (or have led) to significantly greater Local Authority expenditure on improving car parks. While car park quality can affect demand – one of the reasons why commercial car parks can charge a premium – we accept that Local Authorities have opened car parks in order to provide their areas with the facility of parking rather than either to enhance the quality of the experience or to capture business from commercial car parks. The circumstances of under-usage that have made Local Authorities more sensitive to quality as well as more sensitive to the relationship between pricing and usage are a comparatively recent phenomenon.

253. We accept the evidence of the Local Authority witnesses that capital expenditure on car parks would be decided upon on the basis of policy considerations and priorities as regards Local Authorities' capital expenditure generally, rather than by reference to the levels of revenue generated by off-street car parks. We also accept their evidence to the effect that decisions on capital expenditure are taken with regard to the capital budget generally, rather than by reference to the relationship between expenditure and revenue in any particular department of activity.

254. We find, however, that non-taxation would lead indirectly to a different pattern of off-street car parking provision. Obviously, different commercial off-street car parks have different levels of profitability. Mrs Cooper told us that NCP have some car parks that are loss-making because NCP are 'locked in' to levels of rental that the off-street car parking market can no longer sustain. The lower level of Local Authority car parking charges resulting from non-taxation would be likely to produce a spectrum of different consequences for different commercial car parks affected by Local Authority pricing. Some would continue to operate at lower profit levels, at any rate while their leases ran. The level of rent that could be commanded on renewal would be lower. It is likely that some, particularly open air, car park sites that have remained in use over the period since 1978 would have been turned to another use and that some commercial car parks that have in fact opened over the period would not have done.

255. The volume of off-street car parking provision might as a result have been lower than it has historically been, and this altered balance of supply and demand might have to some extent redressed the downwards pressure on commercial car park pricing. But, given Local Authorities' statutory duty to seek to provide adequate car parking, the consequence would have been to generate more Local Authority off-street car parking, tending to cancel out the alteration in the balance of supply and

demand. In any event, whether Local Authority non-taxation led to lower profits for commercial operators, lower volumes of commercial provision, higher volumes of Local Authority provision or a combination of these, the effect would in each case amount to a distortion of competition.

The effect of non-taxation upon outsourcing

256. Another respect in which we find that non-taxation would distort competition is in the area that we have labelled ‘outsourcing’. A situation in which off-street car parking was not taxable when provided by Local Authorities but was taxable when provided by private operators would self-evidently affect the economics of different models of outsourcing. We have recorded in paragraph 127 above our agreement with Mr Hughes’s realistic statement that outsourcing would be structured so as to maximise the benefit to the Local Authority. As the example of Birmingham’s proposed joint venture shows (see paragraphs 131 to 134 above), the effect of VAT being chargeable where car parking was provided by a commercial provider but not where provided by a Local Authority can be to alter the balance of financial advantage between arrangements where the making of the supply of parking to the motorist switches from the Local Authority to a commercial provider, or to a joint venture company owned by a commercial provider in conjunction with a Local Authority, and arrangements under which the supply continues to be made by the Local Authority.

257. We therefore agree with Mr Gallagher that non-taxation would lead to fewer opportunities for commercial providers to take over Local Authority car parks outright or to enter into fully fledged joint ventures of the sort set up in Manchester (described in paragraph 128 above).

258. We do not accept Mr Ghosh’s argument that this would not happen because the policy decision would be taken before the financial aspects were considered. The argument seems to us to be mixing up two different things, namely the decision to produce a result and the decision upon how to produce it. We quite accept that in Birmingham ten years ago a policy decision was taken to refurbish certain car parks before a decision was taken on how to finance the refurbishment: the KPMG reports were designed to inform that second decision, which obviously only arose once the decision to refurbish had been taken in principle. But this part of the debate is concerned with the effect of non-taxation upon that second decision; the 2002 KPMG report and Cabinet paper demonstrate that the recommendation would have been different in a situation of non-taxation. The fact that the project fell though because NCP’s terms became less favourable is irrelevant to the value of the example.

259. Mr Ghosh submitted that the concept of distortion of competition in article 4(5)(2) referred to competition between those who were in the market, rather than being concerned with who was in the market. HMRC, by contrast, submitted that what economists call ‘competition for the market’ was as much competition as ‘competition in the market’, and just as much the concern of article 4(5)(2). As to that, we know from paragraphs 62 to 64 of the ECJ’s judgment in this case that article 4(5)(2) is engaged if non-taxation distorts potential competition by discouraging entry

into the market where there is otherwise a real possibility of it occurring. It seems to us to follow that, if non-taxation dissuades Local Authorities from engaging, where they would otherwise have done so, in forms of outsourcing that involve the commercial sector or a joint venture company taking over the provision of off-street car parking, article 4(5)(2) is likewise engaged. We note Mr Ghosh's argument that the alternative arrangement would not necessarily be less attractive financially to the commercial operator; we incline to the view that, even if that were so, an alteration, produced by the tax régime, in the identity of the maker of a supply would in itself be a distortion of competition. We do not need to reach a concluded view on this, given our conclusion (below) that the effects of non-taxation upon pricing would in themselves amount to a more than negligible distortion of competition.

More than negligible distortion

260. We consider that the degree of distortion of competition produced by non-taxation would be more than negligible. In reaching that conclusion we have had regard to the scale of charged-for Local Authority off-street car parking (the matter that would be relevant under article 4(5)(3) and seems to us one of the relevant matters under article 4(5)(2) as well), to the scale of commercial off-street car parking, to the number of cases in which non-taxation of the one would affect the other and to the extent of the fiscal advantage involved.

261. Local Authorities plainly engage in charged-for off-street car parking on a substantial scale, however approximate our estimate in paragraph 74 above of a two thirds market share must necessarily be. An approximately one third market share on the part of commercial off-street car parks also indicates, in our judgment, commercial provision on a substantial scale. Our best estimate of the proportion of commercial off-street car parks affected by Local Authority competition is the 36% calculated by Mr Aaronson (see paragraph 137 above). We suspect that his data omit a number of cases of actual competition across postcode sector borders, but cannot quantify the effect so we prefer to adhere to his figure. Deciding whether a distortion of competition is negligible is not a purely numerical matter, but we do not consider that a distortion of competition detrimentally affecting something like 36% of commercial car parks could be dismissed as negligible.

262. That figure of 36% is of course, a measurement of the market as it stands today. As we have said, the market might have evolved differently in a situation of historic non-taxation. We nevertheless find the figure useful as a general measure of the proportion of the commercial car parks currently in existence in circumstances of equal taxation that either would face distorted price competition or would not exist in circumstances of Local Authority non-taxation.

263. We have considered whether the distortion of competition could be dismissed as negligible on grounds of the degree of price reduction that non-taxation of Local Authorities car parks would force upon the affected car parks. We are satisfied that it could not be. We certainly do not consider that it could be at any time since VAT rose to 15% in June 1979; since then the overall percentage reduction in question would have approached something between approximately 13% and 17%. Before

then it would have been up to about 7.5% but, bearing in mind the ECJ's repetition in this context of the principle that article 4(5)(2) cannot be construed narrowly, we do not consider that a force depressing pricing overall by a factor approaching 7.5% could be dismissed as negligible.

264. As we have already indicated, we do not suggest either that Local Authority charges or that commercial charges would all be uniformly lower by the amount of the VAT fraction in circumstances of Local Authority non-taxation. Different Local Authorities would respond differently to non-taxation, different forms of parking might be affected differently and commercial operators would be affected differently depending on local factors affecting cross-elasticity of demand. We have already explained why we consider that the overall mix of Local Authority charges would on average be lower, in circumstances of non-taxation, by an amount tending to approximate to the VAT fraction. If the downwards effect of non-taxation were produced to a greater extent in short stay than in long stay parking tariffs, the overall downwards effect on commercial tariffs might be slightly less if a greater proportion of commercially provided than of Local Authority-provided off-street car parking is long stay, but we do not have the information to form a view. We are satisfied by the evidence of Mrs Cooper that short stay parking is very important for NCP, the largest commercial operator.

265. We do not in our view need to decide separately whether the additional degree of distortion to which we have found that non-taxation would lead in the areas of 'outsourcing' and indirectly in the pattern of provision of off-street car parking would be significant in itself. We have concluded that competition would be significantly distorted in the area of pricing, for the reasons we have just stated, even if the additional distortion in these other areas did not exist. Its existence confirms us in the view that non-taxation would significantly distort competition.

266. We should add, for completeness, that we were unpersuaded by Ms Rosewell's approach of gauging significance by examining the proportion of territory in which distortion of competition occurs. As Mr Vajda suggested to Ms Rosewell, if 90% of an industry were located in London, and conditions in London distorted competition in it, one would not say that the distortion was insignificant because London accounts for a small proportion of national territory. We agree with Mr Aaronson that, with 36% of commercial car parks having a Local Authority car park in the same postcode sector, the price-constraining effect that he has observed is a more than negligible competitive pressure.

267. On the other hand, we also reject HMRC's suggested approach of applying the *de minimis* value threshold of €200,000 over three years in Regulation 1998/2006. The ECJ's judgment requires us to produce one answer to the question posed by article 4(5)(2), valid for the United Kingdom as a whole. The approach of applying that threshold to the degree of financial benefit would risk producing different answers for different Local Authorities and for different periods: it will be seen from paragraph 157 above that South Tyneside was not far above the threshold in the period cited and other smaller Local Authorities (particularly non-Metropolitan District Councils) may very well fall below it temporarily or permanently. The only

way of avoiding that result would be to base our decision on the average benefit to Local Authorities, but we do not have the information necessary to perform the calculation; moreover we detect in the ECJ's judgment no suggestion that we should be performing it.

268. 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.

**SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE**

RELEASE DATE: 12 October 2012