[2020] UKFTT 0030 (TC)

TC07536

Appeal number: TC/2009/13710

VALUE ADDED TAX – payment handling charges – nature of supply or supplies – separate entities in VAT group – whether transactions concerning payments – financial transactions – exemption – Article 135(1)(d) Principal VAT Directive – scope of exemption - whether debt collection - Everything Everywhere, Bookit, NEC, DPAS considered – abuse of rights

FIRST-TIER TRIBUNAL
TAX CHAMBER

VIRGIN MEDIA LIMITED **Appellants**
and
VIRGIN MEDIA PAYMENTS LIMITED

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: MICHAEL BELL

Sitting in public at Bedford Square, London on 25-26 November 2013 and 22-30 September 2014.

Further Evidence and Submissions in the period to 25 October 2019

Roderick Cordara QC and Andrew Legg of Counsel, instructed by Pricewaterhouse Cooper Legal LLP, for the Appellants

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

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DECISION

INTRODUCTION

1. Cable TV, Broadband and telephone services (the "media services") have been provided to residential customers in the UK by the first appellant ("VML") under the Virgin Media brand ("Virgin Media") since 8 February 2007. The customers make payment for the media services to the second appellant ("VMPL") which is a wholly-owned subsidiary of VML. The bill to the customers who do not pay by Direct Debit includes a monthly payment handling charge of £5.

2. The appeal concerns the proper VAT analysis of that payment handling charge. The facts, arguments and law are complex. At the heart of the appeal is the issue as to whether or not the creation and interposition of VMPL as a separate entity, although within the VAT group for which VML is the representative member, means that the consequences of the decision in *Everything Everywhere Limited*[1] ("EE") can be averted.

The procedural background to the hearings

3. The first hearing in November 2013 was adjourned on the second day of the five day hearing on the appellants' motion with only the submissions for the appellants having been heard. At that hearing the only subject matter was what we define below as "the first appeal" since by agreed Directions dated 12 November 2013, the appellants' application to consolidate their two extant appeals, the respondents' (the "Commissioners") application to amend their Statement of Case and their application for Disclosure had all been adjourned.

4. The first hearing was reluctantly adjourned. It was a difficult balancing exercise. We do not accept the suggestion in the appellants' second Skeleton Argument that the adjournment was predicated on an unanticipated expansion of the Commissioners' case. The evidence for the appellants at the first hearing exhibited draft documentation, with no explanation, dated after the dates with which we were then concerned and there was little or no evidence on a number of matters which the Tribunal deemed of interest such as the facts prior to the periods with which we are directly concerned.

5. The adjournment was opposed by the Commissioners, on good grounds, even although that would have meant that their own abuse arguments would not necessarily have been admitted, since the decision on that had been adjourned until the conclusion of the first hearing.

6. The Tribunal issued detailed Directions on 21 January 2014 *inter alia* consolidating the then known two appeals under the reference of the earlier appeal, namely TC/2009/13710. The intention was that all outstanding appeals would be consolidated and that then transpired, of consent. In the interests of clarity, we note that on 30 April 2009, the appellants had made a Voluntary Disclosure in the sum of £1,205,566 for the period 1 January 2009 to 31 March 2009, which was denied by the

[1] Case C-276/09

Commissioners on 25 January 2010, and was then the subject of an unopposed application, dated 17 February 2010, for that decision also to be included in this appeal. It is.

7. Those Directions were subsequently amended on a number of occasions and ultimately by the time of the opening of the adjourned hearing the parties appeared satisfied that there had been compliance. It suffices to say that the parties' pleadings had been significantly amended, further witness statements had been introduced with supporting exhibits, and yet further authorities had been lodged in process.

8. We heard oral evidence from four witnesses of fact for the appellants. Those witnesses were Messrs Mullins, Marshall, Clark and Simper, all employees of VML. At the time of giving his first witness statement, Mr Mullins was described as Head of Strategy, Development and Delivery within the Billing and Collections Services team at VMPL, albeit only part of his work related to VMPL. He was also responsible for change in the Business Division. He ultimately furnished four witness statements. Mr Marshall was Head of the Virgin Media Treasury Function. Mr Clark joined Virgin Media in 2010 as "Sarbanes-Oxley" Senior Finance Manager based within Virgin Media Accounting Services and was later described as Head of Financial Accounting for VML. Mr Simper has been Virgin Media Head of Procurement for Marketing, HFC and Warehousing & Logistics since January 2014.

9. In the *Dramatis Personae* produced for the Tribunal the roles of all four men were described as being within VML. In the words of Mr Mullins "… we do work for all of the corporate entities within the structure." and for the reasons we set out below, we find as fact that those were roles for Virgin Media and indeed other group companies and not VML or VMPL *per se.*

10. As had been the case from the outset, the Commissioners tendered one witness of fact, namely Officer Tetlow and his witness statement described, and annexed on behalf of the Commissioners, by way of background to the present dispute, the correspondence and notes of meetings held by the parties. His evidence was not challenged and therefore he gave no oral evidence.

Details of the two original appeals

The first appeal

11. The parties stated that that appeal relates to the decision letter dated 24 March 2009 ("the Decision Letter"), the (variously described) Notice or Notification of Assessments dated 24 March 2009 and the reconsideration decision of 7 August 2009 confirming the earlier decision. The assessments were raised under Section 73 Value Added Tax Act 1994 ("VATA") in the net sum of £11,607,966. Those related to the periods 03/07 to 12/08 (not to 03/09 as stated in the appellants' Skeleton Argument).

12. In fact, the Notification of Assessments was dated 25 March 2009 and the Notice of Assessment(s) was calculated on 26 March 2009 and date stamped 1 April 2009.

13. The Decision Letter extends to 10 pages with two annexes and includes three decisions which are set out at length. In their Statement of Case, dated 1 July 2011, the Commissioners summarised those decisions as follows:-

(a) *The Preferred Decision*

> "That output tax is due on the whole of the consideration paid by a customer of VML for a supply of telecommunication services, which consideration includes the non-direct debit charge received by VMPL. The Respondents are of the view that nothing at all is supplied in addition to the telecommunication services and the consideration for these supplies includes the amounts shown separately on customer bills under the heading 'Payment Handling Charge'."

(b) *The First Alternative Decision*

> "If the preferred decision is found to be incorrect, and the additional payment handling charge is consideration for the supply of a separate service, then, in reliance on the judgment on the (then) European Court of Justice in **Card Protection Plan v CCE (Case-349/96)** ('CPP'), this service was to be properly treated as part of a single supply, being integral to the taxable supply of telecommunication services."

(c) *The Second Alternative Decision*

> "If both the preferred and first alternative decisions are found to be incorrect, and it is found that the additional payment handling charge represents consideration for an additional and separate supply, then that service is taxable and not exempt as within Group 5 of Schedule 9 to VATA 1994."

The Notice of Appeal

14. The Notice of Appeal was dated 2 September 2009. At Box 3 it states that the decisions appealed are dated "24 & 25 March, 1 April and 7 August 2009" and that the amount of tax is £15 million. In fact there is no decision dated 1 April 2009; simply an assessment.

15. The Grounds for Appeal at Boxes 6 and 7 read:

> "6. The disputed decision is contained in a letter dated 24 March 2009, notification of assessment dated 25 March 2009 and assessment dated 1 April 2009 and is confirmed, after reconsideration by the Commissioners, in a letter dated 7 August 2009.
>
> The decision appealed against concerns the liability of charges for payment handling services supplied by Virgin Media Payments Ltd, a member of the group VAT registration, whose representative member is Virgin Media Ltd.
>
> The Commissioners contend either that there is no separate supply of payment handling services, or in the alternative, that if there is a separate supply, it should be treated as part of a single, taxable supply, or in the further alternative, that if there is a separate and additional supply, it does not fall within the provisions of group 5 to schedule 9 of the VAT Act 1994 and is therefore taxable at the standard rate.
>
> 7. The Appellant considers that there is a separate supply of payment handling services by Virgin Media Payments Ltd and that this supply falls within group 5 to schedule 9 of the VAT Act 1994 and is therefore exempt from VAT, following the decision of the Court of Appeal in *Bookit. (CA [2006] STC 1367)*

> The matter in dispute concerns issues of law similar to those in the cases of *T Mobile (VTD 20521)* referred to the ECJ and to be joined with *AXA UK plc* (C-175/09). The Appellant therefore applies for this appeal to be stood over, pending decisions in these two cases."

Subsequent procedure

16. On 13 October 2009, the Tribunal directed that the appeal be stayed until 60 days after the later of the release of the decision in the cases of *T-Mobile (UK) Limited* (later *EE*) and *Axa UK plc ("Axa"*[2]*).*

17. On 4 November 2009, the Commissioners issued a letter notifying further grounds for the second alternative decision in the Decision Letter arguing that because they consist principally in the collection of monies the charges for the payment handling services are not exempt. The Commissioners' position was that *Tiérce Ladbrokes SA and another v Belgium*[3] ("Tiérce") might be relevant in determining the liability of the payment handling charge.

18. On 3 May 2011, the stay on the proceedings having expired on 3 April 2011, the Tribunal directed that the appellants send or deliver a written statement detailing how their appeal is distinct from the decisions of the ECJ in *EE* and *Axa*.

19. On 29 July 2011, that statement ("the Statement") was lodged. We annex at Appendix 1 a copy of paragraphs 5 to 8 thereof inclusive. In summary, the key differentiating point identified in the Statement was that in *EE* the supply of telecoms services and the supply of payment handling services were made by the same legal entity, whereas in this appeal the media services are supplied by VML but, unlike in *EE*, the payment handling services are supplied by a separate legal entity, namely VMPL.

20. It is appropriate to observe here that the Commissioners Skeleton Argument, for the first hearing, at paragraph 19 stated:

> "It will be common ground between the parties that the so-called 'payment handling charge' levied on non-DD customers by the legacy companies (ntl, Telewest etc), and subject to a June 2005 decision by the Commissioners, and appeal, fell squarely within the decision of the ECJ in Everything Everywhere."

The footnote to that paragraph intimated that the legacy companies' appeals had been adjourned and stood behind *EE* and the outcome of the reference to the Court of Justice of the European Union ("CJEU").

21. When adjusting the draft Findings in Fact in 2019 (see paragraph 36 below) the appellants argued for the first time that there had been no such concession. However, we observe that on Day 2 of the first hearing, when referring to the appellants' approach to the hearing as being "…on the basis of the decisions and the enquiries made over the years", Mr Cordara stated: "I of course accept that if the supplies had simply been made by VM, Everything

[2] Case C-175/09

[3] Joined Cases C-231/07 and C-232/07

Everywhere concludes the matter against us." That is consistent with the stance taken in the Statement. Furthermore, that was indeed the position with the legacy companies and we find that that is the case. Lastly, in that context, on Day 5 of the second hearing Mr Pleming produced evidence that the legacy companies' appeals had been indeed been withdrawn.

The second appeal

22. The appellants made a Voluntary Disclosure ("the 2013 Disclosure") on 28 June 2013 which was stated to be "a single disclosure covering all periods to date" for a net amount of overpaid VAT in the sum of £18,880,300 for the periods 1 April 2009 to 31 March 2013 inclusive. The quantum was based on estimated figures which have not been agreed. It was a protective disclosure and actual repayment was not sought. The Commissioners issued a decision letter ("the Decision") dated 24 July 2013 which is the subject matter of the second appeal wherein it was stated that the reasoning for the Decision was precisely the same as in the Decision Letter.

The Notice of Appeal

23. The Notice of Appeal, which was extensive, was dated 20 August 2013 and related only to the 2013 Disclosure and the Decision and was brought pursuant to Sections 83(1)(b) and (t) of VATA.

24. The Grounds for Appeal amplified but did not alter the Grounds for Appeal notified in the first appeal. In summary, it was argued that:

(a) *The Preferred Decision*

The Commissioners have failed to establish, as they must, a direct link between the payment handling charge and the services received by the customers. The media services received by the customer are the same irrespective of whether or not the payment handling charge is paid. It has not been established that the payment handling charge represents consideration for the media services.

(b) *The First Alternative Decision*

The Commissioners have erred in their application of *CPP* by concluding that the payment handling services are ancillary to the media services. The processing of the non-Direct Debit payments requires VMPL to provide additional resources and incur additional costs, so those customers who pay by non-Direct Debit receive additional payment handling services beyond that provided to other customers. The provision of the payment handling services is an aim in itself. Further, supplies made by two separate suppliers cannot be treated as a single supply (*Telewest Communications plc and another v Customs and Excise Commissioners*[4] ("Telewest")).

(c) *The Second Alternative Decision*

[4] 2005 STC 481

The Commissioners have erred in concluding that the payment handling services do not fall within the UK Payment Services Exemption and in so doing have failed to take into account the decision in *Axa*. In particular, since the payment handling services are provided to the customers and not to VML they cannot amount to "debt collection or factoring". The Commissioners have also erred in concluding that the decision in *Bookit Limited v HMRC*[5] *("Bookit 1")* has no application.

Further the effect of the payment handling services is to cause movement of funds from customers' bank accounts to VMPL and ultimately to VML thereby resulting in changes to the legal and financial relationships between the parties to the payment transaction. Accordingly, to the extent that payment handling services do not constitute a "transaction concerning payments", they instead constitute intermediary services being supplies in connection with "a transaction concerning payments" and thus fall within Item (5) of Group 5 of Schedule 9 VATA.

The Abuse Case

25. The Commissioners' detailed abuse case is set out in their Amended Statement of Case dated 28 October 2013 and re-dated 25 February 2014 and the Further and Better Particulars of the Amended Statement of Case dated 16 May 2014.

26. In summary, whilst the Commissioners accept that VML argue that there was a separate supply of payment handling services that was exempt and that avoids the consequences of *EE*, their position remained that nothing at all was supplied to the customer in addition to the media service. The payment handling charge forms part of the consideration for a single indivisible supply that it would be wholly artificial to split. They argue that the essential aim or purpose of the creation and interposition of VMPL into the media services supply chain was to achieve a VAT advantage by securing categorisation of the charge within the VAT exemption and thus represented an abusive practice within the scope of the *Halifax* principle.

The Consolidated Appeal ("the Appeal")

27. Regrettably there are very few matters in the appeal on which the parties are in unequivocal agreement. However, crucially there is absolutely no dispute that both appeals arise out of the same facts and circumstances and that the arguments advanced by the parties in both of the original appeals are identical.

28. There was no argument as to quantum before the Tribunal. Any argument in regard thereto is stood over for the purposes of this appeal.

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[5] [2006] EWCA Civ 550

Subsequent developments

29. The only other matter on which there was complete agreement was in regard to the necessity for this Tribunal to make what were repeatedly referred to as "complex and detailed" Findings in Fact. We agree.

30. At the outset of the adjourned hearing, Mr Cordara stated that: "It's not a case where we're going to agree the facts". Mr Pleming concurred. Regrettably, that is what transpired.

31. In the course of the hearings the Tribunal, and the parties, had difficulty in identifying many key facts, to the extent that even errors in the basic facts as to the group structure of Virgin Media and the nature of the supplies provided by VML only became evident very late in the proceedings. With the consent of the Commissioners, on the penultimate day of the adjourned hearing, Mr Marshall had furnished a further witness statement with appendices setting out a detailed clarification of the group structure and was recalled the following day to speak to it.

32. On 13 February 2015, following the issue of further Directions by the Tribunal, the Commissioners indicated that the parties had been unable to come to any agreed position and both would have to lodge their own documents in relation to movement of monies, which they did and we have been furnished with two separate chronologies.

33. This appeal was stayed pending the outcome of the reference to the CJEU in *Bookit Ltd v HMRC*[6] ("Bookit") and *National Exhibition Centre v HMRC*[7] *("*NEC*")* and following the issue of those decisions, the parties were invited to lodge submissions in regard thereto. The appellants' submission lodged on 31 October 2016 included a further witness statement from Mr Mullins, being his fourth witness statement. The Commissioners objected strenuously to the admission of that witness statement. Ultimately, after receipt of written submissions, the witness statement was admitted on 29 August 2017. Further submissions followed from both parties in relation to that evidence.

34. Lord Reed in *Aimia v HMRC*[8] at paragraph 68 indicated that the application of Article 135(1)(d) of the Principal VAT Directive ("PVD"), and that is the financial services exemption, is dependent precisely on the factual circumstances in each given case. He stated: "A small modification of the facts can render the legal solution in one case inapplicable to another".

35. In our view, it is absolutely crucial to our understanding of the operation of the appellants, to understand the predecessor systems and structures and indeed we find as fact that they shaped and constricted how the appellants operated and operate. In finding the facts we have therefore looked at the periods both pre and post rebranding and the merger in 2006.

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[6] Case C-607/14

[7] Case C-130/15

[8] 2013 UK SC 42

36. In the circumstances, given the fact that there was almost nothing that had been agreed between the parties, we issued Draft Findings in Fact to both parties on 2 August 2018 and invited submissions. Extensive submissions were lodged in the period to 22 November 2018 but the appellants' submissions relied *inter alia* on a document that had never been lodged with the Tribunal. On 18 June 2019 that document was lodged but proved to be of no relevance.

37. Revised Draft Findings in Fact, together with the Tribunal's observations on the parties' submissions, were issued to both parties on 29 August 2019. On 30 September 2019 the appellants wrote to the Tribunal seeking two further revisions and on 25 October 2019 the Commissioners responded conceding one revision and rejecting the other.

A. The Issues as articulated for the second hearing

38. It was not disputed that there were five key issues for the Tribunal:

(1) Is there a supply by VMPL to the Virgin Media customers who do not pay by Direct Debit?

(2) If there is a supply, then what is it? Does it have a free standing fiscal identity or is it subsumed into the supply made by VML?

(3) If the payment handling services are a supply, do they fall within the scope of the exemption for financial services within the provisions of Group 5 Schedule 9, VATA as "the transfer or receipt of, or any dealing, with money" or as intermediary services in relation to the "transfer or receipt of, or any dealing with money" (items (1) and (5) respectively). If they are such an exempt supply do they then, in terms of Article 135(1)(d) of the Principal VAT Directive ("PVD")[9], amount to debt collection so as to be excluded from exemption?

(4) Do the answers to any of the three preceding issues alter because both appellants are in the same VAT group at all material times?

(5) Are the arrangements abusive within the principles set out by the Court of Justice in *Halifax?* In other words, if the payment handling charges are exempt, are the arrangements made by the appellants contrary to the purpose of the PVD?

39. Mr Pleming agreed with that articulation of the issues but argued that without looking at the abuse argument the issue was quite simply whether or not the decision in *EE* can be avoided by the interposition of a wholly owned subsidiary in a VAT group. As can be seen that is our starting point.

B. Virgin Media Group Structure

[9] Council Directive 2006/112/EEC of 28 November 2006

(a) Overview of history

40. The group structure and its history are very complicated not least because large numbers of companies were involved. There had been mergers and acquisitions involving numerous name changes, there was a plethora of companies with not dissimilar names and over the years there had been frequent "loose" references, both internally and externally, to different corporate identities, trading divisions, departments and latterly to "Virgin Media" itself.

41. We find that Virgin Media is a brand and not one single company.

42. As indicated above, it transpired in the course of the hearing, and indeed thereafter, that evidence previously furnished to the Tribunal and the Commissioners was factually incorrect in a number of respects. That is a reflection of the complexity of the group structure and the *modus operandi* of the group. That is described as Virgin Media.

43. Telewest Global Inc and ntl Incorporated ("predecessor companies") were both US holding companies which merged on 3 March 2006. The merger was structured as a reverse acquisition whereby Telewest Global Inc acquired 100% of the shares of ntl Incorporated and then changed its name to ntl Incorporated. At the same time the former ntl Incorporated changed its name to ntl Holdings Inc which became a subsidiary of the new ntl Incorporated. The largest trading entity in the merged group was ntl Group Limited.

44. Both predecessor companies had a substantial number of group companies ("legacy companies" providing media services) with an extensive holding structure. Post merger, the term "NTL" was used internally as a reference to the former ntl Incorporated and its subsidiaries and Telewest Global Inc and its subsidiaries were referred to as "Telewest".

45. As far as the customers were concerned at the UK level, nothing changed following the merger on 3 March 2006, other than that a temporary working name and brand of "ntl:Telewest" was utilised and it traded on much the same basis as the individual groups had done previously. Customers remained customers of NTL group companies or Telewest group companies but the merged group in the UK was owned by ntl Investment Holdings Limited. However, internally as part of the reorganisation of the service functions, including finance and payroll, employees started to be paid by ntl Group Ltd. The process of merger and migration of systems, which we describe below, continued and was accelerated.

46. On 4 July 2006, ntl Incorporated acquired all of the shares of Virgin Mobile (UK) Holdings plc and those shares were delisted. It became Virgin Mobile Holdings (UK) Limited ("Virgin Mobile Group") and was directly held by ntl Investment Holdings Limited. In turn, it had, and has, three subsidiaries, two of which are held indirectly. One of those is Virgin Mobile Telecoms Limited ("Virgin Mobile") and that remains the main trading company for the provision of mobile telephone services ("mobile services") marketed by Virgin Media.

47. In a separate transaction associated with the acquisition of what became Virgin Mobile Group, the merged group entered into an agreement to permit the use of the Virgin brand name under a licence arrangement for which a quarterly royalty fee was paid. That licence permitted the merged group's companies serving non business customers to use that brand.

48. On 6 February 2007, ntl Incorporated, changed its name to Virgin Media Inc and it remains the ultimate US holding company in the group.

49. On the same day, one of its subsidiaries, ntl Holdings Inc changed its name to Virgin Media Holdings Inc as did ntl Investment Holdings Limited to Virgin Media Investment Holdings Limited ("VMIHL") and ntl Cable plc to Virgin Media Finance plc. Pertinently, ntl Group Limited became Virgin Media Limited (ie VML) on 6 February 2007.

50. As far as VAT was concerned, ntl Group Limited was the representative member of a VAT group for the period July 1998 through to 31 March 2006. Following the merger, that VAT group had been deregistered on 31 March 2006, under an arrangement involving the transfer of all existing VAT group members into the Telewest Communications Group Ltd VAT group. The representative member thereafter was ntl Group Limited. Since 14 March 2007, VML has been registered as the representative member of what is now called the Virgin Media Ltd VAT group ("the VAT Group").

(b) High level overview of the Corporate Group structures and VAT Groups

51. This can only be a high level overview due to the level of detail furnished to us.

52. For many years prior to the merger there had been an on-going process of growth involving acquisitions and mergers in the predecessor companies. We have no details and it is not material.

53. On 24 December 1999, when it had more than 10,000 employees and more than 100 companies, NTL put in place an "Agency and Management Agreement" with its legacy companies to reflect the way in which the group operated and document it from a legal perspective. The objective was to have a legal framework in place that would enable NTL to operate from a practical perspective as though it were a single entity. In 2000 it acquired Cable and Wireless Communications ("CWC") which was the product of a number of acquisitions of smaller groups. CWC had its own version of an Agency Agreement which was similar to that of NTL. At that point NTL had 21,000 employees and approximately 250 companies.

54. Since 2004, NTL had undergone a rationalisation of its operational and legal structures and the trade, assets and liabilities of a number of individual legacy companies had been transferred into ntl Group Ltd which was the principal operating company in the UK. Those companies then became dormant and ntl Group Ltd carried out the trades in its own right. However, a large number of other legacy companies in the group also continued to trade but ntl Group Ltd acted as agent for them in terms of the Agency Agreement.

55. In general, results were allocated between the companies solely for statutory accountancy and tax purposes although there was some exceptions to that, for example, separate ledgers were maintained for the borrowing entities for covenant reporting to the wider bank group.

56. We have limited information about the prior history of Telewest other than that there may not have been a comparable rationalisation of corporate bodies. It did however operate with its legacy companies on a similar agency basis.

57. The rebrand of ntl:Telewest to Virgin Media was accomplished on 8 February 2007 and from that date, the Consumer division provided, and provides, media and mobile services, primarily to residential customers. Given the terms of the licence, the rebrand did not include what was described as the Business division.

58. After 8 February 2007 the business contracts remained between the customers and what was known as ntl:Telewest Business. However, some small and medium sized business customers were compulsorily included in the rebrand because they were handled in the billing platforms utilised for residential customers in the Consumer division. In January 2007, the head of "ntl:Telewest Business" wrote to Direct Debit customers stating that:

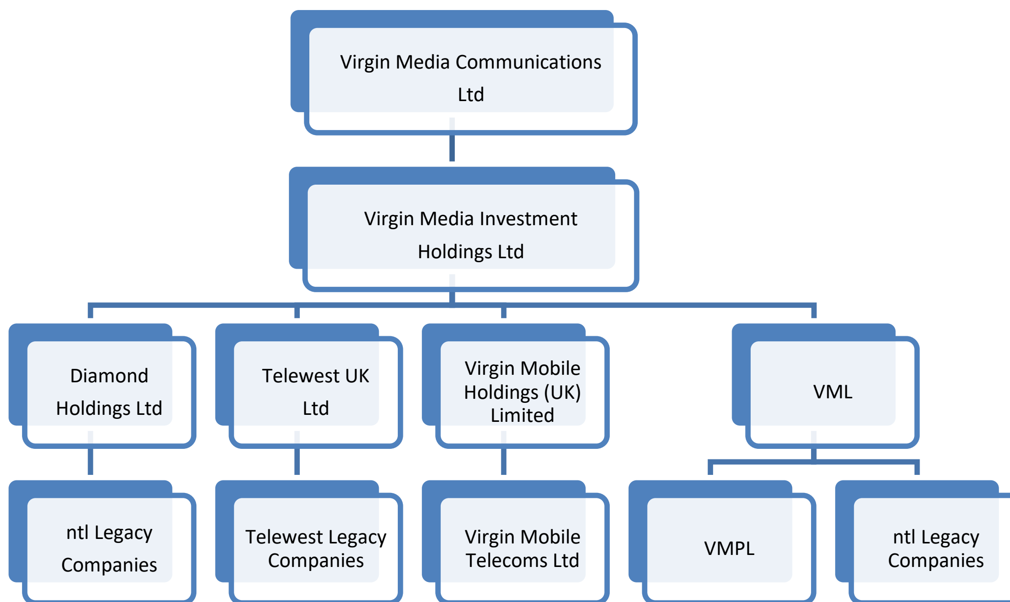
> "…the company we form part of is changing its name to Virgin Media. The Business division will however continue to be known as ntl:Telewest Business".

The letter went on to state that "some of you" will observe that VMPL will collect the Direct Debits and that that name might appear on bank statements.

59. Payment handling services for national business customers, for which there was no charge, were provided by Telewest Communications Group Limited. NTL business customers had not paid charges historically and that did not change. The only business customers who did pay payment handling charges were former Telewest customers on the ICOMs billing platform (see paragraph 180 below). Before the rebrand those charges had been called "non Direct Debit administration charge".

60. The rebrand was a much bigger exercise than simply changing company names and the novation of bank accounts from what became VML and the legacy companies to VMPL. It involved changing how the legacy companies presented themselves to customers, suppliers and employees. Whilst it did further integrate former NTL and Telewest companies, it was a change in culture to become a "Virgin" business for the Consumer division of the group. The aim was to have as few companies obviously visible to the outside world as possible hence the documentation which is described under Internal Documentation at Section I below.

61. We do not know if there were any name changes for the Telewest companies. However, following the rebranding, the very abridged group structure chart shows that in the United Kingdom, Virgin Media Investment Holdings Ltd ("VMIHL") owned, amongst others, Virgin Mobile Holdings (UK) Limited, Virgin Media Limited, Telewest UK Limited and Diamond Holdings Limited ("Diamond"), each with their wholly owned subsidiaries as shown in this schematic.



62. No consumer mobile services are provided by VML. However, as can be seen below, Virgin Mobile Telecoms Ltd ("Virgin Mobile") which is the main trading company for mobile services trades as part of the Virgin Media brand.

63. Both after the merger, and continuing after the rebrand, the NTL companies were held partially by VML and partially by Diamond and the Telewest legacy companies by Telewest UK Limited. The more extensive undated corporate structure charts produced show that as at some date after the rebrand, VML owned 193 companies of which 49 were owned outright, Diamond owned 25 companies and Telewest owned 214 of which four were owned outright.

64. Mr Marshall's evidence was that not all of the legacy cable companies were owned by VML. Although none were produced to us, as we indicated when questioning Mr Marshall, we find that, with effect from 8 February 2007, there must be undisclosed agency agreements with those companies and that the only revenue stream that moved from those companies after the introduction of VMPL was the right to receive a payment handling charge.

65. VMPL was incorporated on 11 December 2006 and remained dormant until it commenced trading on 8 February 2007. At all times it has been a wholly owned subsidiary of VML.

66. On 6 February 2007, an application was submitted to the Commissioners to admit VMPL to the Telewest Communications Group Limited VAT group with effect from 1 February 2007. That application described the nature of the business as "payment handling services" and the expected annual non-taxable turnover (ie exempt) as £40 million with taxable supplies to group members of £10 million.

67. Future Entertainment SARL ("FES"), a Luxembourg registered company, trading as Virgin Media Entertainment, was part of the Virgin Media brand and provided premium TV services to Virgin Media's residential customers with effect from 1 June 2009 until 31 December 2011. VML and VMPL entered into a Payment Activities agreement with FES on 28 May 2009 and that was subsequently terminated with VML providing the premium TV services.

68. The oral evidence was to the effect that the overall corporate group structure constantly changes but, that being said, it had not changed materially between 2007 and 2013.

69. A common pool of directors was maintained and that encompassed virtually all of the companies in the group. In addition there were two VML subsidiaries, Virgin Media Directors Ltd and Virgin Media Secretaries Ltd which could, and did, act as Company Officers but less frequently after the rebrand. The practice was to source a board member rather than one of these companies. One example of how Virgin Media operated was that the Payment Activities Agreement between VML as principal, VML as agent for the legacy companies and VMPL as principal (see Section I (b) below) was signed by Mr Gale in each of those capacities.

70. At the time of the rebrand in 2007, there were approximately 500 companies in the UK corporate group structure.

71. In October 2013 there were 397 subsidiary members in the VAT Group which included all of the UK "Virgin Media" trading companies.

C. The Group modus operandi

The operational group structure in practice; in other words how did Virgin Media operate?

72. One of the difficulties is that this appeal covers a period of six years and that has been a period of continuous change. However, the general principles of the *modus operandi* have broadly remained consistent and in our findings we have focussed on that, identifying material changes where they have been identified.

73. Although throughout, the parties have focussed on VML and VMPL, in the first instance, we deliberately focus on the term "Virgin Media", since it is a very large corporate organisation and we found for the reasons set out, that the distinction between many of the companies is often very far from clear, both internally and externally.

Rebrand generally

74. The rebrand to Virgin Media for the provision of media services was part of a continuum which had started pre-merger and gathered pace thereafter. Although, as we indicate above, there had been some move towards rationalisation prior to March 2006, as would be completely standard in any substantial merger, both NTL and Telewest had numerous and diverse structures, systems, management practices, databases and policies. The rebranding was only part of a very expensive and time consuming rolling process of systems and procedural migration and improvement.

75. Customers who wished to enter into contracts for the provision of media services were required, by means of pre-printed standard documentation, to contract with VML and VMPL. VML, which acts as principal but also may be acting as undisclosed agent for the numerous legacy companies, furnishes the media services whereas VMPL is described as providing the payment handling services.

76. VML acts as undisclosed agent for all of the trading companies with whom it has an Agency Agreement (see Section I (c) below).

77. We have very little documentation or information from before the rebrand but we can see from a price guide dated 2003 that as far as Telewest customers were concerned they dealt with "Telewest Broadband" even although their original contract (and therefore payments) may have been with a different cable franchise company.

(b) External presentation for media and mobile services

78. In a letter sent in January 2007 to all of the customers who used Direct Debit as a means of payment the Managing Director, Customer Care, intimated the brand name change. The letter was on paper with a large header carrying the Virgin Media logo and it had as a footer in very small print "ntl Group Limited (acting on behalf of itself and as agent for its group companies) …". That letter stated:-

> "By now, you've probably heard about some big changes happening at ntl:Telewest. In February this year, we are becoming Virgin Media – and as a customer, you will be part of our digital revolution!
>
> The good news is, your account and services will work in exactly the same way, including all the benefits of paying by Direct Debit – so there is nothing you need to do. But from 14 February onwards, Virgin Media Payments Limited will collect your Direct Debits, instead of ntl:Telewest …
>
> All that leaves you to do is sit back and enjoy the Virgin Media Service …".

79. There are later letters from the same man, albeit about other matters, and the only difference in the header and footer is the change of name in the footer to VML. The significance of that is that although all correspondence, pleadings and evidence was directed almost exclusively to the corporate entities VML, VMPL and latterly Virgin Mobile, we find that VML's activities both internally and externally extended beyond its own subsidiaries and included Diamond and Telewest and their legacy companies, just as ntl Group Ltd had done for ntl:Telewest.

80. As far as the outside world is concerned, for the sale of media services and mobile phones ("mobile services") to residential customers Virgin Media is presented as the brand. On the rebrand, the customer literature was all rewritten in a "Virgin" style and that included the Welcome Pack, the contract, the monthly bill and all other methods of customer interface.

81. The "Hello You" part of the Welcome Pack sent to all existing and new customers in 2007 read:

> "Oh, and don't forget, since we're the first people able to provide you with digital TV, broadband, phone and mobile, it's the first time you could save a small fortune by getting all your services from one company."

It went on to give equal prominence to "Your Virgin TV, Your Virgin Broadband, Your Virgin Phone and Your Virgin Mobile". In fact, of course it is not one company and, in particular, mobile services are provided by Virgin Mobile. However, that was, and is, the message.

82. On the page headed "What does all this mean for you" it highlighted under a sub-heading "Bills that are beautifully simple" that "If you pay by Direct Debit, your payments will switch to **Virgin Media** soon. You won't need to do a thing". We have highlighted in bold because the message to the customer was that payments went to Virgin Media.

83. On the same page under a sub-heading "Small print that you can actually see" it enclosed a copy of the new terms and conditions referred to below.

84. The "You're In" part of the Welcome Pack read under "Ways to Pay":

> "There are five easy ways to pay. Just pick the one that suits you best.
>
> By Direct Debit and **save** £5 per month.
>
> Direct Debit is the simplest and most convenient way to pay. Your bill will automatically be paid every month. Plus you'll **save** the £5 a month payment handling charge (which is payable to Virgin Media Payments Ltd for handling payments made by other methods)".

85. The version issued in 2010 under the heading "Ways to Pay" again stated that there were five ways to pay and under the heading "Direct Debit" it stated:

> "Not only is your bill paid automatically every month, reducing hassle, but it will **save** you £60 a year."

86. We have again highlighted in bold the use of the word "save". Virgin Media is not saying anything to the effect that assistance can be given with the other payment methods which are identified. It is marketing a saving for payment by Direct Debit, in which event there is no payment handling charge. Although it does refer to VMPL it does not say what VMPL will do other than handle the payments.

87. Both versions then went on to describe payment by internet, credit or debit card, cash or cheque and gave the call centre and website details.

88. Typically new customer enquiries were, and are, made through the Virgin Media call centre. The following instructions were given to call centre staff in 2007:-

> "Please remember that if customers don't pay by Direct Debit they will incur a charge from Virgin Media Payments Limited of £5 for providing payment handling services. It's really important that we let customers know the fee is not a fine, penalty or charge, but is for:
>
> 'Providing payment handling services to non-Direct Debit customers'.
>
> You can really help us by never saying:
>
> 'The cost is to cover our costs etc …'
>
> 'it's a non Direct Debit fee or a charge of any variety'
>
> 'it's a penalty or administration charge'
>
> 'a customer can get a discount if they pay by Direct Debit (although its fine to point out the charge if they decide to pay by other means)'
>
> Virgin Media Payments Limited is a big part of building on our success and you can really help us get it right by explaining the charge correct."

It also does not say what the payment handling services comprised beyond the words themselves.

(c) The contract for media services

89. In 2007, the actual contract was very brief indeed identifying what was described as key information, including consumer rights etc and stated that the Virgin Media Terms and Conditions ("the T&C") formed part of the agreement, that the prices quoted were for payment by Direct Debit and that if payment was made by any other method then there would be a £5 monthly charge payable to VMPL for payment handling services.

90. By 2010, the contract was still very brief and again stated that the T&C formed part of the agreement, made no mention of prices or payment but simply stated that all services other than those from FES were provided by VML and VMPL.

(d) Terms and Conditions

91. In 2007 the T&C were issued as part of the Welcome Pack which in total extended to some 20 pages but these were six pages of very small print commencing:

> "RESIDENTIAL CUSTOMER SERVICE AGREEMENT
>
> *About your Virgin TV, Virgin broadband and Virgin phone services*
>
> *It's a two-way thing ...*
>
> These terms and conditions set out the agreement between you ('you' or 'the customer'), Virgin Media Limited ('us' or 'we') and Virgin Media Payments Limited ('Virgin Media Payments').

Your use of the services will be governed by the terms of this agreement."

92. The payment provisions are set out at Section F, which is at page nine of the 20 page document and that reads:

"F Paying for your services

1. You must pay the charges for the services as set out in our price guides or as otherwise notified to you, together with any value added tax or other applicable taxes. We can change the charges as set out in paragraph H3, but if we do so, this may entitle you to end this agreement. You can read more about this in paragraph J3. All payments by you should be made to Virgin Media Payments which will provide you with all necessary payment handling services. Virgin Media Payments agrees to collect and process all payments made by you to it promptly and ensure that they are applied in settlement of the charges to which they relate. Virgin Media Payments may charge you a separate service fee for collecting and processing such payments as provided in paragraph F(c) below.
2. We may ask you to make initial payments and/or a deposit, either through a Virgin Media sales representative in person or over the phone through a Virgin Media telesales representative.
3. You must ensure that your payments are received by Virgin Media Payments by the due date for payment shown on your bill. If you do not pay your bills on time you will be liable to interest or other charges for your default. We may also charge you the full amount of any bill and you may lose any discount we have given you. We will also suspend or cancel the services and charge you the costs of debt-recovery proceedings to recover any debt you owe under this agreement.
4. Bills

(a) Under this agreement, if you ask for any changes to the services we provide, these changes will be reflected by adding proportionate amounts to your first bill after the change and to your payments every month after that.

(b) You may choose to pay your bills by cash, cheque, credit or debit card, or by Direct Debit.

(c) Virgin Media Payments will provide you with payment handling services and unless you pay by Direct Debit you agree that Virgin Media Payments shall charge you a separate payment handling charge each month for **processing** your payment.

(d) If any cheque or Direct Debit of yours is cancelled or is not cleared by your bank or building society, we are entitled to charge you a default fee and the provisions of paragraphs F3 and F4(c) will also apply.

(e) We normally send reminders for late bill payments. We may charge interest at the yearly equivalent of 4% over Barclays Bank plc's base rate for the whole period of any late payment. The interest is worked out daily.

(f) If you want to change any of the services agreed to, we may charge you an administration fee. We will notify you of the amount of any such charge when you request the change.

(g) We may ask for any deposit at any time (as we believe it to be reasonable in the circumstances) as security for the equipment and in case you do not pay our bills or return our equipment. All or any part of this deposit may be used to pay any charges you owe under this agreement. We may (but do not have to) return your deposit after six months if we believe that you have a good payment history."

93. There is no definition of "payment handling services" beyond the words themselves and in the text at F1 it simply states that payments will be collected, processed and applied.

We have highlighted in bold that F4(c) makes it explicit that the payment handling charge is stated to be "processing" the payment. The only relevant definition is to be found under the heading "Glossary" and reads:

> "'Services' – the services you have ordered including any new, extra or substitute services which we agree to supply you at a later date."

That does not include payment handling since there is a definition of "service start date" which talks about "activation" and "order".

94. Also to be found under "Glossary" is:

> "'Other legal stuff' – as well as the terms and conditions set out in this document, there are additional terms and conditions which apply to your services as published by us on the Virgin Media website or can be accessed through the services, as updated by us from time to time. If there is any conflict between the other legal stuff and the terms and conditions in this document the other legal stuff will apply."

We did not see anything defined as "Other legal stuff".

95. We were told that there are no material differences in later versions such as that for 2013. However, we observe that the 2013 version, to which we were taken on the first day of the second hearing (and which purported to be part of the 2010 Welcome Pack produced by Mr Mullins), had two minor changes in Section F in relation to payment handling charges.

96. Firstly, in Section F1 the fourth sentence read "All payments by you should be made to Virgin Media Payments which will provide you with all necessary payment handling services **for Virgin Media**." We have highlighted in bold the amendment. There is no definition of "Virgin Media" but in Section H which is headed "Changing this agreement" it states at H2: "We and or Virgin Media Payments may at any time…alter the terms of this agreement…a. if there is any change or amendment to any law or regulation which applies to Virgin Media, Virgin Media Payments or the services provided to you…". In Section N, which deals with liability, it states that neither Virgin Media nor Virgin Media Payments will be liable for any breach of the agreement. Therefore, in our view, Virgin Media, in the T&C, is VML.

97. Secondly in Section F4c the reference is to a "payment handling fee" rather than a "payment handling charge".

98. We find as fact that although those T&C stipulate the services to be provided by VML, no customer, even if the customer reads the agreement, can have had any understanding from that contract as to what if anything VMPL might do for them other than charge them a fee for collecting, processing and applying the payment if it was not made by Direct Debit. At best, in simple language, they knew that they should pay VMPL on time to extinguish their debt to VML and if they paid by Direct Debit it would cost less. No more and no less.

99. For existing customers of NTL that would have been even more emphatically the understanding of the customer. They had been told that effectively the only change was the rebrand and that they needed to alter nothing. In the January 2006 ntl:home

residential customer contact at Clause 6.2 of Charges and Payments it stated: "… we may also withdraw any **discount** we have given you for … payment by a particular means (e.g. direct debit)".

100. We can understand the preliminary response to the Commissioners from the appellant's then Group Indirect Tax Manager that that phrase was "at best unfortunate". However, it makes it clear that what was offered was a discount. It would be fair to assume that the customer would have expected that to continue. That is consistent with the frequent promotional use of the word "save".

(e) Other publications and correspondence

101. The "Buyer's Guide" given to customers in February 2010 (which includes mobile phones) reads in a footnote in regard to pricing on the page for TV that:

> "If you prefer not to pay by Direct Debit and/or want to receive a paper bill, the monthly price … Prices include a payment handling charge payable to Virgin Media Payments Limited and/or a paper bill charge … Legal stuff applies …".

102. By 2012, the "Legal Stuff" for the media services stated that the offer required the customer to pay by Direct Debit using e-billing but went to on say "If you prefer not to pay by direct debit, you will incur a monthly £5 payment handling fee payable to Virgin Media Payments Limited."

103. The Consumer Code of Practice issued in February 2007 by Virgin Media read:

> "Payment:- All customer payments are payable to Virgin Media Payments Limited. You may pay your bill by using any of the options listed below.
>
> By Direct Debit:- … if you choose not to pay by direct debit, Virgin Media Payments Limited will charge you a separate payment handling fee for processing your payment, please see our tariff guide for details."

104. Extensive draft sample correspondence for the Payments Processing team was produced to the Tribunal in the Disclosure process. The key wording in letters to residential customers where a cheque had bounced or payment by other means had failed was:

> "… there are lots of ways to pay your bills, the easiest ways are:
>
> - Direct Debit – this is the simplest way and could save you £5 a month, as any other method of payment involves us charging you a ~~£5~~ (sic) payment processing fee …".

105. The Commissioners argued that "us" meant VML because of the definition in the T&C. Although we assume that, like everything else, that letter would have carried the Virgin Media logo it is clearly signed by the Head of Payment Processing at VMPL and the customer is invited to write to VMPL with any queries. We reject the Commissioners' argument and find that the customer, because of the circumstances of the failed payment, would have been aware that it was VMPL.

(f) Content of Bills

106. Customers are billed in advance for the basic monthly service they buy from Virgin Media being, for example, telephone line rental, internet provision, television packages, subscription and rental charges. Any additional charges such as chargeable telephone calls, additional downloads, pay per view television services, the payment handling charge or a late payment charge are only billed once they have been incurred.

107. The anonymised bill dated 29 May 2007 is very important not least because that is the main document that any customer would read. That shows the Virgin Media logo in bold on three of the six pages which comprise the bill.

108. The first half of the first page shows that the bill is for £50.97 comprising Service Charges of £49.67 and telephone usage charges of £1.30. To the left of that it states "We look forward to receiving your payment…" and in a box below that ("the box") it states "To find out more about Virgin Media and to make the most of your service please visit www. VirginMedia.com". The box appears on each of the first four pages.

109. The giro slip is below that and has in small print, in the usual format for such slips, "ROYAL BANK OF SCOTLAND COLLECTION ACCOUNT VIRGIN MEDIA PAYMENTS LTD".

110. Page two is headed "Payment Summary" and has the logo and the box and shows payment of the previous balance in full.

111. The third and fourth pages of the bill break down the service charges into 14 component parts in six categories. Firstly, there are two refunds and adjustments. The next is six core components being the telecoms services which are the largest part of the bill and are the "Advance charges". Those are followed by the payment handling charge of £5 in the category "Other charges". The remaining three categories are for services that have already been provided.

112. We find as fact that as far as the customer is concerned, the payment handling charge is included in and is simply part of the bill for services from Virgin Media.

113. The last page does not have the Virgin Media logo or the box. It has three headings with equal prominence. On the left the heading is "Contacting us" and it gives the postal address for contact as being VML at a PO address. On the right the heading is "Paying Your Bill" and it gives the VMPL reference number at the top and it sets out the different options for payment, and at the bottom under the sub-heading "Payment Handling and Late Payments" it reads:-

> "All your payments are made to Virgin Media Payments Ltd, which is responsible for the collection of customer payments on behalf of Virgin Media Ltd. Please refer to our terms and conditions for further details of your relationship with Virgin Media Ltd and Virgin Media Payments Ltd.
>
> Please note, if you do not pay by direct debit, Virgin Media Payments Ltd will charge you a payment handling fee of £5 per month. Please pay your bill on time. If not we may charge you a £10 late payment fee."

The final heading at the foot is "More about your bill" and that offers a free online billing service if a customer visits "HTTPS://ebill.virginmedia.com".

114. If a customer accesses the website to find out about bill payment, certainly in 2013, in relation to payment by cheque it read:-

> "If paying by cheque, please make your cheque payable to Virgin Media Payments Ltd. **They're responsible for collecting the amounts paid by you to us at Virgin Media Ltd."**

115. It is we who have highlighted in bold and we find in fact that VMPL collected payments for VML. That is what they did and the bill accurately states the position. As with the T&C, we find that the customers, if they ever thought about it, would have seen VMPL's role as being solely payment collection. The debt was incurred when entering into the contract for media services. After that the customer simply knew that they had to pay VMPL on time by whatever method seemed appropriate.

116. Further, it is consistently argued for the appellants that everything has to be read in the context of the T&C since that is the contractual framework. That clearly defines "we" as being VML so it is VML who would, and did, impose the late payment charge. That is confirmed in the correspondence between the appellants and PwC on the basis that "It would be nonsense for VMP to charge £5 per month in its own right but be able to charge £10 if this is not paid". In fact, VML was contractually obliged to remit the full £10 to VMPL from 1 September 2007 and only £4 from 1 January 2008.

(g) Bundled Services

117. As we indicate above, Virgin Media can and does market media services and mobile services together and price guides include both. However, if a customer elects for both services, then two different contracts are required with the contract for media services resting with VML and the contract for mobile services with Virgin Mobile. We have seen none of the latter as mobile contracts do not form any part of the appeals.

118. The customer receives two bills. The processing, billing and payment for mobile and media services are completely separate operations because the underlying systems are different.

119. Payment for all media services is made to VMPL. Some smaller business customers pay a payment handling charge but the larger businesses do not.

(h) Virgin Mobile and mobile services

120. Virgin Mobile operates its own billing and payment processing system. Contracts for mobile services must be paid by Direct Debit on a monthly basis but there are a variety of payment options for Pay As You Go. All payments by customers are made into one of six bank accounts in the name of Virgin Mobile. There are no payment handling charges even if the Pay As You Go payments are made by payment channels such as cash or cheques.

121. Virgin Mobile's support functions are performed by various Virgin Media departments, as with the other companies in the group, as explained below.

D. Overview of Centralisation of corporate functions

122. We have referred above to the Consumer and Business divisions of Virgin Media and they are operational divisions. We do not know how many operational divisions exist but apart from these two we are told that there is a Mobile division.

123. The Consumer division includes VMPL, some of the legacy companies and some of the activities of VML. Other of the costs of VML and some of the legacy companies are reported in the Business division.

124. Many of Virgin Media's key business functions are centralised. It operates through many different departments across the group companies and divisions because a number of activities are central functions which do not fit within a particular Virgin Media company or indeed the Consumer or Business divisions.

125. That is a business model that was utilised in NTL, Telewest and in ntl:Telewest.

126. We do not have a complete list of the centralised departments but they include Networks, Procurement, Property, Legal, Accounting Services, Human Resources, Technology and Treasury.

127. Although there are these centralised departments, they too have a centralised reporting mechanism. For example, Accounting Services sits within, and reports to, Virgin Media Shared Services Division and its Director.

128. In turn, some or all of those centralised departments also have further teams or divisions and sub teams reporting to them, as appropriate. Those have functions which are delegated further down because they are more specific to particular areas of the business rather than purely corporate functions.

129. The operational accounting function within Virgin Media from revenue and turnover down to operating profit is done by the Management Accounts Team within Accounting Services and they are divided into divisions such as cable, mobile and business. There are separate teams because different parts of the business use separate billing systems and also because the financial information comes from a different system it makes sense organisationally to have a separate team of people looking at that. In summary "Virgin Media Accounting Services" spans the companies but it is done by type.

130. Accounting Services comprises the Financial Accounting Team which in turn is broken down into three component elements, namely Group Accounting, Accounting for "below operating profit" transactions and Statutory Reporting. Collections and Reconciliations is also a sub-division within Accounting Services as the Management Accounts team.

131. Procurement has four key divisions and they are then further broken down into teams.

132. Occasionally, as with the employment of personnel, the centralisation is within a group company, in that instance VML.

133. Historically, VMIHL usually acted on behalf of group companies in relation to financing. However, in general, the centralisation is in over-arching departments such as Treasury etc.

134. It is not only the business of Virgin Media in the UK that is thus supported but, for example, Treasury and Procurement can and has supported the US companies.

135. Policy is a function of central management.

136. Confusingly, and we certainly found that to be the case, as Mr Mullins confirmed in relation to the period immediately prior to the rebranding in February 2007, sometimes the business arms would have "called themselves and identified themselves slightly separately".

E. Specific functions managed centrally

(a) Cash and Sweeping of bank accounts

137. It is Virgin Media policy for cash to be held, and investment decisions to be taken, centrally. In that context, funds above a *de minimis* level are swept daily from all UK subsidiaries' bank accounts.

138. Prior to the merger both NTL and Telewest had in place a practice for regular sweeping of bank accounts in order to achieve effective cash management. Following the merger the bank accounts held by NTL companies continued to be swept to ntl Investment Holdings Limited and the bank accounts held by Telewest companies continued to be swept to Telewest Communications Ltd. In each case it is the prime signatory company to the banking facilities and the prime legal entity that is used. For that reason it was the entity wherein all the cash was concentrated and from which interest was drawn to meet bank facility debts.

139. After the rebrand ntl Investment Holdings Limited became VMIHL and the accounts held by the Telewest companies were then also swept into VMIHL. Of course, the former ntl accounts were already being swept into VMIHL so all Virgin Media bank accounts were swept into VMIHL with the one exception of VMPL whose accounts were swept into VML. Mr Marshall was clear that that practice continued until 2009/10 and since then (because of issues with SEC regulations) all bank accounts have been swept into VML. Mr Mullins, at paragraph 42 of his second witness statement states that: "In 2011 it was identified that this process was causing difficulties…As a result Virgin Media treasury function decided to alter the process…".

140. It was suggested in Mr Marshall's witness statement that the reason the VMPL sweep went through VML "may have been to preserve existing inter-company trading accounts

between VML and some of the other legacy trading companies". However, the correspondence with PwC indicated that it was considered to be a risk if VMPL's accounts were also swept into VMIHL. The risk is not quantified but we find that, on the balance of probability, it was because, in order to have a substance, and that was a priority in terms of the tax planning, VMPL had to pay VML in order to extinguish customers' debts.

141. As far as VMPL is concerned, at the end of each working day its bank accounts were swept into VML. The sweep involved moving most of the proceeds of all of the Direct Debits, cheques, cash and other payments that had been received including the proportions of those payments representing the payment handling charges. None of the amounts are transferred back the following day.

142. The proportion of the swept amount that represented the payment handling charges was recognised as turnover of VMPL and a proportion of the late payment charge was also recognised.

143. As VMPL receives regular customer payments and holds over 100 bank accounts, its accounts are swept every day. By contrast, Virgin Mobile's six accounts are manually swept once a week or when they "hit" a particular balance.

144. Only very exceptionally is a sweep partially reversed and that is only in regard to customer refunds. Residential customer refunds are always made by cheques drawn on one of VMPL's specified "refund" accounts. If there are insufficient funds in the refund account then the Treasury function will effect a transfer of money back from the relevant VML account in order to put the VMPL refund account back in funds.

(b) Staff

145. As we indicate VML is the employing entity for the majority of the employees in the group. In 2007, the Commissioners were told that employees of VML staffed all of the companies in the group except for the staff in the Flextech companies, Virgin Mobile Group, Virgin.net and Sit Up Ltd. As at 2014, more recent employees of Virgin Mobile were employed by VML but some longer standing members of staff may have been employed by legacy mobile companies.

146. VML acts as the payroll company for all Virgin Media employees in the UK and also for Virgin Mobile. All employee costs and expenses go through VML before being allocated to the relevant companies.

147. In many cases a particular employee will work as part of more than one group entity and across the business. Accordingly a member of staff might act for many entities on a daily basis although they may be completely unaware of that. We accept the evidence, and find as fact, that most staff would consider themselves simply to be working for Virgin Media.

148. The management of all staff is conducted on the same principles across the whole Group. The staff who allocate notification of receipt of payments received by VMPL work in Birmingham and they report to and are managed by the Payments Manager, who in turn reports to the head of Finance Services who reports to the Director of Shared

Services who is a Board Member of numerous companies including VMPL. The reconciliation team are managed by a Team Manager, who reports to a Manager and ultimately to the Head of Finance Services.

149. The billing and collections teams are in the minority of employees working largely but not exclusively for one entity.

150. Prior to the merger both predecessors had similar practices in place.

(c) Costs and Accounts

151. Virgin Media has a policy that all costs should be incurred centrally and throughout the year it treats the group as one single entity for the purpose of accounting for those costs.

152. A buyer in Procurement arranges the purchase and sets up the appropriate internal cost coding. All costs and expenses, are in the main incurred through VML and irrespective of how the invoices are addressed, they are received and processed by the accounts payable team which sits within the over-arching Virgin Media Shared Services. VML then pays the accounts as, in Mr Simper's words, it "…holds cash on behalf of the rest of the Group". It is not uncommon for an invoice simply to be addressed to Virgin Media but invoices which relate to, for example, VMPL might well be raised in a large variety of names such as VMPL, VML, Virgin Media, Virgin Media Financial Shared Services Centre and other group company names. The costs would then be allocated out to VMPL.

153. The group accounting system is set up to produce consolidated group accounts, and so at any given point in the year, all that is relevant for Virgin Media is to know that there is accounting for costs somewhere within the group.

154. Virgin Media initially prepares accounts on a group wide basis and those accounts are then allocated into the various statutory entities when required, for example, at the end of the financial year for statutory reporting purposes. One aspect of this process is that, although internally, revenue is allocated immediately to the group company including the legacy company in which it arises, for the purpose of accounting for various costs and expenses, Virgin Media works on the basis that the group is a single entity, with an exercise performed to allocate costs among the different companies when required.

155. The first stage in the costs allocation process is to allocate all individual expenses to a cost centre which typically would cover a team or department or operational division. Thereafter an allocation process, with checks and balances, is undertaken to ensure that costs and revenues are split appropriately between group companies.

156. In general, it is only at the year end when the individual company's statutory accounts are produced that the cost allocation exercise between the different group companies is carried out. Draft estimates of profit and loss account and trial balance estimates are produced on an irregular basis during the year to measure whether cost allocation models are broadly in line with expectation.

157. Management accounts, business plans and strategic decisions are prepared at a group level.

158. VML and VMPL are externally audited but that is not the case for all of the Virgin Media companies.

(d) Procurement and contracts

159. Procurement is a centralised function and suppliers negotiate contracts with the central procurement team.

160. When Virgin Media requires services or supplies as Mr Simper's witness statement makes clear:

> "It will rarely be practical to wait until the relevant paperwork is finalised and often the supplier in question will begin providing services before the contracts are signed or finalised. Formal documentation may be delayed and sometimes not completed at all but the relationship with the supplier would continue to be handled on a commercial basis by the relevant business managers. It is and was not uncommon for business to be conducted on the basis of those drafts."
>
> "… when Procurement is instructed to source a particular service, or engage with a particular supplier, we will not necessarily concern ourselves with the name of the company or companies that will be consuming that service, and we will in general negotiate supplier contracts in the name of VML".

That explains a great deal and is borne out by the rest of the evidence. We find that this was the general approach to contracts. It certainly explains the draft contracts produced at the first hearing.

161. On 16 April 2007, the Commissioners had initiated a request for sight of contracts both within and outside the corporate group. It transpired, to the articulated surprise of Virgin Media, that most of the services supplied by third parties were not covered by written contracts nor had they been able to trace original contracts that may have been entered into with, or by, the predecessor companies.

162. On 28 March 2008, Virgin Media advised the Commissioners that with the exception of the contract with NatWest Streamline for the provision of merchant acquirer services, which was stated to have been signed on 1 September 2007 (in fact it was dated 4 and 8 October 2007), there were no signed contracts. The NatWest Streamline contract described VMPL as trading in the business of "telecommunications".

163. Having been prompted by the Commissioners, procurement embarked on a process of novating contracts and in particular novating contracts with suppliers from VML to VMPL. That took years. Inevitably in some cases suppliers were changed or terms and conditions renegotiated. When we looked at the contracts for VMPL, which was the focus of the novation exercise, we identified the fact that VMPL had become responsible for following up unpaid residential customer bills and late payment charges in addition to payment handling. Mr Simper stated that "… collections activity represents a significant proportion of the VMPL's expenditure".

164. Six contracts for debt collection services were lodged as exhibits and each of those contracts defined VMPL as "Virgin Media" and stated "Virgin Media is the supplier of telephony, internet and digital television services …".

165. It was suggested that errors in the debt collection contracts had arisen because the wrong template had been used and we do not doubt that that was the case. However, we can see from the letter to Advantis Credit Limited for the trial of their services that it was even more shambolic than that. The letter carries the Virgin Media logo in bold, is dated 2 July 2009, states that it enclosed two signed copies of the letter and requests that one signed copy be signed and returned in order to confirm that the arrangements with "Virgin Media" are satisfactory. "Virgin Media" is mentioned twice. Bizarrely, the date of signature on that letter (by VMPL with no explanation) has been changed from either 17/0/09, or more likely 17/09/09 to 17/7/09 and Advantis signed it on 6 July 2009. The trial of the services was stated to be from the date of the agreement until 31 December 2009 but the final contract (with VML) was only signed in May and July 2011 but purported to have commenced on 24 June 2009.

166. We find that the formal documentation with third parties, even when produced for a specific defined purpose such as for the Commissioners, is haphazard and less than ideal. However, notwithstanding the documentation or lack of it, both before and after the rebrand, the predecessor companies and then Virgin Media (whether or not overtly trading as VML, VMPL or simply relying on the logo) did contract with third parties such as DataCash Ltd etc and there was reciprocity in terms of payment for services.

167. We find as fact that the novated contracts, reflected only the commercial arrangements between the third parties and Virgin Media and not necessarily with a particular corporate entity within the group.

168. It is clear that the formal contracts and the detail thereof were not a high priority and these novated contracts were produced for the Commissioners. It explains the plethora of draft contracts produced, with no explanation as to why they were simply drafts, at the first hearing.

169. By contrast the internal documentation relating to the rebrand was drafted with huge care and considerable input from PwC as we set out below.

(e) Bank accounts

170. The Telewest payroll, accounts payable and bank accounts had been novated to ntl Group Ltd following the merger. Not all companies in NTL, Telewest or ntl:Telewest were customer facing or necessarily active but we do not have the detail. As at 7 February 2007, there were 101 bank accounts into which customers made payment and, of those, NTL had 41 companies which had customer facing bank accounts. The balance were presumably Telewest.

171. The title to the bank accounts was novated into the name of VMPL with effect from 8 February 2007 but the sort codes and all other details remained the same. The

customers needed to make no changes as indeed they had made no changes on the merger.

172. In NTL, as a matter of policy from 2004, all new customer facing bank accounts had been opened in the name of ntl Group Ltd and as part of the rationalisation, a number of accounts had been transferred to ntl Group Ltd. No consequential changes had been made to customer billing systems or payment instructions because ntl Group Ltd acted as undisclosed agent for all of the group companies. Resources had not been made available to make more radical changes to billing etc.

173. As internet and telephone banking evolved, ntl Group Ltd established one single account to receive those payments because they are initiated by the customers and therefore do not require a billing system tied to a particular account. Virgin Media adopted that practice.

174. As at the date of rebrand, ntl Group Limited had 31 bank accounts in its own name and a total of 124 bank accounts (including those 31) were novated to VMPL on the rebrand.

175. The sample refund cheque produced does state in comparatively small print that the Authorised Signatory is "For and on behalf of Virgin Media Payments Ltd" which is in the usual format for a cheque, but we observe that the Virgin Media logo on the cheque is several times that size.

F. Ledger and Customer management systems including billing systems

176. In approximately 2004 there had been six regional areas within NTL and they all had their own separate billing payments and collection areas. They became consolidated over time so that by the time of the merger NTL had about three or four payment departments, still in different locations around the UK but with a centralised billing department for the consumer side. It remained geographically split but there was a central administration insofar as there was one director to whom reports were sent.

177. There were many different types of software across the legacy companies and as NTL and Telewest had grown they inherited systems from the smaller cable companies. At the point of merger there were a number of separate systems and those in turn were separated by many databases. The companies operated what are described as "ledger and customer management systems" or "subscriber management systems".

178. At the point of the merger NTL had three core systems, which were SMS (and there were multiple versions), ICMS (with three versions) and SABS Harmony which was the consolidating system for NTL. Since there were so many legacy companies, in fact there were up to eight versions of SMS and there were three versions of ICMS. The systems worked in parallel, and independently, so the configurations and codes differed across the platforms. Further, individual companies had configured their individual platforms differently so in effect there were a great many variations on a theme of those three core systems.

179. NTL had been working towards migrating all of the systems into the SABS Harmony system and had reduced the number of core systems to those three from the six in use in 2004.

180. Telewest had different systems and had been following a parallel process. However, at the point of merger although some of the legacy companies used the same or similar systems to those used by NTL, they had otherwise achieved consolidation into a core system called ICOMS provided, like others, by third parties but operated internally. On the merger, the drive was for everything to migrate to ICOMS which is divided into separate regional databases which reflect the numerous legacy companies. Unfortunately, the customer account numbers are only unique within the relevant regional ICOMS database so VMPL has different bank accounts to match each said database.

181. It is the geographical location of the customer that determines the trading company from which the customer actually receives their media services because of the system utilised for that geographical area. Accordingly, when a customer signs a Virgin Media contract, the internal system allocates it to a trading company by postcode. Amending the ICOMS system to give customers nationwide account numbers has been discounted since it would involve large scale changes in the core ICOMS system and would have a knock on effect on many sub-systems and processes.

182. The reason some Business division customers make payments to VMPL is quite simply because it has not been possible to separate the smaller or medium sized businesses out of these systems, whether ICOMS, or something else. It is also for that reason that Virgin Mobile is forced to bill separately from VML. However, VML provides the teams to the Business division and Virgin Mobile to provide all billing, collections and reconciliation processes in the same way as VMPL. Mr Mullins was clear that the staff "work alongside" the staff working for VMPL. Mr Marshall confirmed that in 2014 the four staff based in the Bradford office who did bank reconciliations for VMPL, "… on rotation operate both Virgin Media, Virgin Mobile and, say, for example Virgin Media Investment Holdings bank account reconciliation."

183. These systems all contain the customer information including correspondence, history and services provided together with the functional operations of billing, payments and rating. In addition, pre-merger there had been a few other non-core legacy billing systems. There were also numerous other software packages in use. There is no separate payments system. The systems are accessible by all of the group companies.

184. Oracle, which is a financial system where the general ledger is retained was operated by both NTL and Telewest.

185. VML manages all contracts and customer billing for all trading companies for media services, including the relevant legacy companies where they were the actual suppliers, and the trading debtors are recognised in VML.

186. Prior to the rebrand, the brand "ntl" or "Telewest" was the major logo on the bill and then the legacy company would have been mentioned on the bill back and on, for

example, the giro payment slip. Following the rebrand that policy was adopted with the only alteration being that Virgin Media was the logo and instead of the legacy company it was VMPL.

187. Mr Mullins clarified the operational effect when describing the billing process post-merger when he stated:

> "… from memory the bills would have come from ntl or Telewest. I believe the business division rebranded and became ntl:Telewest, as I remember, I think they did actually change their name, but on the consumer side, I believe the name stayed as they were, but I am sure there would have been a reference to the fact that it was now part of an ntl:Telewest group."

188. Although NTL had numerous legacy companies, at the point of the merger they had four payment departments in different locations in the UK and a centralised billing department for the consumer side.

189. One payment processing team performs the same function for both Direct Debit and non-Direct Debit customers.

190. We find that it is the complexity of these systems which underpinned and still underpins Virgin Media, that has dictated the operational imperatives. Mr Mullins confirmed that both prior to and after the rebrand there was a major task of ensuring that the internal accounting took place so that bills could be reconciled and accurate information recorded.

191. One of our key findings is that it operated in the manner set out above because that is precisely how the predecessor companies had operated. The group was very large and complex and although the systems were viewed as in need of rationalisation and improvement, they existed and they worked and the customer base still required to be serviced as efficiently as possible with as little disruption as possible.

192. As far as the customers and the various teams within Virgin Media were concerned, the two main things that changed in February 2007 were that the Virgin Media brand presented a "single face to the world" and the payment stream was to VMPL as opposed to the legacy companies or ntl Group Limited.

G. Bad debts

193. Bad debts are written off and charged initially to the profit and loss account of VML because VML manages customer billing but VMPL bears 90% of the bad debt cost so it is then recharged to VMPL. That figure was arrived at through an application of the Corporation Tax Transfer Pricing Rules to the inter-company service agreement. If a debt is bad then it is written off in VML which removes the entry against trade debtors in VML. The written off amount is then attributed to a cost centre for bad debt and the costs are then recharged as to 90% to VMPL with the remaining 10% allocated between the remaining media service provider companies.

H. External advice on the rebrand

194. It is evident from the substantial amount of documentation, produced latterly in response to the Tribunal's Directions following the adjournment, that the appellants had taken extensive advice from PwC, as was not only their right, but was entirely appropriate. There are a number of points which arise from the implementation discussion papers, correspondence and other documentation which has been produced.

195. Advice was sought from PwC in October 2006 about the possibility of introducing a "Newco" to the group as a separate entity to process customer payments. The initial Implementation Discussion Paper referred to four recent leading tax cases namely "*Telewest, Bookit, Debenhams* and *Plantifor*" and stated that they were relevant.

196. *Telewest* was, of course, their own successful appeal in the Court of Appeal. They had argued that although Telewest provided the cable television services and a subsidiary, which was outside the VAT group, provided the Cable Guide magazine, nevertheless the supplies were not linked.

197. In preparation for a meeting on 14 November 2006, PwC sent the appellants a number of slides. The starting point on those slides was the fact that ntl:Telewest was charging a £4 payment processing fee to customers who did not pay by a recurring payment method and that there was an extant appeal to the Tribunal. At the end of the notes of that meeting under the heading "Decision to proceed" the VAT implications are again highlighted. It was reported that ntl:Telewest were awaiting the outcome of the T-Mobile litigation and the advice was that if T-Mobile lost then a separate company would distinguish ntl:Telewest from the facts of that case and put the business in a stronger position to defend exempt treatment. If T-Mobile won then ntl:Telewest would be in the same VAT recovery position it would have been had the current structure been maintained with new contractual terms.

198. The Draft for Discussion dated 20 November 2006 makes it clear that when looking at "… the responsibilities assumed by Virgin Media's payment processing and credit service teams" those would have to be set out in minute detail as that was the reason for the taxpayer's success in *Bookit 1*. A bullet point was:

> "Documentation of the processes undertaken by Virgin Media, together with any necessary amendment will also be of significant assistance in the disclosure of activities to HMRC and any subsequent defence as necessary that the services qualify for VAT exemption."

A further bullet point refers to potential dialogue with HMRC and the possibility of a case before a VAT Tribunal.

199. Virgin Media's Executive Summary for the Rebrand Project dated 2 January 2007 makes it explicit that VMPL will supply "… payment handling services to all Consumer customers and to VML".

200. The starting point for the rest of that document is the legacy companies' appeals relating to the VAT liability for payment handling charges (see paragraph 20 above). That is analysed at some length before the paper goes on to describe the rebrand project as being the commercial driver to justify the treatment of the charges. That analysis

made it explicit that the prospects in any litigation would be much better if payment handling services are provided from a separate entity.

201. As far as customer communication is concerned it states:

> "It is critical that customers are made aware that the charges previously described as non-DD admin fees or non-DD charges or simply admin fees are in fact charges for the provision of the service or services for handling payments made other than by Direct Debit".

202. On accounting and banking changes the point is made that:

> "There are no changes to the payment processing teams, they will continue to carry out their work as before. However, their cost centre will be VMP …".

203. On billings and collections, it states that:

> "The billings and collection processes will not be affected by the introduction of VMP … Billing will continue to be done as before… Collections will also continue as before".

It made it clear that the billing and collections teams, and not VMPL, would have been responsible for billing and collecting on behalf of VML any £10 late payment charges.

204. The Summary concluded by stating that that paper covered

> "… the main areas affected by the introduction of VMP into the group, both as a business in its own right and as a means of resolving the issues we have with HMRC regarding payment handling charges going forward".

205. On 24 January 2007, in a sequence of emails involving the appellants and PwC it was stated:

> "I can't think of any reason on the VAT front why Collections can't go into VMP at a later stage, I think … will agree we are reasonably confident that VMP as currently planned will have enough presence to achieve what we want – subject, of course, …, to the money flow review (from customer bank/pocket to VMP) which we still need to do with …".

That was shortly followed by a response from PwC which included the statement:

> "… because it is the VAT analysis, after all, that should be driving this …
>
> The position I thought we had got to was that if VMP was loaded up with functions and costs … VMP collects all the cash and what remains is to decide how much of the £40 subscription it passes back (keeping the £5). The answer we thought was just enough to make sure it turns a modest profit."

206. The obvious point is that VAT planning was clearly key to this issue, notwithstanding the repeated assertions in correspondence that "… the payment handling charge has nothing to do with tax planning arrangements of any kind".

207. At that time there was still discussion in regard to whether or not debt collection, factoring and bad debts would go into VMPL. The resolution was that the parties would enter into an agreement stipulating that only payment processing would be moving at

that time and that other functions would move at a later date as and when identified and that would deal with the corporate tax issues. They did indeed move.

208. PwC produced a memo on 29 January 2007 and pertinently that stated:

> "VMP will levy a £5 charge to non-DD customers for its services. There is comparable evidence in the market to support that this is a market price. We believe that the costs incurred in processing payments received from non-DD customers are considerably lower than £5 which means that VMP will make a substantial profit.
>
> ntl: Telewest are of the opinion that the £5 charge accurately reflects the additional collection costs and bad debt risk as a consequence of accepting payment via these methods and therefore it is not expected that VMP will be significantly profitable once the totality of all costs involved has been taken into account. VML and VMP do not believe that the totality of the activities being transferred should achieve more than a low level of profit. Thus, the activity involved is likely to include collecting payments from DD customers as well as additional cost bearing activities which have yet to be defined."

209. On 5 February 2007, it was noticed internally that the ntl:Telewest web site described the payment handling charge as being to "cover the costs of managing the payment". The internal view was that that had to be changed forthwith since it was "many things but emphatically not that".

210. PwC were very actively involved in advising on the finer points of the Internal Documentation, internal briefing notes, the bill formats and all customer facing documentation for the rebrand. We make no criticism of that and simply state it as fact.

I. Internal Documentation

(a) Memorandum of Understanding

211. On 8 February 2007 VMPL, VML and the legacy companies signed a Memorandum of Understanding ("MoU") in relation to the provision of payment processing services to be performed by VMPL on or after 8 February 2007. It was a short life agreement for the period until 30 September 2007. The primary provisions were:-

(1) The companies had decided that it was desirable that VMPL, acting as principal and not as an agent for any of the companies, performs the companies' payment processing activities.

(2) The extent of such activities and the scope of the underlying functions had yet to be determined in full detail, as also the terms on which that would be performed but that since they would be "low risk" the return was likely to be "low and predictable".

(3) Notwithstanding that, the parties agreed that with effect from that date VMPL would "… undertake all the payment processing services currently performed by VML (except to the extent they relate to direct debit payments, which VMP shall only undertake from 14 February 2007) which shall, *inter alia,* include

(i) handling and processing all payments of Customers with regards to the Services;

(ii) accessing a Customer's files in order to establish the amount of any payments due by such Customer, and

(iii) updating such files to reflect any payments made by a Customer."

(4) VMPL shall be entitled to supply "payment handling services" to any customer and charge a payment handling charge for each time that a customer pays any bill in respect of Services other than by Direct Debit.

(5) VML would supply all infrastructure to permit VMPL to perform its duties in terms of the MoU.

(6) The definitions provide that

……

(f) "'Payment Handling Charge' means a fee payable by a Customer to VMP for processing its payment (which includes the transferring of the Customer's payment for Services to the relevant provider of the Services) and

(g) 'Services' means, as applicable, communications and entertainment services provided by any of the Companies."

212. The impact of the MoU is that it makes it explicit that VML was undertaking all payment processing services before the rebrand without the requirement for any separate legal entity.

(b) Payment Activities Agreements

213. On 18 September 2007, the same parties entered into a "Payment Activities Agreement" to replace and supersede the terms of the MoU. The commencement date was backdated to 8 February 2007. VMPL was again appointed by all of the companies to act as principal and not as agent (disclosed or undisclosed) to provide Collection, Handling and Processing Services to the companies. VMPL agreed that it would act as principal and not as agent (disclosed or undisclosed) to provide Customer Services to each of the companies' customers and again VML undertook to provide the infrastructure.

214. Extensive definitions were furnished and those read as follows:

"'**Collection Services'** means all matters involving the collection of payments from non-paying Customers with respect to monies due to the companies, including, but not limited to:-

(a) credit checking any new Customers and advising on the appropriate condition of sale;

(b) handling unpaid, refused and missing Customer payment;

(c) being the point of contact for the relevant Customer with regards to any payment related questions such Customer may have and helping such Customer plan how to pay his bill;

(d) handling fraudulent Card payments;

(e) engaging in collection services on any payment due but unpaid by a customer to a Company; and

(f) where necessary or thought appropriate (in VMP's sole discretion), enforcing any Contract on behalf of the relevant Companies insofar as such enforcement is confined to the collection of any payment due but unpaid to such company;".

"**'Collection Handling and Processing Services'** means the Collection Services, the Data Handling Services and the Payment Processing Services."

"**'Customer Services'** means the provision of payment handling services by VMP to the Customers in relation to all manner of payment, other than direct debit payments, including, but not limited to:

(a) processing payments made by cheque, which shall include presenting (or procuring the presentation of) Customers' cheques to their respective banks for payment of the relevant funds to VMP;

(b) in relation to any Card Transaction:

   i. establishing the Customer account in respect of which payment is to be made;

   ii. taking the relevant Customer's (or payer's) card details [(including name and address and CV2 number)] to establish the validity of its Card details presented;

   iii. checking the Card details against a [hot list] and undertaking software checks that the Card details match the details maintained by the Card issuer;

   iv. transmitting the Card details to the card issuer and requesting authorisation of the relevant Card Transaction; and

   v. procuring by transmission of the Card details as provided in (iv) above, payment of the amount of the relevant Card Transaction by the issuer to VMP; and

(c) processing bank counter payments, cash payments at Post Offices and cash payments via Paypoint;".

"**'Data Handling Services'** means the provision of information, data handling services, credit management services and the maintenance of records, including but not limited to:

(a) accessing a Customer's files with a Company in order to establish the amount of any payments due to such Company by such Customer, and

(b) updating the Companies' files to reflect any payments made by a Customer."

"'Payment Processing Services' means all matters involving the handling and processing of payments by a Customer (other than the Customer Services) made with respect to Services provided by the Companies pursuant to the terms of a Contract."

"'Payment Handling Charge' means a fee (currently £5, but subject to such variation as the Companies and VMP may from time to time agree) charged with VMP to a Residential Customer for the Customer Services".

215. Paragraphs 3.2 and 3.3 read as follows:-

"3.2 It shall be a condition of the Companies accepting payment other than through a Direct Debit Arrangement that the relevant Customer agrees and accepts that VMP will provide Customer Services to such Customer and be entitled to charge a Payment Handling Charge.

3.3 The parties acknowledge that VMP has the right to charge any Residential customer a Payment Handling Charge each time such Residential Customer makes any payment in respect of Services provided by any of the Companies other than by means of a Direct Debit Arrangement and that VMP will be entitled to retain any such Payment Handling Charge for its own account."

216. Paragraph 5.2 refers to the funding of the Collection Services prior to 1 September 2007. Paragraph 5.4 reads:

> "As from 1 September 2007 VMP will be entitled to receive a fee of £10 for every Late Payment Charge paid to VML after such date. In addition, in light of VMP's obligations under Clause 5.2, VML will pay to VMP £10 for every Late Payment Charge VML has received or receives during the period from the Commencement Date through to 31 August 2007".

217. VMPL then went on to acknowledge that its ability to provide Customer Services and therefore charge a payment handling charge and retain those funds was "conditional upon VMP Credit bearing the Non-Direct Debit Credit Risk from the Commencement Date". It undertook to pay to each company or VML, as its agent such amount as VML and VMPL jointly determined was necessary to ensure that that risk had been and would continue to be borne by VMPL. Hence the bad debt provision.

218. That agreement was amended and restated on 18 December 2008 with effect from 1 January 2008. The only material variation was Clause 5.4 which reads:

> "VMP will be entitled to receive a fee for every Late Payment Charge paid to VML. The fee shall be such amount as the parties may from time to time agree. With effect from 1 January 2008 until agreed otherwise, the amount agreed for the fee is £4.00".

219. As we indicate at paragraph 67 above there was also a Payment Activities Agreement between VML, VMPL and FES. We have not seen a signed copy but it appears to be in almost identical terms to the two other such Agreements. The Late Payment Charge was £4.00.

(c) Agency Agreement

220. Therefore also on 18 September 2007, VML and VMPL entered into an Agency Agreement. The salient provisions are that:

(a) it referred to the Payment Activities Agreement signed on the same day,
(b) it recorded that neither VML nor VMPL had entered into any formal written contracts with any of the listed third party service providers,
(c) they intended that VMPL should do so; and
(d) where it was not possible or desirable for VMPL to be a party to a written contract it was proposed that, either on a disclosed or undisclosed agency basis, VML would enter into the relevant written contract with the third party service provider or become an additional party to a contract with VML or any other Virgin Media company.

The provisions of the agreement simply indicate that until that time VML will procure that services provided to VML would be provided to VML as agent for VMPL.

(d) Operating Agreement

221. As at January 2007, VML had approximately 15,000 employees and in excess of 460 companies. For precisely the same reasons as NTL, CWS and Telewest it operated on an agency basis and an agreement in broadly similar terms was required.

222. Therefore on 8 February 2007 a Mutual Acquisition, Cost Sharing and Operating Agreement was entered into between VML and the companies set out in the Schedule (which are the legacy companies). The import of that Agreement is that each of the companies irrevocably authorised VML to effectively manage the companies, buy or sell anything on their behalf and to allocate on a fair and reasonable basis all costs, expenses and other matters.

223. Confusingly it is referred to internally as an Agency Agreement in the same terms as the 1999 NTL Agency Agreement (see paragraph 53 above). Indeed in a document dated 26 January 2007 and headed "Transfer Pricing issues re the Agency Agreement" both are generically referred to as the "Agency Agreement".

(e) In-house note

224. On 16 March 2012, the appellants produced to the Commissioners a copy of an in-house note which had been prepared on 4 January 2007 and which was designed to describe VMPL's activities, the implications for customers' operational activities and for finance and accounting. The key points that it made were as follows;

> "18. The rebranding of customer facing activities … should not impact the way those activities are carried out within the group at an operational level. The introduction … should not have a significant impact on how those operations are carried out. Operational customer facing activities … will continue as before.
>
> 21. Payment handling activities and possible Customer Collection activities will be housed within the corporate wrapper of Virgin Media Payments Ltd for statutory accounting purposes, but this should not change the day to day operations of either payment handling or collection activities … It simply means that the current cost centres will be mapped to Virgin Media Payments Ltd as part of statutory entity reporting.
>
> 34. Setting the appropriate arms-length charge for services by Virgin Media Payments Limited is complicated by the fact that the £5 payment handling charge for customers who do not pay by direct debit, is unrelated to the cost of handling those payments. Instead it is set at a level designed to be sufficiently high to encourage those customers to choose to switch to paying by direct debit. If it were completely successful in achieving this objective Virgin Media Payments Ltd would earn no direct income from customers, and would need to be separately compensated…
>
> 35. If Virgin Media Payments Ltd receives the £5 charge from customers and is also compensated for handling other payment methods, it seems likely that it would make a profit vastly in excess of what the group would pay to a third party, because the £5 is not a reflection of handling costs.
>
> 37. Paying handling activities will be carried out under the corporate wrapper of Virgin Media Payments Ltd. This will not change the way in which those activities are presently carried out."

J. Statutory Accounts

225. The Directors Report in the first accounts for VMPL, being for the period ended 31 December 2007, reads:

> "… The company provides payment handling and collections services on behalf of the Virgin Media group …

> The company receives revenue in the form of payment handling charges incurred by those residential customers not settling by direct debit and management charges from the group companies for whom the company acts in collecting direct debit payments …
>
> The company centrally manages the majority of the Virgin Media group's credit control procedures and processes and therefore incurs significantly all of the bad debt exposure".

226. In the following two years, there was no change to the third sentence but the equivalent report reads:

> "… The company acts as the collections agency for significantly all the Virgin Media group trading companies and has been responsible for their payment handling activities together with customer collections and related operations".

227. In 2010 and 2011, the format changed and the wording was:

> "The principal activity of the company was, and will continue to be, that of the provision of payment handling and collection services in respect of substantially all of the Virgin Media group's residential fixed line telephone, television and broadband internet customers. Virgin Media group customers contract directly with the company for the provision of its payment services, with recipients of these services choosing to pay by methods other than Direct Debit having to pay a payment handling fee per payment".

228. In fact the last few words are not accurate. The payment handling charge is for each monthly bill that is not paid by Direct Debit. A customer is at liberty to make multiple small payments in any month. It is not made explicit that VMPL's role in providing payment handling and collections services is to VML and to the legacy cable companies that still trade but not to Virgin Mobile (which is part of Virgin Media group) although that is inferred because of the reference to "fixed line telephone".

K. Charges in respect of non-Direct Debit payments before and immediately post rebranding

229. During the period from July 1998 until rebranding, the various companies had supplied media services to both residential and business customers. Although at one time it had been argued that there was no evidence of any payment handling charges through NTL for business customers it may be that some smaller businesses had to pay it. Both the NTL and Telewest legacy companies had applied payment handling charges for all residential customers choosing to pay other than by Direct Debit.

230. The Telewest broadband mini guide relating to contracts from March 2003 read:

> "Important Direct Debit. All customers who do NOT pay by direct debit will now be charged £2 administration fee each month. To avoid paying this fee, and to save yourself time and hassle, simply call us …".

Further on in the guide a note is highlighted which states:

> "Important: all prices quoted are for payment by Direct Debit. All customers who do NOT pay by direct debit will now be charged a £2 administration fee each month …".

231. Mr Mullins indicated that he understood that prior to the imposition of the March 2003 £2 administration fee, customers had been offered a discount for paying by Direct Debit but the quantum of that is unknown. By the time of the merger with NTL the Telewest payment handling charge had increased to £4.

232. NTL had had a payment handling charge in place from at least 2001 of £1 for customers who purchase one service and £2 for those purchasing two or more services. It remained at that level until at least 2005 but had increased to £4 by the time the present £5 payment handling charge was introduced following the merger.

233. The Commissioners had challenged Telewest's VAT treatment of those charges as long ago as 20 June 2005 and that was appealed to the Tribunal in 2005. In 2009 the Commissioners challenged Voluntary Disclosure claims submitted by NTL in September 2006 and subsequent periods covering the period from 1 July 2003 to 31 March 2006. Those challenges resulted in five appeals to the Tribunal which were withdrawn in July 2012.

234. As we indicate at paragraph 20 above, although there was debate in the second hearing for the reasons for those withdrawals, it is entirely consistent with Mr Cordara's very frank concession on the second day of the original hearing that "I, of course, accept that if the supplies had simply been made by VML, *Everything Everywhere* concludes the matter against us."

235. As we indicate above, by October 2006, advice was actively being sought from PwC. Indeed, at a meeting with HMRC on 1 May 2007, the then Group VAT Manager confirmed that external advice had been to the effect that following the cases of *Bookit, Telewest* and *SEC,* provided they had in place a contracting company with a real and separate personality, then the group would have a significantly stronger position, particularly with regard to *CPP* challenges, ie challenges by the Commissioners based on the *CPP* case.

236. On 21 March 2007, the appellants wrote to the Commissioners stating that:

(a) As a requirement of the Virgin licence, the Business division processes were not rebranded and should be separated as far as possible from the Virgin brand.
(b) VMPL was managed by, and part of the Consumer division at an operational level and provided payment handling services to all Consumer division customers.
(c) The primary areas that constituted the payment handling services at that date were:

- "providing and receiving payment information to and from banks and other payment handlers such as Paypoint,
- preparing and transmitting applications for direct debit payments to the banks,
- crediting payments received to customers' ledger accounts,
- reconciling bank etc statements to the subscriber management systems, in particular allocating payments to the correct systems and customer accounts".

L. Virgin Media's rationale for the payment handling charge and payment to VMPL

237. There are four principal reasons behind the acknowledged drive to encourage customers to pay by Direct Debit and they are as follows:

(a) The transaction costs associated with Direct Debits are much lower and the administration costs of a failed Direct Debit is a mere 24p per incident compared with £9.99 for other payment methods (as at 2013).

(b) The administrative burden is much reduced in that although 84% of customers paid by Direct Debit, in 2013, approximately 80% of the time of the payment processing team was spent in dealing with the remaining 16% of payments made by non-Direct Debit methods. That work involved reconciling payments with bills and liaising with banks and the other service providers through whom the non-Direct Debit payments were made.

(c) There is a significantly lower rate of default not least because customers do not have the opportunity to "forget" to make their payments. There are therefore significantly lower rates of churn and bad debts. That represents secure revenue and cash flow streams.

(d) VML take the view that the customer has a better overall "life time experience" if making payments by Direct Debit.

238. VML argue that their choice to present payment by Direct Debit as a "saving" is simply part of the drive to ensure that as many customers pay by Direct Debit as possible. However, they say that they remain committed to maintaining customer choice.

239. It is accepted that the discounts or charges both pre and post merger and rebranding were a "carrot and stick" approach to endeavour to eliminate non-direct debt payments, although it was accepted that that would never be entirely achieved.

240. It was argued from a Treasury perspective that consolidating all outbound or payment bank accounts into VML and all inbound or receiving bank accounts into VMPL make it easier to track cash, obtain trending data for managing and forecasting future cashflows, manage payments and revenue and reconcile bank accounts.

M. Summary of Payment methods in 2007

241. Although the promotional materials specified only five alternative means of payment, in practice there were numerous payment methods in place in 2007. Those included:-

(i) Direct Debit

(ii) Credit and debit card

(iii) PayPoint (payment made at retail shop)

(iv) Payment at own bank

(v) Cheques by post

(vi) Telephone and Internet banking

(vii) Payment at Post Office (Girobank)

(viii) E-billing (this was initially only available to ex Telewest customers on the ICOMS subscriber management system)

(ix) BACS (standing orders)

(x) Secure Homes (Birmingham & Midlands regions only, a service of Secure Trust Bank) – this was only available to customers on the ICOMS subscriber management system and so was phased out

(xi) Cash and postal orders by post

(xii) Payments receive by debt management companies.

242. On 1 June 2007 and in March 2008 papers were produced outlining the processes whereby customers paid VMPL. The second report was produced for the Commissioners and sent to them on 28 March 2008 explaining that because of the rolling programme of systems and procedural migration the processes had changed. In 2007 three teams handled payment processing but by 2008 there was only one team. Payment Processing was responsible for:

- Receiving data provided by banks and other payment handlers, running it through various processes and crediting customers' accounts.

- Preparing and submitting data to BACS or VOCA Limited (the main hardware transmission company that links up with or operates on behalf of BACS) to apply for Direct Debit payments.

- Managing refunds, unpaid refused payments and missing payments.

243. Monthly reports are presented to Virgin Media Senior Management on the performance of the payment processing team(s). Daily payment processing reports are provided to the Cash and Bank Reconciliation Team who later match bank receipts with the amounts posted to customer accounts.

244. In both 2007 and 2008 there was a Cash and Bank Reconciliation Team and that team was responsible for:

- Reconciling funds credited to VMPL bank accounts by the Payment Processing Team, with the amounts recorded on ICOMS by the Payment Processing Team.

- Ensuring that the correct amounts sit in the correct bank accounts and reallocating monies accordingly. If the funds credited do not agree with the payments processed then the team will investigate, usually by direct contact with the bank and other handlers.

245. In 2007/2008 the payments handled by VMPL by payment type and volume were as follows:-

2007/08	Volume
Direct Debit	76.3%
CardPoint (credit and debit cards)	10.95%
Cheques	1.45%
Bank Automated Clearing System ("BACS")	0.14%
PayPoint	7.13%
Bank Counter	3.17%
e-Billing	0.35%
Internet Banking	0.43%
Cash (including postal orders)	0.09%

N. Payment Channels

(a) General

246. Regardless of the method utilised for payment, in order for the payment to be credited to the correct customer account, there is an essential administrative function of allocating and reconciling the payment(s) and updating the customer account on the VML ledger. This requires the making of appropriate accounting entries. This culminates in the issue of the next bill which shows the then financial position.

247. From the customer's perspective the payment is made when the credit or debit card details are accepted, or the cheque posted or payment made in any other form albeit, with the exception of cash, the funds may not have left the customer's account.

248. VMPL, and previously VML and its predecessors, employ numerous third party providers to assist in the processing of funds received, or not, from customers.

249. Inevitably a percentage of payments are either difficult to allocate to customer accounts or fail and that involves a greater administrative burden.

250. From time to time VMPL must issue a refund to a customer or initiate debt collection activity.

(b) Direct Debit

251. Customers can set up Direct Debits face to face, online or over the telephone providing their bank details, sort code and account numbers which are then verified and saved to the billing system. The following working day Direct Debit set-up files are sent via a third party BACS processor ("Webseries") to BACS. If the setup is successful, the Direct Debit will be available to be claimed against the customer's account within approximately five working days.

252. Once the Direct Debit is in place the customer's account automatically generates the amount to be billed. The customer's ledger is effectively closed and netted off showing the balance due thereby creating the bill. The bill will state that payment is due to be collected by Direct Debit on a certain date. On the second working day before the due date for the Direct Debit payment ICOMS will generate a Direct Debit payment request against each customer's account. Those requests are set up to claim the payment two working days later. The Direct Debit payment is credited to the customer's account in ICOMS on the day that the payment request is sent to the bank.

253. Direct Debit requests are sent to the banks via BACS each day in batch files. The batches range in size from 10 requests up to a maximum of 33,333. The batches are submitted using Webseries.

254. The banks transfer the funds via BACS and once the payments are received approximately two working days later they are automatically allocated to the appropriate customer ledger. If a Direct Debit fails the failed payments are also automatically recorded and collection activities triggered.

255. The processing of Direct Debits is almost entirely automated and the only manual activity relates to the auditing, authorising and processing through a user-friendly electronic system.

256. If a Direct Debit fails the Payment Processing team issues letters to the customer. In 2008 that function was outsourced to R R Donnelley Business Process Outsourcing Limited ("RRD") a third party cheque processing and data capture provider.

(c) Payment by credit and debit cards (excluding Amex and Diners Club International which were not accepted)

257. Customers make payments by calling the Virgin Media call centre, by calling customer services and selecting the automated payment option or by online e-billing. The latter two processes were entirely automated and the only difference between them and the first was that in the first a customer services representative enters the card details into CardPoint which is a Virgin Media internal software system for capturing and processing card and payment information.

258. It is CardPoint that verifies that the card is superficially valid (eg not out of date) and initially either authorises or rejects the payment. If authorised then it transmits the information to DataCash Ltd which formats the card information received from customers into a form recognised by a bank known as a "merchant acquirer". It acts as

a secure link to the merchant acquirer. In 2007 VMPL used two merchant acquirers, namely NatWest Streamline and Barclays Merchant Services ("BMS"). Since February 2012 BMS has been the sole merchant acquirer.

259. DataCash Ltd are contractually obliged to provide "standard bank card services". Those services included obtaining authorisation codes for and on behalf of VMPL by lodging the required authorisation requests with the merchant acquirer and receiving the authorisation responses. DataCash Ltd then stores that information in a batch file and transmits confirmation that the payment has been authorised or refused to VMPL via CardPoint.

260. The merchant acquirer submits the authorisation request to the card scheme (eg Visa or Mastercard) which in turn submits the request to the card issuer bank.

261. The effect of the authorisation code from the card issuer bank is to confirm that the card number is valid, that the card has not been reported as lost or stolen and that the customer has sufficient credit or funds to make the payment and that those funds are temporarily ring fenced and held for VMPL.

262. Within 24 hours of authorisation, DataCash Ltd sends a batch settlement file to the merchant acquirer for onward transmission to the card issuer bank. The merchant acquirer should receive settlement from the card issuer bank within one working day and VMPL (under deduction of the merchant acquirer's fee) within approximately three working days but that can vary.

263. Internally the CardPoint payment files are automatically extracted and loaded onto ICOMS using FTP Pro software and the customer's account is credited. A similar process to that described for cheques is then completed for payment allocation and bank reconciliation.

264. Customers can also pay by debit card at banks using the giro slip with the bill. Those payments are authorised by the banks concerned and transferred into VMPL's bank accounts. Data files are sent to VMPL and the payment allocated and bank reconciliation completed.

265. Lastly the customer will have a record that the payment has been processed when the next bill is received and, of course, on receipt of the credit or debit card statement.

266. Mr Mullins confirmed that VMPL does not obtain authorisation direct from the card issuer bank. All authorisations are made via the normal merchant acquirer route, that is Streamline or BMS.

(d) Telephone and internet banking generally

267. The bill gives a single bank account number for payment by these methods. That is a system inherited from NTL and Telewest. That is not possible for other methods of payment. Although internet is recorded by VMPL as a payment method, it refers to payments made via BACS using the internet service provided by the customer's bank. Telephone banking is also achieved in that manner.

(e) Cheque Payments and Postal Orders

268. Cheque and postal orders processing is almost entirely outsourced.

269. The preferred method of collection is for the customer to send the cheque or postal order together with the giro slip to a PO Box operated by RRD on behalf of VMPL. In 2007 it was RRD for ex NTL customers and Natwest for ex Telewest customers.

270. Customers can and do send payments directly to VMPL or other Virgin Media offices but they are then sent to RRD for processing if the giro slip is attached.

271. If no giro slip is attached Mr Mullins states that "VMPL will often process the cheque in-house, as the more onerous reconciliation and higher processing fees make this the more efficient way of processing the payments". Once the customer has been identified the Payment Processing team prepares bank credit slips for each batch of cheques and Loomis, a security company, collects the batched cheques and credit slips and delivers them to the relevant banks. If the cheque cannot be processed then VMPL contacts the customer.

272. RRD log the cheques and present them to the relevant VMPL bank identified by the giro slip (see below). At the end of each day RRD send electronic batch data files through their "secure" lockbox facility to the Payment Allocation team detailing the total values together with summary reports. In the first instance the crediting of cheques to ICOMS is an automated process, the team having divided the file into regions, it is uploaded to ICOMS which causes each payment to be credited to the relevant customer accounts. Errors are corrected manually. If RRD lack information then each morning they provide the partial data to VMPL and the missing information is accessed and provided, where possible, by the team.

273. Once the cheques have been credited to the VMPL bank accounts then the Bank Reconciliation team upload the batched files and the NXG system reconciles the individual receipts with the information previously uploaded to ICOMS. Once reconciled the relevant customer's account balance is updated. Where the supply is by a legacy company the appropriate credit entry is thereafter made internally.

274. Cheques that "bounce" are returned direct to VMPL by the banks and not by RRD. VMPL then initiate collection "activity". Mr Mullins explained that "A member of the payment processing staff will create manual entries in the VMPL ledgers and update an internal statement of payments." That triggers the issue of a letter to the customer.

(f) Bank Counter and Post Office

275. VMPL accepts cheques, debit cards and cash in these outlets. The process was:

(a) Customers can present the giro slip and make payment over the counter at a high street bank. The bank processes the payment and remits payment to VMPL via BACS using the unique customer identification reference number on the giro slip. The Post Office will accept payment without the giro slip but with, say, an account reference. That carries a higher risk of misallocation to the correct customer account.

(b) Each day the Cash and Banking Reconciliation team downloads BACS reports from each of the major clearing banks using internet based online banking connections and those reports are batched into regions to match ICOMS and then transmitted to the Payment Processing team. Payments are then processed in batches, reconciled and then posted to the customers' accounts. This applies to all BACS payments, however made, including those made via internet and telephone. Of course, a percentage will have inaccurate reference numbers and further work will be required in order to reconcile payments.

(c) Although not advertised, VMPL does accept bank transfers from customers. Those are processed by BACS or telephone or internet banking. This can often involve a significant workload in terms of reconciliation which frequently has to be accomplished manually since the payments may not be adequately referenced.

(d) Payment at the Post Office is only accepted if made in cash. The Post Office remitted the funds to Alliance and Leicester Commercial Bank ("ALCB") prior to 2010 and since then to Santander UK plc ("Santander"). ALCB or Santander send a daily data file to VMPL stating the total and the number of transactions. They remit the money to VMPL the following day. The IT support teams validate the data files and load the data to ICOMS. Payments are then credited in batches by the Payment Processing team.

276. VMPL has a contract in place with Santander for the provision of bill payment services. Santander operates a scheme called "Transcash" and all VMPL Transcash giro slips (sent with the paper bill) bear the words "standard fee payable at PO counter". In 2014, the fee was £2.95 and it is payable to the Post Office. It is believed that the Post Office and Santander share that fee.

(g) PayPoint

277. PayPoint is the primary method of accepting cash payments. The customer's paper bill has a bar code which includes the customer's reference information.

278. The customer makes a payment (which might only be a partial payment and one of several for one bill) through a PayPoint terminal in a retail outlet where the barcode is scanned and a PayPoint VMPL receipt issued. Of course the payment goes into the retailer's bank account. PayPoint collects all funds for all of their clients, from all of their outlets, by daily Direct Debit placing it into a holding account. It then allocates all of the payments to its client files. The funds for VMPL are placed in a settlement account before being transferred to a VMPL bank account by BACS payment some days later.

279. In the interim, for VMPL, PayPoint sends three client files (based on the regions confirming the values and the volume) to the Payment Allocation team, usually within 24 hours of payment. The files are validated in-house and uploaded to ICOMS where the payments team create credits against customer accounts, provided the correct reference has been used. At that point VMPL have the data and so credit the customer accounts but have not received payment. The Bank Reconciliation team then finish the process.

280. Mr Mullins confirmed that PayPoint charges £0.29 per activity. Certainly on 22 February 2007 PayPoint was billing VML for "collection services". By 2011 the invoices were addressed to VMPL, the contract having been novated to VMPL at some unknown date but which we find was likely to have been in or around 2008.

(h) Debt Management Agencies

281. Payments are received through intermediate debt management agencies by any available means.

O. High Level view of the Arguments other than Abuse

282. On day 4 of the second hearing Mr Pleming pointed out that the Tribunal had detailed submissions and had been referred to in excess of 80 Authorities. The four Skeleton Arguments extend to 125 pages alone and they include copious footnotes and references to other documents. Numerous other Authorities have also been tabled. The submissions on *Bookit* and *NEC* and exhibits and submissions relating thereto, excluding Mr Mullin's fourth witness statement, extend to 72 pages. We also have short submissions on *HMRC v DPAS*[10].

283. Although, of course, we have read all of the arguments and the Authorities it is simply not practicable to canvas all of the disparate arguments on either the facts or the law.

284. At a very high level therefore the relative positions in regard to the proper VAT analysis applicable to the payment handling charges can be stated as:

(a) For the appellants

The appellants core position is that firstly, they argue that the customer has a choice whether or not to incur the £5 fee. Secondly, they consider that the payment handling charges are exempt supplies within Group 5 Schedule 9 VATA as the "transfer or receipt of, or any dealing with, money" or as intermediary services in relation to the "transfer or receipt of, or any dealing with, money" (Items (1) and (5) respectively of Group 5). The payment handling charge of £5, therefore, as consideration for the payment handling services, is exempt from VAT.

Further, they argue that although VML and VMPL are members of the VAT Group, nothing within Section 43 VATA has the effect of characterising a supply to a non-member of the group as if it were part of a single supply by the representative member.

(b) For the Commissioners

The Commissioners' preferred overview is that the VAT Group supplies taxable services to customers and the consideration that it earns for those taxable supplies

[10] Case C-5/17

is collected by another VAT Group company, and any monies received are swept each day into the Virgin Media Group accounts. VMPL therefore is not making supplies to the customers, nor will it be treated as making supplies to the representative member of the VAT Group, namely VML.

Effectively, there is no separate supply of payment handling services. However, if and to the extent that there is a supply of payment handling services, that service should be treated as an ancillary component of a single taxable supply.

VMPL acts under the control and direction of VML and nothing of substance has changed since before VMPL commenced trading.

P. The relevant VAT Legislation on supply and also supply in a VAT group context

285. As can be seen, at the heart of this appeal, is the question of "supply". Article 2(1) of the PVD provides as follows:

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

286. The PVD is implemented, as was the Sixth Directive before it, by VATA.

287. It is not in dispute that the scope of VAT on taxable supplies is to be found at Section 4 VATA which reads:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply of goods or services made in the United Kingdom other than an exempt supply."

288. In relation to the VAT treatment of groups, Article 11 of the PVD is discussed by Lord Hodge in *HMRC v Taylor Clark Leisure PLC*[11] ("TCL") at paragraphs 19 to 21 which read as follows:

> "19. The starting point for consideration of the parties' submissions is article 11 of the Principal VAT Directive, Council Directive 2006/112/EEC of 28 November 2006 ('the Principal Directive') which provides:
>
>> 'After consulting the advisory committee on value added tax (hereafter, the 'VAT committee'), each member state may regard as a single taxable person any persons established in the territory of that member state who, while legally independent, are closely bound to one another by financial, economic and organisational links.

[11] [2018] UKSC 35

> A member state exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.'

Two points may be made about this provision. First, it is permissive. There is no obligation on a member state to institute such a regime. Secondly, it is not prescriptive. It does not lay down a template as to how a member state will treat a group of persons as a single taxable person. It shares these characteristics with its predecessor, article 4.4 of the Sixth Council Directive of 17 May 1977 (77/388/EEC) ('the Sixth Directive').

20. The UK took up the opportunity to establish VAT groups of companies, initially in section 21 of the Finance Act 1972 and later in section 29 of the Value Added Tax Act 1983 ('the 1983 Act'). The current provision is section 43 of VATA, as amended, which provides, so far as relevant:

> '(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and -
>
> > (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
> >
> > (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; …
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member.'

21. It is clear from the statutory words in section 43(1) of VATA that the UK chose to achieve the end which the Directive authorised not by deeming the group to be a quasi-person but by treating the representative member as the person which supplied or received the supply of goods or services."

289. We have set out at Appendix 2 the full text of Section 43 VATA, as amended.

Q. Discussion and Decisions on supply and groups

290. Although the parties identified five issues, the inferences to be drawn from the facts run across all of them to a greater or lesser extent. We have therefore adopted a more general approach. Our starting point is to consider who or what is the "taxable person" in the context of this appeal since only the taxable person can make a supply that is subject to VAT.

The VAT Group

291. At the time of the hearings there was a lack of clarity and conflicting FTT and other decisions in relation to the effect of Section 43 VATA, but in the interim jurisprudence relating to this legislation has moved on apace. In particular, Lord Hodge in *TCL* made the following points:

(a) As can be seen at paragraph 21 he is clear that it is the representative member, ie VML in this case, who is to be treated as the person which supplied the services.

(b) At paragraph 22, having relied on Lord Nolan in *Customs and Excise Comrs v Thorn Materials Supply Ltd* [12] ("Thorn"), he stated: "I do not construe Lord Nolan's reference to "dealing on behalf of" the other members of the VAT group as a reference to an agency relationship. Section 43 is not concerned with intra-group legal arrangements of group members. It is concerned with dealings in relation to VAT with entities outside of the VAT group and with HMRC…In its dealings with HMRC in relation to VAT the representative member is treated as carrying on the businesses of the other members of the group."

(c) At paragraph 23: "In *Ampliscientifica Srl v Ministero dell' Economia e delle Finanze* (Case C-162/07) … the CJEU (paras 19 and 20) explained that article 4.4 of the Sixth Directive, if implemented by a member state, had the effect that companies in a VAT group were no longer treated as separate taxable persons for the purpose of VAT but were to be treated as a single taxable person."

(d) At paragraph 24: "The words in section 43(1) are clear beyond question: 'any business carried on by a member of the group shall be treated as carried on by the representative member."

(e) At paragraph 26: "…it is the appointment of a company as a representative member of the group which provides the legal person which is the taxable person."

(f) At paragraph 27: "Section 43 of VATA does not make the group a taxable person but treats the group's supplies and liabilities as those of the representative member…", and

(g) At paragraph 31: " In this regard I agree with the impressive analysis of the single taxable person in the context of a subsisting VAT group by the FTT (Judge Roger Berner and Mr Nigel Collard) in paras 73-75 of the decision in *Standard Chartered plc v Revenue and Customs Comrs* [2014] UKFTT 316 (TC)…In particular, as Judge Berner stated (para 73): 'Under UK law, as set out in section 43 VATA, the concept of the single taxable person is properly implemented through the representative member…The representative member is not the agent or trustee of the constituent members of the group. It is … the domestic law embodiment of the single taxable person…".

292. In the course of the hearings we had been referred to *Taylor Clark* (which was then subject to appeal) *Ampliscientifica, Thorn* and *Standard Chartered* so it is very helpful to have such an authoritative and clear exposition of the law.

293. We observe in passing that Lord Hodge, as *obiter dicta,* stated at paragraphs 40 and 41 that he declined to make a reference as to whether his interpretation of Section 43 VATA was compatible with Article 11 of the PVD. His reasoning was that a ruling by the CJEU that a member of a VAT group is a member of a single taxable person would not alter the conclusion in that appeal. Even if there were such a ruling we do not see any application in this appeal.

[12] [1998] 1 WLR 1106

294. We see no dubiety in the reasoning advanced by Lord Hodge. Indeed his reference in paragraph 25 to *Skandia America Corp. (USA), filial Sverige v Skatteverket*[13], to which we were also referred by the parties, reinforces our view that the taxable person is the representative member and that any supply must therefore be treated as made to or by the representative member. In that case a third party supply to a member of a VAT group was treated not as a supply to the member but as a supply to the group.

295. As the appellants correctly state at paragraph 5 of the Statement, in EE the media services and the payment handling services were provided by the same legal entity and therefore the additional payment handling charges were not to be treated as a distinct and independent supply.

296. The logical *sequitur* to that is that the taxable person, ie VML, who, for VAT purposes is treated as making the supply to the customer of both media services and the payment handling services, cannot therefore be treated as making a distinct and independent supply of the payment handling services.

297. For the reason set out in the quotation from Lord Nolan in *Thorn* at paragraph 291(b) above we disagree with Mr Cordara's argument that Section 43 VATA is a purely inward looking fiction.

298. We agree with the Commissioners' assertion that since the effect of the VAT grouping is that the single taxable person, in the person of the representative member, makes the supply or supplies then there is no escape from the CJEU decision in *EE.*

299. However, if we are wrong in that we must look at the other arguments on the effect of grouping.

300. Mr Cordara argued that, unlike in *EE* where there was only one supplier, the services supplied by VML are provided partly as principal and partly as agent, so the Commissioners must be relying on the deeming provisions in Section 47(3) VATA. Therefore the *CPP* concepts of ancillary supply come into play. Section 47(3) has nothing to do with groups but reads "Where services … are supplied through an agent who acts in his own name may, if they think fit, treat the supply both as a supply to the agent and as a supply by the agent."

301. However, we agree with Mr Pleming that where, as here, there is an all-encompassing VAT group, that section is not of any great relevance since Section 43(1)(a) VATA provides that all intra group supplies are disregarded.

302. In finding that the representative member is the taxable person who makes the supply we do not see that there is any conflict with the line of authority to the effect that Section 43 VATA does not have the effect of altering the character of a supply made to a person outside the group.

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[13] Case C-7/13 or [2015] STC 1163

303. Indeed Judge Berner addresses that very issue at paragraph 70 of *Standard Chartered* which reads:

> "70. That is not to say that the single taxable person concept is all-encompassing. It operates only at the level of the VAT consequences of the transactions carried out by the group members, and does not coalesce the group members for all purposes. Those group members remain individual entities as a matter of law. Regard must be had to the real transactions they carry out. It is only the VAT effect of those transactions, once identified by reference to the real facts, that is governed by the single taxable person construct. The single taxable person fiction does not alter the character of the actual transactions, or combine what would otherwise be separate supplies into a single supply."

We agree and in particular that it does not combine separate supplies into a single supply for purposes <u>other</u> than VAT.

The Transactions

304. The issue then for the Tribunal is to decide whether there was a separate supply made by VMPL and, if so, to whom.

305. In 2013, the Upper Tribunal issued its decision in *The Honourable Society of Middle Temple v HMRC*[14] ("Middle Temple") and, under the heading "Principles derived from CJEU cases", at paragraph 60 set out those principles as follows:

> "60. The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
>
> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
>
> (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

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[14] [2013] STC 250 (TCC)

> (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.
>
> (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
>
> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
>
> (12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

306. That appeal had been stayed pending the issue of the decisions of the CJEU *Purple Parking and Airparks Services v HMRC* ("Purple Parking")[15] and *Field Fisher Waterhouse LLP v HMRC* ("Field Fisher Waterhouse")[16]. The principles set out at paragraph 60 are derived from the exposition of the law in the latter case which referred to the former case. We annex at Appendix 3 a copy of paragraphs 14 to 26 of *Field Fisher Waterhouse* which references the cases on which reliance was placed.

307. At paragraph 61 of *Middle Temple,* Judges Sinfield and Gort pointed out that it was apparent that in *Field Fisher Waterhouse* the tenant had no choice but to receive the services from the landlords. They had no right or opportunity to obtain the services from a third party. They stated:

> "In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply."

308. We find that from the perspective of a typical customer who did not, or could not, pay by Direct Debit the choice was to sign the contract for provision of media services which included the liability for the payment handling charge, or not to obtain the media services at all. There was no possibility whatsoever of obtaining any assistance from an independent third party. Furthermore, for many of those customers there was no real choice in any event. If one does not have a bank account or one's income fluctuates payment by Direct Debit is simply not even a possibility.

The contract with the customer

309. The Supreme Court has held that the contract is the starting point in determining the nature of a supply and the legal rights and obligations between the parties. This is

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[15] Case C-117/11 issued on 19 January 2012

[16] Case C-392/11 issued on 27 September 2012

because the contractual position normally reflects the economic and commercial reality of the transactions.

310. Thus, in *HMRC v Secret Hotels2 Ltd*[17] ("Secret Hotels2"), Lord Neuberger stated at [31]- [32]:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J. said in A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214, para 40, in a passage cited by Morgan J:
>
>> 'The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy* Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.'"

311. We have also had regard to Lord Neuberger in *Arnold v Britton and others*[18] at paragraph 15 which reads:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

312. For the avoidance of doubt, although, following *Middle Temple* we have made findings about what the typical customer might think, we stress that is not what the

[17] [2013] STC 784

[18] [2015] 2 WLR 1593

customer might subjectively think but rather objectively what such a customer would think.

313. We have set out at length our findings in fact but as far as the T&C are concerned, it is obviously tripartite and the payment handling charge is clearly identified as is the fact that it is payable to VMPL.

314. We note that section F3 of the T&C means that if a customer pays for the media services in full, nevertheless if the payment handling charge is not paid VML has the right to terminate the media services. That is not suggestive of separate supplies.

315. There is a lack of clarity in relation to a number of matters in the contract. For example although the contract is between VML, VMPL and the customer, as we point out at paragraph 96 there are repeated references to Virgin Media. Further, the contract is described as a "two-way thing" yet there are purportedly three parties.

316. As we point out repeatedly, payment handling services are not defined. Whilst, to an extent, we understand the argument that those words are self-explanatory, nevertheless, our findings at paragraph 98 are crucial. In particular we are clear that all a typical customer would know is that if they wanted access to media services then they had to pay VMPL not VML and if they paid by Direct Debit it would cost less.

317. To use the words of Lord Neuberger, it is "commercial common sense" that although VMPL is described as providing payment handling services for the customer, the reality is that VML is using VMPL, as its agent, to collect all of the monies due. That is borne out by the wording in the bill itself (see paragraph 113).

318. Although F1 of the T&C states that VMPL will collect, process and apply payments the emphasis is on "process" as can be seen at paragraph 93 above. That is borne out by the Memorandum of Understanding (see paragraph 211(1), (3) and (6) above).

319. It was argued for the appellants that the payment handling charge is severable from the provision of media services because the £5 fee "…is not synchronised at all with service delivery" because the supply of media services has been made before the fee is charged. We disagree. As we point out at paragraph 106 customers are billed in advance for the basic monthly service and in arrears for those parts of the media services, such as, for example, pay per view television services, and the payment handling charges that they have already incurred. The £5 fee is embedded in the middle of the bill. We have no difficulty in finding that, in the words of paragraph 54 of *Ministero dell'Economia e delle Finanze v Part Service Srl*[19], the bill is "… evidence [which] discloses the characteristics of a single transaction".

320. We rely on, and are bound by the decision of the Upper Tribunal in *General Healthcare Group Limited*[20] ("GHG"). In that case, after analysing the law on single

[19] [2008] STC 3132

[20] [2016] UKUT 315 (TCC)

composite supply or multiple separate supplies the Tribunal found at paragraph 45 that after *Levob Zerzekeringen BV v Staatssecretaris van Financiën*[21] ("Levob")

> "… there can be a single composite supply where two or more elements supplied by the taxable person to the typical consumer are not in a principal/ancillary relationship but are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split".

321. We observe that the Tribunal went on to consider both *Telewest* and *C&E Commissioners v Wellington Private Hospital Ltd & Others*[22] ("Wellington") both of which cases were referred to extensively in the course of the submissions in this appeal.

322. It was argued at paragraph 61 in *GHG* that in *Telewest*:

> "The Court of Appeal had held that supplies by two separate suppliers, **not being members of a VAT Group**, could not be treated as a single supply. At [80], Arden LJ referred to the fact that Millett LJ had expressed the view, obiter, in *Wellington* that supplies by two separate suppliers could not be treated as principal and ancillary supplies."

The Tribunal distinguished *Telewest* on the basis that it was concerned with very different facts and did not provide the answer to the question in *GHG*.

323. The Tribunal had considered whether or not *Wellington* was still good law and at paragraph 60 had decided that the approach in *Wellington* "… could no longer be regarded as correct after *Levob*."

324. It is we who have highlighted in bold in the quotation the crucial distinction between *Telewest* and this appeal.

325. We conclude that the media services and the payment handling services are, therefore, not only inseparable but also indispensable in relation to the access to the media services from the point of view of those customers who did not use Direct Debit. Consequently, it is not possible to regard the media services as the principal service and the payment handling service as an ancillary service. The two are so closely linked that, objectively, they form, a single indivisible economic supply that it would be artificial to split. Accordingly the supply is a single supply which is chargeable to tax at the standard rate. In that context there is no supply by VMPL.

326. If we are wrong in that then we must look at the alternatives. As we point out at paragraph 93 the only explanation of payment handling services is that the payments due to VML will be collected, applied and processed.

327. We have made a number of key findings in relation to the Welcome Pack, of which the T&C form part. Although it was argued that we should focus on the contract, being the T&C, we are in no doubt that we must carefully consider all of the circumstances relating to the transaction and that includes the Welcome Pack, the bills

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[21] [2006] STC 766

[22] [1997] STC 445

and the other customer facing documentation. We do so, given the finding at paragraph 26 of *EE* which reads:

> "…the essential features of the transaction must be ascertained and regard must be had to all circumstances in which that transaction takes place (see to that effect, *CPP* (paras 28 and 29); *Aktiebolaget NN* (paras 21 and 22); *Ludwig* (para 17; and order in *Tiercé Ladbroke and Derby* (paras 19 and 20)."

328. In particular, in regard to the Welcome Pack, at paragraph 86, for the reasons given, we find that Virgin Media was marketing a **saving** if payment was made by Direct Debit. That is consistent with other references to discounts and savings.

329. It is also consistent with Mr Mullin's confirmation that the absence of a payment handling charge for payment by Direct Debit but the imposition for other methods of payment was a carrot and stick approach. As we see the matter, the contract provides that VML will furnish the customer with the media services for which it reasonably expects that the customer will have to pay. VML's preference is that payment is made by Direct Debit so therefore we agree with Mr Pleming's argument that the carrot and stick approach can only be an approach for VML.

330. If the object were to maximise VMPL's returns then a strategy whereby payment by Direct Debit was encouraged, as it admittedly most certainly was, would be counter-productive.

331. The last key document that is customer facing is the bill and, as we state at paragraph 107, that is very important. At paragraph 112 we have found that the payment handling charge is simply part of the bill for services from Virgin Media.

332. Once the customer provides its credit or debit card details, pays PayPoint, puts a cheque in the post or arranges other forms of payment, it has no interest in the processing of the payment or by whom. From the point of view of the typical customer the payment handling service provided by VMPL, at VML's instigation, is certainly not an aim in itself. Indeed to adopt the language of the CJEU in *Commission v France*[23] ("France") at paragraph 28 the customer would be "indifferent" as to how the payment is processed.

333. Although, of course, there are nuances, we find that the only material difference between the broad factual matrix in this case and that in *T-Mobile (UK) Limited v HMRC*[24] ("T-Mobile") is the interposition of VMPL. Of course that is consistent with paragraph 5 of the Statement.

334. Like in *T-Mobile*, the actual charge bore no relation to the actual cost of processing the payments and business customers incurred no charge. We agree with, and adopt, the reasoning of the Tribunal when it stated at paragraphs 65 and 66 that:

[23] (French Laboratories) C-76/99

[24] (2007) V20521

> "65 … Neither the fact that the SPHC is made only to customers who pay by a non-preferred method, nor the fact that the SPHC appears as a separate item on the bill, has the effect of transforming the receipt of consideration in respect of the supply of the services into a separate distinct supply of a 'payment handling' service: *Levob*. Any provider of goods or services for a consideration will incur administrative costs in respect of receipt of payment for the goods or services which it provides. They are the overheads of running a business. It is to be expected that by providing telecommunications services T-Mobile will receive remuneration. In our view it is inappropriate to analyse the transaction in terms of what is principal and what is ancillary. The supply of the SPHC in this case accounts for a small proportion of the price of the transaction as a whole, and does not constitute for customers an aim in itself.
>
> 66. If we are wrong in holding that there is a single supply in the present case, then in our judgment the supply of the SPHC is an ancillary supply which takes on its VAT treatment from the principal service. The SPHC is not an end in itself, it has no independent existence or usefulness in isolation from the telecommunications services and is simply the means by which T-Mobile administers its receipt of payments for the telecommunications service."

335. Of course *T-Mobile* became Everything Everywhere and we are bound by the decision in *EE*. Of course we accept that (paragraph 21) "…every transaction must normally be regarded as distinct and independent", nevertheless (paragraph 22) "…a single supply from an economic point of view should not be artificially split…" and (paragraph 23) "…several formally distinct services, which could be supplied separately and thus give rise in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent".

336. For the reasons we have set out we find that the supplies made by VML and VMPL are not independent, and they, like in *EE*, are a single supply from an economic point of view. The conclusion in *EE* at paragraph 32 reads:

> "Consequently, the answer to the eighth question is that, for the purposes of collecting VAT, the additional charges invoiced by a provider of telecommunications services to its customers, where the latter pay for those services not by Direct Debit or by BACS transfer but by credit card, debit card, cheque or cash over the counter at a bank or authorised payment agent acting on behalf of that service provider, do not constitute consideration for a supply of services distinct and independent from the principal supply of services consisting in the supply of telecommunications services."

That is precisely the position in this appeal with the only difference being that VMPL not VML *de facto* made the supply of the payment handling services but as we find at paragraph 298, for VAT purposes VML is deemed to have made both supplies.

337. However, if we are again wrong, we find that if there is a separate supply by VMPL then it is a supply of collection services which is provided to VML and not to the customers. Crucially, quite apart from anything else, as we record at paragraph 113, it is made explicit that VMPL "…is responsible for the collection of customer payments on behalf of Virgin Media Limited." In our view that is an entirely correct analysis. There is no consideration paid for that and in any event it is intra group so it carries no VAT consequence.

Internal Contracts

338. We have set out our findings at length. These contracts reflect the arrangements that Virgin Media (not necessarily VML) put in place to underpin their argument about the separate identity of VMPL. We are not convinced that they assist.

339. As can be seen from the definitions at paragraph 214 "Customer Services" describes the provision of payment handling services by VMP to customers but excludes Direct Debit payments which, of course VMPL collected.

340. A great deal of the other "tasks" referred to are simply administrative in nature and, in our view, amount to validation of data after the payment process has been initiated. It is of value to VML and the legacy companies but unknown to, and, of no interest to, the customers.

341. Lastly, in this context, if we are again wrong and if VMPL does indeed make a supply of payment handling services to the customers, we find that it is analogous to the position in *Tiercé Ladbroke SA and Derby SA v Belgian State*[25] ("Tiercé*")* where the *buralistes* (independent local agencies) collected monies and took bets for Tiercé.

342. The reported French version of *Tiercé* makes difficult reading but one thing that is clear is that that case is authority for the proposition that the collection of funds by an intermediary is an ancillary service. Further even if that were not so and it was a principal service, having regard to the objectives of the Sixth Directive (now the PVD) such transactions cannot be exempt.

R. The relevant VAT Legislation on exemption

343. Article 135(1)(d) of the Principal VAT Directive requires Member States to exempt the following transactions:

> "transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;"

344. This exemption was formerly contained in Article 13B(d)(3) of the Sixth VAT Directive (77/388/EEC), which was in the same terms but also included the words "and factoring" at the end.

345. This exemption is implemented in UK law, albeit using different language, by section 31(1) VATA which provides that supplies specified in Schedule 9 are exempt. Items (1) and (5) of Group 5 of Schedule 9 provide as follows:

> "1. The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.
>
> 5. The provision of intermediary services in relation to any transaction comprised in item 1 … (whether or not any such transaction is finally concluded) by a person acting in an intermediary capacity."

346. The relevant Notes to Group 5 are as follows:

> "(1) Item 1 does not include anything included in item 6 [which deals with securities].

[25] Case C-231/07

> (1A) Item 1 does not include a supply of services which is preparatory to the carrying out of a transaction falling within that item …
>
> (5) For the purposes of item 5 'intermediary services' consist of bringing together, with a view to the provision of financial services-
>
> > (a) persons who are or may be seeking to receive financial services, and
> >
> > (b) persons who provide financial services, together with (in the case of financial services falling within item 1 …) the performance of work preparatory to the conclusion of contracts for the provision of those financial services but do not include the supply of any market research, product design, advertising, promotional or similar services or the collection, collation and provision of information in connection with such activities.
>
> (5A) For the purposes of item 5 a person is 'acting in an intermediary capacity' wherever he is acting as an intermediary, or one of the intermediaries between
>
> > (a) a person who provides financial services, and
> >
> > (b) a person who is or may be seeking to receive financial services.
>
> (5B) For the purposes of Notes (5) and (5A) 'financial services' means the carrying out of any transaction falling within item 1, 2, 3, 4 or 6."

S. Discussion and Decisions on exemption and debt collection

347. The question of exemption, and therefore also the question of debt collection, only come into play if we are wrong and it is found that VMPL does make a separate supply of payment handling services to the customers.

Interpretation of exemptions

348. The general approach to the interpretation of VAT exemptions is well-established. As explained by the CJEU in *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën*[26] ("*SUFA*"):

> "11. … the exemptions constitute independent concepts of Community law which … should be placed in the general context of the common system of VAT introduced by the Sixth Directive.
>
> 13. … the terms used to specify the exemptions envisaged by Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that turnover tax is levied on all services supplied for a consideration by a taxable person."

349. This passage was cited by Chadwick LJ in the Court of Appeal in *Expert Witness Institute v Customs and Excise Commissioners*[27] at paragraph 16 and he went on say the following at paragraphs 17 and 19:

> "17… A "strict" construction is not to be equated, in this context, with a restricted construction. The Court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption; so that if the Court is left in doubt whether a fair

[26] Case 348/87

[27] [2002] STC 42

> interpretation of the words of the exemption cover the supplies in question, the claim to the exemption must be rejected. But the Court is not required to reject a claim which does come within a fair interpretation of the words of the exemption because there is another, more restricted, meaning of the words which would exclude the supplies in question.
>
> 19. …I reject the premise that the proper approach to construction does require the court to confine the scope of an exemption if it can. The task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used."

350. In *HMRC v Axa UK plc*[28] *("Axa"),* a case which related to a payment handling service provided by a member of the Axa VAT group, Denplan Ltd, to dentists, the CJEU stated at paragraph 30 that although Article 13 exemptions needed to be interpreted strictly, "debt collection or factoring" :

> "…is to be interpreted broadly as it is an exception to such derogation, with the result that the transactions which it covers are subject to tax in accordance with the fundamental rule forming the basis of the Sixth Directive…".

351. As can be seen, the domestic legislation does not make an express reference to the exclusion of debt collection from the exemption but when Axa returned to the Court of Appeal[29] the unanimous conclusion was that, despite the absence of an express reference to debt collection in the UK legislation, that carve out applied as a matter of UK law. Arden LJ made it explicit at paragraph 49 that: "In my judgment it is clear that Group 5, item 1 implements the whole of art 13(B)(d)(3)." Accordingly the domestic legislation is compliant with the PVD. Debt collection falls to be construed broadly.

The Arguments

352. Quite apart from the Skeleton Arguments and the oral submissions we had extensive written submissions on *Bookit* and *NEC* and also submissions on *HMRC v DPAS*[30] ("DPAS"). It is not possible to reiterate in full in this already lengthy judgment all of the arguments advanced. The decisions in *Bookit* and *NEC* altered some of the original arguments so those original arguments are not rehearsed here.

Overview of the appellants' arguments

353. All of the appellants' payment methods to which the payment handling charge applied fall within the exemption because it is not providing collection services to VML. Rather VMPL is providing a payment handling service to the customers who remain in control of the method and timing of the payments that they make but rely on VMPL to process those payments. It is for that that they pay the fee.

354. VMPL is in the payment chain between the customer and the third party suppliers, with which it contracts to move funds, and VML. It is its subcontracts with those various entities and its own work in processing the funds that enables the discharge of

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[28] Case C-175/09

[29] [2012] STC 754

[30] Case C-5/17

the debt to VML and it is therefore VMPL that causes the change in the legal and financial relationship.

355. Since the services are supplied to the customer the debt collection carve out in the PVD cannot apply as, in the words of the Tribunal in paragraph 71 of *Paymex Ltd v HMRC*[31]: "Debt collection by its nature can only be performed for the creditor."

356. The legal and factual focus of the *Bookit* and *NEC* decisions was on debit and credit cards whereas VMPL offered a much wider range of payment related services. The breadth of work undertaken by VMPL in processing and applying the payments, whether itself or via the use of subcontractors, was much wider than in *Bookit* and *NEC*.

357. *Bookit* and *NEC* are cases dealing with a single supply where an attempted financial supply had been "tacked on". They deal with isolated transactions (directly associated with the principal supply).

358. VMPL's sole role is the provision of payment handling services with no other taxable function and a VML or VMPL customer can choose to make payment in smaller tranches. That decision about how to pay is separate from the decision to purchase the media services and is on a continuum.

359. VMPL has a vital role not only in ensuring movement of funds but in keeping up to date the account, between the customer and VML and the legacy companies, in the ICOMS billing system.

360. Alternatively, if any of the payment handling charges do not fall within item 1 then to the extent that the services involve a transfer of, or dealing with, money it is the case that they involve VMPL acting as an intermediary in relation thereto. It is VMPL that brings the customers in contact with eg PayPoint, the banks, merchant acquirers etc.

361. Lastly, because *DPAS* dealt only with direct debits and, in this appeal, no payment handling charge is applied to those, the appellants argue that *DPAS* is of no application.

Overview of the Commissioners' arguments

362. The Commissioners rely on paragraph 66 of *Sparekassernes Datacenter (SDC) v Skatteministeriet*[32] which reads:-

> "66. In order to be characterised as exempt transactions for the purposes of points (3) and (5) of art 13B, the services provided by [VMPL] must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of a service described in those two points. For 'a transaction concerning transfers', the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation."

[31] [2011] UKFTT 350 (TC)

[32] Case C-2/95

363. It is argued that the services provided by VMPL, even if viewed broadly:

(a) Do not form a distinct whole;

(b) Do not fulfil the essential function of services described in point 3 of Article 13B(d), now Article 135(1)(d); and

(c) Do not have the effect of transferring funds and entailing changes in the legal and financial situation.

364. In summary VMPL does no more than ensure that any payment made to it is passed on to VML or to VML's bank accounts. The background work of reconciliation, attribution etc would be an essential part of any transaction and is for the benefit of VML and the legacy companies rather than for the benefit of the customers.

365. The customer has been told that, so long as VMPL is paid, the debt is extinguished.

366. The exemption does not apply simply because the service is in some way connected with obtaining or receiving payments. It is only services that form part of a distinct service consisting in the actual execution of the transfer of funds, acting on the orders of another person, that comes within the exception.

367. VMPL does not itself participate in actually making any debits or corresponding credits. That is the task or function that is performed by the relevant bank or intermediary such as RRD.

368. The Commissioners argue that it would be inconsistent with the purpose of the exemption if it extended to the trader's task of accepting payment, by any means, as that process is essentially one of administration. It is a process of collecting and transmitting information rather than one of actually effecting transfers between accounts. In particular, the VAT treatment should be no different if the task is carried out for and on behalf of the trader or for and on behalf of the customer.

369. Insofar as VMPL has a separate fiscal existence, which is denied for VAT purposes, its activities are confined to those of an agent authorised by VML to collect payments. If those activities amount to a separate service they are taxable.

370. Although the appellants refer to "exempt sub-contractors" (eg its own bank and merchant acquirers) they are not sub-contractors but rather organisations supplying services to the appellants.

371. The receipt by VMPL of card payments follows the same process as that considered by the CJEU in *Bookit* and *NEC*. There is nothing in the manner that the other payment methods are processed that would give a different result just because they are not card payments using a merchant acquirer.

372. It is the customer who triggers the payment in every case. The accounting entries are undertaken by VMPL and are no different from what would be expected in any service business.

373. The accounting entries do not effect the transfer of funds or change the legal and financial relationship but merely record receipt of the payment that is due. They do not even effect the transfer from VMPL's bank account to that of VML as that occurs as part of the Virgin Media policy to sweep the bank accounts and is undertaken by the bank.

374. The fact that VML has contracted with its subsidiary to undertake these accounting and credit control functions does not make the supply, if indeed there is a supply, to VML's customers one of a financial service.

375. The argument that VMPL is an intermediary is simply wrong. In setting up arrangements with a variety of providers of services to VMPL, VMPL is merely enabling itself (on behalf of VML) to be able to receive the customers payments by a variety of methods. It is a commercial decision of the Virgin Media Group as to what methods of payment it is going to accept and has nothing to do with making the supply of intermediary services.

376. As far as *DPAS* is concerned, unlike the appellants, the Commissioners argue that the judgment in *DPAS* applies and reinforces the earlier CJEU decisions in *Bookit* and *NEC* confirming:

(a) At paragraph 31 that transactions exempted are "defined according to the nature of the services provided and not in terms of the person supplying or receiving the service", and that the exemption is "…subject to … the condition that the transactions in question relate to the sphere of financial transactions". *AXA* at paragraph 26 (and the case law cited there) and *Bookit* at paragraph 36 were cited.

(b) At paragraph 33 that "…a transfer being only a means of transmitting funds, the functional aspects are decisive for the purposes of determining whether a transaction constitutes a transfer within the meaning of Article 135(1)(d). *SDC* at paragraph 53 and *Bookit* were cited.

(c) At paragraph 36, the scope of the exemption excludes "mere physical, technical or administrative services". *SDC* at paragraph 66 and *Bookit* at paragraph 40 were cited.

(d) At paragraphs 39-43 (in fact paragraphs 42 and 39 respectively) that supplies of services that are "merely a step prior to the transactions [within Article 135(1)(d)]", (in that case) "in requesting from the financial institution … a predetermined sum of money", do not "effect the legal and financial changes which characterise the transfer of a sum of money … but is administrative in nature".

(e) At paragraph 45 that the "…provision of services such as that at issue in the main proceedings is administrative in nature".

(f) At paragraph 46 that the "…determination of the taxable amount does not present any particular difficulty".

377. The Commissioners then argue that the CJEU has now considered, and reached the same conclusion in relation to debit and credit payments in *Bookit,* payment card processing services in *NEC* and direct debit mandates in *DPAS.* There is no reason to suppose that a different approach would be adopted in relation to the other payment channels described in our Findings in Fact which the Commissioners had seen in draft.

378. Lastly, the Commissioners argue that that argument is entirely consistent with the decision of the CJEU in *EE* which was summarised in *Bookit* at paragraph 25 and which reads:

> "25. The Court then added that the receipt of a payment and the handling of that payment are intrinsically linked to any supply of services provided for consideration, and that it is inherent in such a supply that the service provider should seek payment and make appropriate efforts to ensure that the customer can make effective payment in consideration for the service supplied, the Court holding that, in principle, any method of payment for a supply of services involves the provider taking certain steps for the handling of the payment, even if the extent of those steps may vary from one method of payment to another (see, to that effect, judgment of 2 December 2010, *Everything Everywhere*,…)".

Accordingly the same approach should be taken to all payment methods offered by the appellants.

Minor matters arising

379. We observe in passing that, strangely, in the submissions on *Bookit* and *NEC* the appellants argue (by contrast with the argument articulated at paragraph 347 above and often repeated eg in the Statement) that there are "…transactions concerning debt". The argument in the submission was that:-

> "As to … transactions concerning debt: that is a free standing aspect of the exemption, which has full application to the service supplied by VMPL, which is essentially a service to customers of discharging a specific class of debts, i.e. debts owed to VML. This applies to *all* of VMPL's supplies."

380. Whilst we accept that VMPL collects or, in our view, receives the debts due to VML the thrust of the appellants' argument in that regard is not clear if it is meant to suggest anything else. The Commissioners, in their response, were concerned that the appellants were now arguing that VMPL was a debt collector. They are correct in saying that if that is the case then the supply is taxable.

381. Elsewhere in their submission the appellants argued that on card use, a debt arises between the card holder and its bank and that various debts rise and fall at different points in the chain moving the funds. We agree with the Commissioners when they state that:

> "a) If it is a debit card then the funds belong to the card holder, are in *his* account and are his funds. He uses the card to make a payment from *his own funds*;

b) If it's a credit card, then the *card issuer* makes a supply of credit with terms agreed with the card holder."

382. We also observe that twice in the appellants' submission there is a new suggestion that a differentiation with *Bookit* and *NEC* is that VMPL extends credit to the customer. We reject that.

383. We agree with the Commissioners that there is no evidence to support the existence of a separate supply of credit. The customer simply signs a contract for services and agrees to pay for services received or about to be received. Consequently neither appellant can be granting credit. We accept that VMPL is also not registered on the FCA register to be a grantor of credit.

General discussion

384. We do not address each individual strand of the parties' lengthy arguments but rather have considered the totality of the arguments as they relate to the facts as found.

385. Our starting point is that *DPAS* is the most recent CJEU case relating to payments and exemption. DPAS relates to a dental plan similar to the one considered in *Axa*, except that the contractual arrangements had been restructured following the decision in that case.

386. We observe that in the course of its judgment in *DPAS* the *CJEU* extensively (12 times in 24 paragraphs) referred to, and relied on, its decision in *Bookit.*

387. In turn the Court in *Bookit* (and also in *NEC),* in its preliminary observations, placed reliance on its decision in *EE* not only at paragraph 25, as the Commissioners point out, but also in most of the other paragraphs under that heading.

388. In *EE,* amongst other cases, the Court also placed reliance on *SDC, Tiercé, CPP, Levob,* and *Axa.*

389. It is clear to us that, over more than the last decade, the jurisprudence of the CJEU in relation to payment activities has evolved. The current position is that, read together, *EE*, *Bookit*, *NEC* and *DPAS* make it clear that any appellant seeking to establish entitlement to the financial exemption, where an alleged financial service or supply has been carved out of a transaction, has a significant hurdle to surmount.

390. We observe that the very fact that these cases all deal with a situation where the purported financial transaction is very closely linked with the provision of a different supply is hugely significant. In domestic law, as long ago as 1999, Lord Hope when considering whether a supply was incidental or ancillary in *HMRC v British Telecommunications PLC*[33] stated "As a matter of general principle comparable transactions should for VAT purposes, so far as possible, be treated equally". These cases all enshrine that principle.

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[33] [1999] 1 WLR 1376

391. We also observe that we agree with the Commissioners that, although in each of these cases, of necessity, the CJEU was dealing with the particular payment route utilised, nevertheless, the fact that each case confirms the previous one, and *EE* did consider multiple payment routes, means that there is a significant degree of consistency.

392. We note that the Upper Tribunal in *HMRC v The Ice Rink Company Limited and Another*[34] when considering arguments that the Tribunal should draw conclusions from the underlying facts in two CJEU cases stated "We regarded such reasoning by analogy of being of limited utility since decisions of the ECJ served to give guidance on the interpretation of EU law so that their principles, rather than their facts, are relevant."

393. Our first finding in this context is that we therefore agree with the Commissioners argument set out at paragraphs 369 and 370 above. We take the view that the same broad principles apply and would apply to all of the payment methods.

394. The Upper Tribunal recently considered *DPAS*, in a slightly different context, in *Target Group Limited v HMRC*[35] ("Target"). We are bound by, and agree with Judges Zacarolli and Sinfield at paragraph 74 where they state:

> "74. The decision of the CJEU in *DPAS* is, in our judgement (sic), clear and unambiguous. Where the relevant service at issue involves the giving of an instruction to a financial institution to effect a payment, it does not constitute an exempt supply even though it may be a necessary step in order for the payment to be made."

Basically that is what VMPL did.

395. In *Target*, amongst other cases, the Tribunal summarised the decisions in *SDC, Axa* and *DPAS*. We annex at Appendix 4 those summaries.

396. *Bookit and NEC* are the other key cases. It is not necessary to recite the full details.

397. In summary, *Bookit* and *NEC* make it explicit that where a company or individual itself debits or credits an account directly, or intervenes by way of accounting entries on the accounts of the same account holder, that permits a finding that there is a transfer or payment within Article 13B(d)(3) (paragraphs 42 and 43 of *Bookit* and paragraphs 37 and 38 of *NEC)*. However, those cases make it equally explicit that a card processing service provided in connection with ticket purchases, whilst resulting in, and essential for completing, an exempt transaction, did not meet the test. This was because the company or individual neither debited or credited accounts, nor intervened by way of accounting entries, or even ordered them since in those cases it was the purchaser of the tickets who decided that his or her account should be debited by using a payment card (paragraph 47 of *Bookit* and paragraph 42 of *NEC*). There was simply a demand or request for payment, or in essence an exchange of information between a trader and merchant acquirer, rather than something that could be regarded as executing a payment

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[34] [2019] UKUT 108 (TCC)

[35] [2019] UKUT 340 (TCC)

or transfer (paragraphs 48 and 53 of *Bookit* and paragraphs 43 and 48 of *NEC*). The company or individual also did not assume any responsibility or liability for achieving a transfer or payment (paragraph 50 of *Bookit* and paragraph 45 of *NEC*).

398. That is the case in the transactions with which we are concerned. We agree with the Judge Brooks at paragraph 65 in *PayPoint Collections Ltd and PayPoint Network Ltd v HMRC*[36] where he states:

> "It is clear that when a Customer hands over his or her money to pay a utility bill to an Agent there is a change in the legal and financial position between that Customer and Network's Client in that the Customer no longer owes the Client the amount stated on that utility bill. The Customer, having settled the outstanding amount in accordance with the instructions on the bill would have an absolute defence if the Client were to issue proceedings to recover that sum."

When a VML customer goes to PayPoint and pays the agent, writes and posts a cheque, offers a debit or credit card or makes payment by any other means, it is then that the legal and financial position is altered.

399. If the appellants are correct in their arguments then any provider could create an exempt supply by incorporating a subsidiary and insisting on a contract with the customer stipulating for provision of, say, a sofa by the provider and for payment to be made to the subsidiary.

400. We considered paragraphs 54-56 of *Bookit* to be particularly relevant. Those read:

> "54. It may be added, first, that such a service cannot be deemed to be, by its nature, a financial transaction for the purposes of Article 135(1)(b) to (g) of the VAT Directive, unless the view is taken that any trader that takes steps necessary for the receipt of payment by debit card or credit card is undertaking a financial transaction for the purpose of those provisions, which would render that concept meaningless and would be contrary to the requirement that VAT exemptions must be interpreted strictly.
>
> 55. Second, if the exemption provided for in Article 135(1)(d) of the VAT Directive were to be granted to a card handling service, such as that at issue in the main proceedings, that would be at odds with the purpose of exemption for financial transactions, which is to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit (judgment of 19 April 2007, *Velvet & Steel Immobilien*, C-455/05, EU:C:2007:232, paragraph 24, and order of 14 May 2008, *Tiercè Ladbroke and Derby,* C-231/07 and C-232/07, not published, EU:C:2007:332, paragraph 24).
>
> 56. If a card handling service, such as that at issue in the main proceedings, is subject to VAT, there are no such difficulties. In particular, the tax base, which corresponds to the consideration received in exchange for that service, namely the fee charged to the purchaser of the ticket for that service, can readily be determined, and such a transaction does not involve the provision of any credit to the purchaser by the provider of that service. Such a service cannot therefore properly be the subject of an exemption under Article 135(1)(d) of the VAT Directive."

401. In summary, we agree with the arguments advanced by the Commissioners and we find that even if there is a supply by VMPL to the VML customers that that supply does not fall within the exemption.

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[36] [2017] UKFTT 424 (TC)

402. Lastly, if we are wrong in that, we do not accept that any such supply is debt collection as the supply, if any, is not to the creditor.

T. Abuse

403. There was no dispute between the parties that the leading case is, of course, *Halifax plc v HMRC*[37] ("Halifax") and most readers of this decision will be conversant with the detail of that case.

404. In *Halifax*, the Grand Chamber of the ECJ set out the general principles that apply to the treatment of VAT avoidance arrangements:

> "69. The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, *Firma Peter Cremer v Bundesanstalt fur Landwirtschaftliche Marktordnung* (Case 125/76) [1977] ECR 1593, para 21…
>
> 73. Moreover, it is clear from the case law that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system (see, in particular, *BLP Group* [1995] STC 424, [1996] 1 WLR 174, para 26, and *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2002] QB 546, para 33). Where the taxable person chooses one of two transactions, the Sixth Directive does not require him to choose the one which involves paying the highest amount of VAT. On the contrary, as the Advocate General observed in para 85 of his opinion, taxpayers may choose to structure their business so as to limit their tax liability.
>
> 74. In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
>
> 75. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in para 89 of his opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.
>
> 81. … it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for the reduction of the tax burden …
>
> 94. It follows that transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice."

405. More recently, Lord Sumption cited these paragraphs in *HMRC v Pendragon*[38] ("Pendragon") and at paragraphs 12 and 13 went on to state:-

> "12. The second difficulty which arises from the application of the principle of abuse of law to tax avoidance is that of concurrent purposes…. The potential for abuse consists in the method chosen to achieve the commercial purpose…but the method of achieving that purpose was held

[37] Case C-255/02

[38] [2015] UKSC 37

> to be open to challenge if 'the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue' (para 45). This conclusion seems to me to do no more than make explicit something which is implicit in the Halifax tests. Identifying the 'essential aim' in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from (para 89) of his opinion which was in terms approved by the court (para 75), the taxpayer's choices must be 'at least to some extent, accounted for by ordinary business aims'. The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.
>
> 13. These considerations effectively answer a question which is likely to arise in most cases involving prearranged sequences of transactions. Is the relevant 'aim' that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme also has to be considered. In **WHA Ltd v Customs and Excise Comrs [2007] STC 1695, para 22**, Lord Neuberger of Abbotsbury, delivering the leading judgment in the Court of Appeal, rejected the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination. I agree with this observation."

406. As can be seen, Lord Sumption referred to the "Halifax tests" which he articulated as:

"The first Halifax test: contrary to the purpose of the legislation", and

"The second Halifax test: transactions with the essential aim of obtaining a tax advantage".

The purpose of the legislation

407. It is not in dispute that, the summary of the decision in *EE* reported in Simons Taxes[39] is accurate and it states that:

> "It followed from art 2 of the Sixth Directive that every transaction was normally to be regarded as distinct and independent. However, a transaction which comprised a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system."

408. We agree with the Commissioners that the purpose of the legislation is to ensure that there is no such artificial split.

Essential aim

409. The CJEU at paragraphs 53 and 54 in *R & C Commrs v RBS Deutschland Holdings GmbH*[40] stated:

> "53. It is important to add that taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens.

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[39] [2011] STC 316

[40] Case C-277/09

> 54. The court has held that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the neutral system of VAT *(see Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2001] ECR I-7257, para 33). In that connection, the court has made clear that, where it is possible for the taxable person to choose from among a number of transactions, he may choose to structure his business in such a way as to limit his tax lability (see *Halifax* (para 73)).

410. The Commissioners are entirely correct in saying that VML could have continued to operate the payment handling services and charge a fee for doing so as their predecessors had done. As can be seen, however, that does not mean that they had to do so.

411. It is unfortunate that, as we find at paragraph 206, PwC consistently denied that there were tax considerations driving the introduction of VMPL since the Disclosure documents make it explicit that tax considerations were an extremely important consideration. In that context it is unsurprising that the Commissioners have actively considered an abuse argument since as long ago as 2011.

412. Prior to hearing the detailed evidence as to the *modus operandi* of Virgin Media we can understand why the Commissioners argued at paragraph 11 of their Further and Better Particulars that:

> "11 VMPL does not act independently of VML:
>
> a. VMPL is 100% owned by VML;
>
> b. There are common officers;
>
> c. VMPL owns no assets and directly employs no permanent staff;
>
> d. Central operating costs, including office accommodation, facilities, and its employment costs are for the most part paid by VML but a proportion were recharged to VMPL;
>
> e. The VMPL annual accounts each record that 'there are few meaningful performance indicators monitored at an entity level for [VMPL]";
>
> f. Sums due to VML for the supply of telecoms services were paid into (and through) particular banks accounts originally engendered by the particular geographical location of the particular telecoms franchise. From 8th February 2007, the account numbers remained the same whilst each account name was changed to VMPL;
>
> g. Sums paid into these accounts by consumers and some business customers were paid into the bank account of ntl Group Limited (latterly, VML) and all customer payments so received would continue to be automatically swept into the central VML account.
>
> h. In summary, VMPL, although a separate legal entity, acts under the direction and control of VML."

413. Mr Pleming was in some ways correct in saying that "…VMPL functions to all intents and purposes save for its separate legal entity as a business – probably the wrong word - but a business or accounting division or department of VML."

414. However, that is precisely how all the companies in the Virgin Media group operate and indeed how their predecessors operated. There is nothing "manufactured" or artificial about it.

415. As can be seen from our Findings in Fact, we find that looking at the *modus operandi* of any company in the Virgin Media group, there is nothing extraordinary about how VMPL operates.

416. This is a specialist Tribunal and we are both well aware of the structures of large corporate organisations such as the Virgin Media group, the way they conduct their businesses and the issues that they face prior to and following a merger. This was a very large corporation attempting to restructure and also rebrand after a merger. That is always a very difficult, expensive and time consuming situation. It is also an opportunity for change.

417. In our view, looking at the structure of the various organisations prior to the merger, we can easily understand that the rebrand was a perfect opportunity to try and streamline at least some of that which they had inherited. As our Findings in Fact indicate, that is precisely what they did.

418. We accept the appellants' arguments for the utilisation of VMPL as a trading vehicle that we have set out at paragraph 240.

419. In our view it is not unreasonable for Virgin Media group to have put the income receipts into one part of the organisation and the payment collection facility into another. The fact that that was tax driven is not decisive. As Lord Sumption pointed out at paragraph 31 in *Pendragon*: " …the *Halifax* test requires the 'essential aim' of a transaction to be determined by reference to 'objective factors' but this 'must not be confused with the subjective intention of the participants'".

420. In the particular circumstances of this group of companies, looking at the way that the companies conduct their business, we find that in the words of Lord Sumption at paragraph 12 of Pendragon "…the taxpayer's choices must be 'at least to some extent, accounted for by ordinary business aims'". Furthermore, as can be seen from the accounts, it is a profitable business.

421. We do not find that the essential aim was to obtain a tax advantage.

U. Summary of Decisions on the five issues

422. As we have indicated, we have considered all of the alternative arguments and approached this appeal on the basis that we should make a decision on each of the five issues before us. Before doing so it is appropriate to articulate our preferred decision.

423. Our preferred decision is quite simply that the taxable person making supplies is VML and it is the representative member of the VAT Group. There is one supply of media services and the £5 consideration paid, where payment is not made by Direct Debit, is an integral part of that supply. If we are wrong in that then the supply of payment handling services is an ancillary supply.

424. VMPL does not make a supply to the Virgin Media customers who do not pay by Direct Debit.

425. If we are wrong in that then the only supply made by VMPL is to VML when acting as agent to collect, process and apply payments due by customers. That is intra group so there is no VAT consequence.

426. VMPL does not have a free standing fiscal identity for VAT purposes.

427. If we are wrong in that and VMPL does make a supply of payment handling services to the customers, in light of the decisions in *Bookit* and *NEC* in particular, those are not exempt supplies. Further in light of the decision in *DPAS* any such supply is simply technical and administrative and does not qualify as being exempt.

428. If we are wrong in that any such supply does not amount to debt collection.

429. In the event that we are wrong on every other issue, the essential aim of the transaction is not to secure a tax advantage so the Commissioners' argument on abuse fails.

V. Disposition

430. The appeal is dismissed.

W. References

431. The question of references to the CJEU were addressed in the hearings but the decisions in *Bookit, NEC* and *DPAS* have clarified these issues and no reference is appropriate.

432. 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.

ANNE SCOTT

TRIBUNAL JUDGE
RELEASE DATE: 16 January 2020

Appendix 1

Extract from the Statement

5. In the *Everything Everywhere* case, the supply of telecoms services and the supply of payment handling services were made by the same legal entity. The ECJ found that, for VAT purposes, the additional charges invoiced by a provider of telecoms services to its customers, where the latter pay for those services not by Direct Debit or BACS, did not constitute consideration for a supply of services distinct and independent from the principal supply of telecoms services.

6. In the instant appeal, the television and telecoms services are supplied by VML and FES; unlike *Everything Everywhere*, the payment handling services are supplied by a separate legal entity, that is to say VMPL.

7. Following the decisions in *Canary Wharf* (1996 V&DR 323), *Thorn Granada* (1993 VATTR 94) and others, it is clear that, although VML and VMPL are members of a group VAT registration, nothing within s.43, Value Added Tax Act 1994 (the "Act") has the effect of characterizing a supply to a non-member of the group as if it were part of a single supply by the representative member of the group. Thus, the payment handling service supplied by VMPL and the television and telecoms services supplied by VML do not fall to be treated as a single supply by virtue of the legal fiction create4d by s.43 of the Act.

8. In the *Axa* case, Denplan acted as agent of the dentist in collecting payments from patients. The ECJ found that this was a debt collection service. VMPL does not act as agent of VML and FES to collect debt on their behalf. It has a contract with the customer to handle the customer's payment and distribute it to VML and FES on behalf of the customer. It follows that VMPL cannot be supplying a debt collection service. The ECJ noted however, that the service supplied by Denplan consisted of *"a transaction concerning payments which is exempt under Article 13B(d)(3) of the Sixth Directive, unless it is debt collection …"*. In other words, if Denplan's supply had been to the patient (in the instant appeal, if FMPL's supply is to the customer, which contractually, it is), then it would have been within the scope of the exemption provided by Article 13B (d)(3).

Appendix 2

Section 43 VATA

43 Groups of companies

(1) Where under [sections 43A to 43D] any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(b) any [supply which is a supply to which paragraph (a) above does not apply and is a supply] of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—

(i) in the case of goods acquired from another member State, for the purposes of section 73(7); and

(ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,

as acquired or, as the case may be, imported by the representative member;

and all members of the group shall be liable jointly and severally for any VAT due from the representative member.

[(1AA) Where—

(a) it is material, for the purposes of any provision made by or under this Act ("the relevant provision") whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description,

(b) paragraph (b) or (c) of subsection (1) above applies to any supply, acquisition or importation, and

(c) there is a difference that would be material for the purposes of the relevant provision between—

(i) the description applicable to the representative member, and

(ii) the description applicable to the body which (apart from this section) would be regarded for the purposes of this Act as making the supply, acquisition or importation or, as the case may be, as being the person to whom the supply is made,

the relevant provision shall have effect in relation to that supply, acquisition or importation as if the only description applicable to the representative member were the description in fact applicable to that body.]

[(1AB) Subsection (1AA) above does not apply to the extent that what is material for the purposes of the relevant provision is whether a person is a taxable person."]

[(1A) …]

(2) An order under section 5(5) or (6) may make provision for securing that any goods or services which, if all the members of the group were one person, would fall to be treated under that section as supplied to and by that person, are treated as supplied to and by the representative member [and may provide for that purpose that the representative member is to be treated as a person of such description as may be determined under the order].

[(2A) A supply made by a member of a group ("the supplier") to another member of the group ("the UK member") shall not be disregarded under subsection (1)(a) above if—

(a) it would (if there were no group) be a supply of services falling within Schedule 5 to a person belonging in the United Kingdom;

(b) those services are not within any of the descriptions specified in Schedule 9;

(c) the supplier has been supplied (whether or not by a person belonging in the United Kingdom) with [any services falling within paragraphs 1 to 8 of Schedule 5 which do not fall within any of the descriptions specified in Schedule 9];

(d) the supplier belonged outside the United Kingdom when it was supplied with the services mentioned in paragraph © above; and

(e) the services so mentioned have been used by the supplier for making the supply to the UK member.]

[(2B) Subject to subsection (2C) below, where a supply is excluded by virtue of subsection (2A) above from the supplies that are disregarded in pursuance of subsection (a)(a) above, all the same consequences shall follow under this Act as if that supply—

(a) were a taxable supply in the United Kingdom by the representative member to itself, and

(b) without prejudice to that, were made by the representative member in the course or furtherance of its business.]

[(2C) [Except in so far as the Commissioners may be regulations otherwise provide] a supply which is deemed by virtue of subsection (2B) above to be a supply by the representative member to itself—

(a) shall not be taken into account as a supply made by the representative member when determining any allowance of input tax under section 26(1) in the case of the representative member;

(b) shall be deemed for the purposes of paragraph 1 of Schedule 6 to be a supply in the case of which the person making the supply and the person supplied are connected within the meaning of section 839 of the Taxes Act (connected persons); and

(c) subject to paragraph (b) above, shall be taken to be a supply the value and time of which are determined as if it were a supply of services which is treated by virtue of section 8 as made by the person by whom the services are received.]

[(2D) For the purposes of subsection (2A) above where—

(a) there has been a supply of the assets of a business of a person (“the transferor”) to a person to whom the whole or any part of that business was transferred as a going concern (“the transferee”);

(b) that supply is either—

(i) a supply falling to be treated, in accordance with an order under section 5(3), as being neither a supply of goods nor a supply of services, or

(ii) a supply that would have fallen to be so treated if it had taken place in the United Kingdom.

and

(c) the transferor was supplied with services falling within paragraphs 1 to 8 of Schedule 5 at a time before the transfer when the transferor belonged outside the United Kingdom,

those services, so far as they are used by the transferee for making any supply falling within that Schedule, shall be deemed to have been supplied to the transferee at a time when the transferee belonged outside the United Kingdom.]

[(2E) Where, in the case of a supply of assets falling within paragraphs (a) and (b) of subsection (2D) above—

(a) the transferor himself acquired any of the assets in question by way of a previous supply of assets falling within those paragraphs, and

(b) there are services falling within paragraphs 1 to 8 of Schedule 5 which, if used by the transferor for making supplies falling within that Schedule, would be deemed by virtue of that subsection to have been supplied to the transferor at a time when he belonged outside the United Kingdom.

that subsection shall have effect, notwithstanding that the services have not been so used by the transferor, as if the transferor were a person to whom those services were supplied and as if he were a person belonging outside the United Kingdom at the time of their deemed supply to him; and this subsection shall apply accordingly through any number of successive supplies of asses falling within paragraphs (a) and (b) of that subsection.]

(3)—(8) …

[(9) Schedule 9A (which makes provision for ensuring that this section is not used for tax avoidance) shall have effect.]

[43A Groups: eligibility

(2) Two or more bodies corporate are eligible to be treated as members of a group if each is established or has a fixed establishment in the United Kingdom and—

(a) one of them controls each of the others;

(b) one person (whether a body corporate or an individual) controls all of them, or

(c) two or more individuals carrying on a business in partnership control all of them.

(3) For the purposes of this section a body corporate shall be taken to control another body corporate if it is empowered by statute to control that body's activities or if it is that body's holding company within the meaning of section 736 of the Companies Act 1985.

(4) For the purposes of this section an individual or individuals shall be taken to control a body corporate if he or they, were he or they a company, would be that body's holding company within the meaning of that section.]

Appendix 3

Field Fisher Waterhouse LLP on supply

14 It should be recalled, as a preliminary point, that for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 22; Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 35; and Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraph 21).

15 Where, however, a transaction comprises several elements, the question arises whether it is to be regarded as consisting of a single supply or of several distinct and independent supplies which must be assessed separately from the point of view of VAT. According to the Court's case-law, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51).

16 In that regard, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 22, and *Everything Everywhere*, paragraphs 24 and 25).

17 Moreover, that is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, to that effect, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30; *Part Service*, paragraph 52; and Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-0000, paragraph 54).

18 In view of the two circumstances that, first, every supply must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the characteristic elements of the transaction concerned must be examined in order to determine whether the supplies constitute several distinct principal supplies or one single supply (see, to that effect, *CPP*, paragraph 29; *Levob Verzekeringen and OV Bank*, paragraph 20; *Aktiebolaget NN*, paragraph 22; *Everything Everywhere*, paragraphs 21 and 22; and *Bog and Others*, paragraph 53).

19 None the less, there is no absolute rule for determining the extent of a supply from the point of view of VAT, and consequently, to determine the extent of a supply, all the circumstances must be taken into consideration (see *CPP*, paragraph 27).

20 In the context of the cooperation established by Article 267 TFEU, it is for the national courts to determine whether the taxable person makes a single supply in a particular case and to make all definitive findings of fact in that regard (see, to that effect, *CPP*, paragraph 32; *Part Service*, paragraph 54; *Bog and Others*, paragraph 55; and order in Case C-117/11 *Purple Parking and Airparks Services* [2012] ECR I-0000, paragraph 32). However, it is for the Court to provide the national courts with all the guidance as to the interpretation of European Union law which may be of assistance in adjudicating on the case pending before them (*Levob Verzekeringen and OV Bank*, paragraph 23).

21 It may be observed that, according to the documents before the Court, in the main proceedings the lease concluded between the landlord and the tenant provides that, in addition to

the leasing of the premises to the tenant, a number of services are also provided to him by the landlord. In return, the tenant is obliged to pay the landlord the rents specified in the lease. Furthermore, in default of payment of those rents by the tenant, the landlord is entitled to terminate the lease.

22 In those circumstances, for it to be possible to consider that all the supplies which the landlord makes to the tenant constitute a single supply from the point of view of VAT, it must be examined whether in the present case the supplies form a single, indivisible economic supply which it would be artificial to split, or whether they consist of a principal supply in relation to which the other supplies are ancillary.

23 For the purposes of that examination, the content of a lease may be a factor of importance in assessing whether there is a single supply. In the main proceedings, it appears that the economic reason for concluding the lease is not only to obtain the right to occupy the premises concerned, but also for the tenant to obtain a number of services. The lease accordingly designates a single supply agreed between the landlord and the tenant. Moreover, it should be observed that the leasing of immovable property and the supply of associated services, such as those mentioned in paragraph 8 above, may objectively constitute such a supply. Obtaining the services concerned cannot be regarded as constituting an end in itself for an average tenant of premises such as those at issue in the main proceedings, but constitutes rather a means of better enjoying the principal supply, namely the leasing of commercial premises.

24 It is true that, according to the Court's case-law, supplies of services such as those at issue in the main proceedings are not necessarily covered by the concept of the leasing of immovable property referred to in Article 135(1)(l) of the VAT Directive (see, to that effect, Case 173/88 *Henriksen* [1989] ECR 2763, paragraph 14, and Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I-4629, paragraph 38). However, that does not mean that those supplies of services, which are linked to the leasing of immovable property and are supplied in accordance with the provisions of a lease, cannot constitute ancillary supplies or be indivisible from that leasing.

25 That being so, even though in the circumstances of the main proceedings the inclusion of services in the lease in question supports the view that there is a single supply, it must be noted that the mere fact that a supply is included in a lease cannot in itself constitute the decisive element to that effect. Thus if a lease were to provide for the inclusion of supplies which by their nature could not objectively be regarded as indivisible from or ancillary to the principal supply of the leasing of immovable property, but were independent of it, such supplies having only an artificial link to the principal supply, those supplies would not form part of a single supply of the leasing of immovable property, exempt from VAT. In the dispute in the main proceedings, as stated in paragraph 23 above, the obtaining of the services in question does not, however, appear to constitute an end in itself for the tenant.

26 As to the relevance of the fact that a third party could in principle supply certain services, it must be observed that the existence of such a possibility is not decisive in itself either. As may be seen from the Court's case-law, the possibility that elements of a single supply may, in other circumstances, be supplied separately is inherent in the concept of a single composite transaction, as explained in paragraph 15 above (see, to that effect, order in *Purple Parking and Airparks Services*, paragraph 31).

Appendix 4

Extracts from *Target*

SDC

53. SDC was a Danish association of savings banks which provided its members, who were connected to its data handing network, with data-handling services, comprising the execution of transfers, the provision of advice on and trade in securities, and the management of deposits, purchase contracts and loans. The Danish court referred to the ECJ the question whether the data-handling services provided by SDC to banks constituted "transactions, including negotiation, concerning … payments, transfers, debts" within Article 13B(d)(3) of the Sixth VAT Directive (the predecessor provision to Article 135(1)(d) of the PVD) and a number of subsidiary questions. The ECJ set out the principles to be applied, leaving it to the national court to determine whether the services provided by SDC fell within them. In summary, the ECJ held that, for the services provided by a data-handling centre to be regarded as exempt, they must "form a distinct whole provided by a data-handling centre to be regarded as exempt, they must "form a distinct whole, fulfilling in effect the specific, essential functions of a service described in [Article 13B(d)(3)]". The ECJ also held that, for a "transaction concerning transfers", the services provided must therefore have the effect of transferring funds and entail changes in the legal and financial situation.

AXA CJEU

61. In AXA CJEU, Denplan Limited ('Denplan') operated a range of services for dentists, the main one being the operation of payment plans between dentists and their patients. On receipt of a direct debit mandate from the patient, Denplan lodged details of the mandate with the patient's bank. Each month, it created for each patient an electronic file containing details of the patient's bank account number and the amount which Denplan was to collect from that account, which it transmitted to BACS, for onward transmission by BACS to the processing centre of the relevant bank. Provided that the patient had not cancelled the direct debit and provided the patient's account remained open and in credit, the bank would debit the patient's account and notify BACS accordingly. BACS then posted a corresponding credit to Denplan's bank for the credit of Denplan's account. After approximately ten days, Denplan accounted to the dentist for the payment it had received, less certain agreed deductions.

62. In the CJEU, the first issue (and the only one relevant to this appeal) was whether the payment handling services would be exempt on the assumption that they constituted a separate supply. The CJEU concluded, at [28], as follows:

> "Denplan is, in return for remuneration, responsible for the recovery of those debts and provides a service of managing those debts for the account of those entitled to them. Therefore, as a matter of principle, that service constitutes a transaction concerning payments which is exempt under Article 13B(d)(3) of the

> Sixth Directive unless it is ‘debt collection or factoring’, a service which that provision, by its final words, expressly excludes from the list of exemptions”.

63. At [32], the CJEU concluded that the service supplied by Denplan to dentists was ‘debt collection and factoring’ in Article 13B(d)(3) and was thus not exempt.

64. As we have noted above, AXA CJEU and the other decisions relied on by Target now need to be considered in light of DPAS. Mr Cordara accepted that to the extent that the CJEU, at [28] of AXA CJEU, appeared to express the view that the service (had it not constituted debt collection) fell within the ambit of “transactions concerning payment”, such a conclusion is no longer tenable in light of the decision of the CJEU in DPAS.

DPAS

65. DPAS had provided services to dentists similar to those which Denplan had provided and which were the subject of AXA CJEU. In light of that decision, Denplan changed the contractual arrangements under which it provided the services to both dentists and their patients. DPAS contended that, under the new contracts, it made a standard rated supply of services to dentists and a separate exempt supply of payment services to their patients. The dental plan payment services involved, in essence, directing, pursuant to a direct debit mandate, that money was taken by direct debit from patients’ bank accounts and paid into DPAS’s own bank account and instructing its bank to make payments, less an amount for DPAS’s remuneration, to the dentists. At [10], the CJEU observed that DPAS’s way of implementing the plan was materially the same procedure (including the involvement of BACS) as was operated by Denplan in AXA CJEU.

66. DPAS accepted that its supplies to the dentists were taxable but argued that its supplies to patients were exempt for VAT purposes on the basis that they were transactions concerning transfer or payments within Article 135(1)(d). The Upper Tribunal referred two questions to the CJEU. The first question was whether DPAS’s supplies were exempt pursuant to Article 135(1)(d). The second was what were the principles for determining whether a service such as that performed by DPAS falls within the scope of “debt collection”. The CJEU answered the first question in the negative and, therefore, found it unnecessary to deal with the second question.

67. In relation to the first question, the CJEU reiterated that the transactions exempted under Article 135(1)(d) are defined according to the nature of the services provided, and not in terms of the person supplying or receiving the services. The CJEU held at [31]:

> “Accordingly, the exemption is subject, not to the condition that the transactions be effected by a certain type of institution or legal person, but to the condition that the transactions in question relate to the sphere of financial transactions.”

68. Second, the CJEU endorsed, at [33], the conclusion reached in SDC that:

> "… a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another … characterised in particular by the fact that it involves a change in the legal and financial situation existing on the one hand, between the person giving the order and the recipient and, on the other, between those parties and their respective banks and, in some cases, between the banks. Moreover, the transaction which produces that change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer within the meaning of Article 135(1)(d) of the VAT Directive."

69. At [38], the CJEU held:

> "… a supply of services may be regarded as a 'transaction concerning transfers' or as a 'transaction concerning payments' within the meaning of Article 135(1)(d) of the VAT Directive only where it has the effect of making the legal and financial changes which are characteristic of the transfer of a sum of money. By contrast, the supply of a mere physical, technical or administrative service not effecting such changes will not come within that concept."

70. Applying those principles to the facts, the CJEU concluded, at [40] and [41], that, in requesting the patients' banks to make transfers to its own bank account and then asking its own bank to transfer amounts to the dentists and insurers (in all cases using BACS), DPAS did not itself effect the legal and financial changes which characterise the transfer of a sum of money. The CJEU held that:

> "DPAS does not itself carry out the transfers or the materialisation in the relevant bank accounts of the sums of money agreed in the context of the dental plans at issue in the main proceedings, but asks the relevant financial institutions to carry out those transfers."

71. The Court, in this respect, endorsed the opinion of the Advocate-General who, at [41] and [42] of his opinion, concluded that the action of DPAS (in requesting from a financial institution pursuant to a direct debit mandate that a sum of money be collected from the patient's account and paid to DPAS, which then asks its bank to transfer the sum, net of remuneration, to the dentist and the patient's insurer), while "essential for completing the transfer of the payment", did not in itself result in the legal and financial changes which are characteristic of the transfer of a sum of money but was merely a step prior to the transactions concerning payments and transfers covered by Article 135(1)(d).