Neutral Citation Number: [2021] EWCA Civ 1043

Case No: A3/2020/0239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
MR JUSTICE ZACAROLI and UTJ GREG SINFIELD
[2019] UKUT 340 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2021

Before:

LORD JUSTICE UNDERHILL
VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE HENDERSON
and
LADY JUSTICE SIMLER

- -

Between:

TARGET GROUP LIMITED	**Appellant**
- and -	
HER MAJESTY'S REVENUE AND CUSTOMS	**Respondent**

- -
- -

Mr Roderick Cordara QC (instructed by **Pricewaterhouse Coopers LLP**) for the **Appellant**
Ms Hui Ling McCarthy QC and Mr Michael Ripley (instructed by **General Counsel and Solicitors to HM Revenue and Customs**) for the **Respondent**

Hearing dates: 12 and 13 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.

Lady Justice Simler:

Introduction

1. The question on this appeal is whether loan administration services (including the operation of individual loan accounts and processing payments received from borrowers) supplied by the appellant ("Target") to Shawbrook Bank Limited ("Shawbrook") (which originates and provides mortgages and loans to borrowers) are exempt from VAT pursuant to the exemption for financial services contained in article 135(1)(d) of Council Directive 2006/112/EC (the "Principal VAT Directive" or "PVD") implemented in UK law in Group 5, Schedule 9 of the Value Added Tax Act 1994 ("the VAT Act").

2. The exemption in article 135(1)(d) is for "*transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts ... but excluding debt collection* ...". In this case the following provisions within the exemption arise for particular consideration:

   i) the exemption for transactions concerning payments and transfers;

   ii) the exemption for transactions concerning debts;

   iii) the exemption for transactions concerning current accounts; and

   iv) the exclusion of debt collection from the exemption.

3. The services supplied by Target are described in further detail below by reference to the findings of fact made, but in essence they comprised the following. Target created a "loan account" on receipt of loan origination data from Shawbrook. Target recorded the account information on file (including the initial loan advance) and identified the balance of the loan, the next repayment date and the amounts (including interest) to be applied to the next payment. Then it interacted with borrowers (in the name of Shawbrook) including taking steps to facilitate timely repayment. Target created a standing direct debit instruction to be applied to the borrower's bank account (with other payment methods also available). In terms of processing payments, the loan payments were processed by direct debit where possible. This involved transfers of money from the borrower's bank account to Shawbrook's bank account which Target reconciled with the loan accounts. Target submitted the initial payment request/agreed the form of payment with the borrower, reviewed the money paid through different mechanisms, processed collection of money paid through different methods (for example by cheque), reconciled payments to the loan accounts, credited loan accounts once payments were made, recalculated the amount of the next payment to be made and confirmed total repayments made to Shawbrook each month. Target also accepted and processed overpayments from account holders and guarantors, monitored and applied corresponding repayment charges, amended the account's secured loan balance and, issued standardised correspondence to account holders and guarantors to confirm the overpayment. Once a loan reached its full contractual term or the borrower repaid the loan in advance, Target was responsible for closing the account.

4. Significantly Target was not involved in the making of any loans at the outset or in making any further advances.

5. The appeal arises in consequence of a ruling dated 31 July 2015 made by the respondent (Her Majesty's Commissioners for Revenue and Customs, "HMRC") in response to a request by Target for non-statutory clearance of the proposed VAT treatment of the supplies it made to Shawbrook following changes to their supply agreement. Target contended that the supplies were composite supplies of payment processing and therefore exempt. HMRC rejected that claim, deciding that the supplies made by Target to Shawbrook were composite supplies of the management of loan accounts and were therefore taxable. Target sought a review and by a decision dated 25 September 2015 (confirmed by letter dated 8 January 2016) HMRC maintained the view that Target's supplies to Shawbrook were composite supplies of the management of loan accounts and subject to VAT at the standard rate accordingly.

6. Target appealed to the First-tier Tribunal and by a decision released on 20 April 2018, Judge Sarah Falk ("the FTT") dismissed Target's appeal, holding that the loan administration services supplied by Target to Shawbrook were a single composite supply that would have qualified for exemption as transactions concerning payment and transfers but since she held that the supplies constituted debt collection, they were excluded from the scope of the exemption and standard rated for VAT purposes accordingly.

7. Target appealed to the Upper Tribunal and by a decision released on 15 November 2019, Zacaroli J and UTJ Sinfield ("the UT") dismissed the appeal but for different reasons. The UT held that the loan administration services did not attract the exemption at all because Target's role in transactions concerning payment and transfers was limited to passing the necessary information to "BACS"[1] (an automated electronic clearing house system established and operated by a company all the members of which are major UK banks) to enable BACS to give the relevant instructions to the borrower's bank and Shawbrook's bank so that a transfer of funds could take place. The UT followed the decision of the Court of Justice of the European Union ("the CJEU") on a reference for a preliminary ruling in *HMRC v DPAS Ltd* [2018] EUECJ C-5/17 (25 July 2018), [2018] STC 1615 ("*DPAS*"), and held accordingly, that this supply "*does not constitute an exempt supply even though it may be a necessary step in order for the payment to be made*" (see [74]). While the UT accepted that, "*in some cases, a unilateral entry in an account might have the effect of making the legal and financial changes necessary to effect a transfer*" (see [85]), this had "*no relevance to the entries made by Target in the loan accounts in this case*" because making a credit entry in a loan account did not change the legal and financial relationship between Shawbrook and the borrower "*unless (or until) there had been an actual transfer of funds from the borrower's bank account to Shawbrook's bank account*" (see [88]). The UT held that Target's supplies were not exempt transactions concerning current accounts because the loan accounts did not have the necessary features to qualify as current accounts (for example, enabling a customer to deposit/withdraw funds in varying amounts), and, since the question of debt collection did not arise in these circumstances, the UT did not deal with it.

8. There are three grounds of appeal (for which permission for a second appeal was granted by Lewison LJ) directed at the UT's conclusion that the supplies did not fall

[1] Bankers' Automated Clearing System.

within the scope of the exemption and so are standard rated for VAT purposes. They are:

i) the UT erred in law by unduly narrowing the scope of the exemption for "transactions concerning payments, transfers" and thereby failing properly to apply long-established principles settled by the European Court of Justice ("the ECJ") in *Sparekassernes Datacenter v Skatteministeriet* (Case C-2/95) [1997] ECR I-3017, [1997] STC 932 ("*SDC*"). In doing so, the UT overturned two decades of settled understanding about how the financial services VAT exemption applies in the UK, pursuant to decisions of the Court of Appeal in *Customs and Excise Commissioners v FDR Limited* [2000] EWCA Civ 216, [2000] STC 672 ("*FDR*") and *Electronic Data Systems Ltd* [2003] EWCA Civ 492, [2003] STC 688 ("*EDS*"). Target's responsibility to make legal and financial changes in the position of the parties brought its services within the scope of the exemption and prevented it from falling within the debt collection carve out.

ii) The UT erred in failing to consider the full scope of the exemption for "transactions concerning debts". Target's alternative case was that its complex services comprised a sub-contracting of a critical part of an overarching exempt supply by a bank and went far beyond simplistic debt collection. The services were transactions concerning debts and not debt collection.

iii) The UT erred in law by unduly narrowing the scope of "current accounts" so as to exclude the loan accounts operated by Target from exemption. Target also argued that it was operating current accounts as an agent for Shawbrook, a bank. The accounts were obviously current accounts accordingly and the UT erred in law in reaching a contrary conclusion.

9. If Target succeeds on any of these grounds, it recognises that the FTT's conclusion that its services nonetheless fell within the exclusion from exemption for debt collection must be addressed.

10. In addition, Target seeks permission to raise an additional point of law in the event that it fails to persuade the court to allow the appeal on any of the grounds raised. It invites the court to exercise powers now available in the European Union (Withdrawal) Act 2018 and associated regulations, the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained Case Law) Regulations 2020 ("the 2020 Regulations") to depart from retained EU law. Target contends that this would be "*an additional tool to enable [the court] to reach the same conclusion as is argued for in [Target's] main skeleton argument*". Having discussed this additional point with the parties, and in view of the limited time available for hearing the main grounds of appeal, the court directed that consideration of this additional argument (including whether permission should be granted to permit Target to rely on it at all) would be held over until after judgment has been delivered on the main grounds. This point is not therefore addressed further below.

11. The appeal is resisted by HMRC who seek to uphold the UT's order for the reasons given and on the additional ground that if, contrary to their primary submissions, the services fell within the exemption, they were excluded as debt collection services.

12. I have been greatly assisted in determining this appeal by the expertly drafted written arguments, developed in focussed oral submissions, from Mr Roderick Cordara QC on

behalf of Target and Ms Hui Ling McCarthy QC and Mr Michael Ripley on behalf of HMRC.

13. Before I turn to the grounds of appeal, I shall explain in summary form the statutory framework for the financial services exemption and the general approach to construction. I will then set out the underlying facts; and deal with the developing jurisprudence, both of our domestic courts and the CJEU in relation to the exemption.

The statutory framework and approach to construction

14. A founding principle of the common system of VAT introduced by Council Directive 77/388/EEC on the harmonisation of laws relating to VAT ("the Sixth Directive") is that VAT is paid on all services supplied for consideration by a taxable person. There are exceptions, and these constitute "independent concepts of Community law which must be placed in the general context of the common system of VAT introduced by the directive" (see *SDC* at [21]).

15. Article 135(1) of the PVD creates a series of financial services exceptions to this principle and requires member states to exempt from VAT a number of transactions, including so far as material to this appeal, the following:

> " …
>
> (b) the granting and the negotiation of credit and the management of credit by the person granting it;
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> …
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection; …"

The exemption in subparagraph (d) was formerly contained in article 13B(d)(3) of the Sixth Directive which was in exactly the same terms but in addition to excluding debt collection from coming within its terms, expressly excluded factoring as well.

16. These exemptions are implemented in UK law, albeit using different language, by Group 5 of Schedule 9 to the VAT Act. Items 2 and 2A of Group 5, Schedule 9 implement the exemption in subparagraph (b) and provide for exemptions in respect of:

> "2. The making of any advance or the granting of any credit.
>
> 2A. The management of credit by the person granting it."

The exemption in subparagraph (d) is transposed by items 1 and 8 of Group 5:

> "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.
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> …
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> 8. The operation of any current, deposit, or savings account."

17. It has been common ground throughout that Target cannot avail itself of the exemption in article 135(1)(b) because it is not, itself, the grantor of the credit afforded to borrowers and since 1 January 1991, the exemption for "management of credit" has been restricted to management undertaken by the grantor only. Since 1991 therefore, services involving management of credit supplied by anyone other than the grantor of the credit have attracted VAT at the standard rate. This has implications for the approach to construction of the exemption in subparagraph (d) because, as the CJEU has made clear, where there is a specific exemption (here for the management of credit), a broader exemption (here the exemption in article 135(1)(d)) must not be interpreted so widely as to undermine the deliberate legislative choice made in restricting other exemptions (see *Skatteverket v Hedqvist* [2015] EUECJ C-264/14, [2016] STC 372 ("*Hedqvist*") at [51] and [52] AG opinion and [41] CJEU).

18. Target's case is that it supplies exempt financial services delegated to it by Shawbrook (the grantor of credit) by managing loan accounts on behalf of Shawbrook, and the services are either transactions concerning payments and transfers, transactions concerning debts, and/or transactions concerning current accounts within subparagraph (d) of article 135(1).

19. 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* (Case 348/87) [1989] ECR 1737:

> "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."

This passage was cited by Chadwick LJ in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882, [2002] STC 42 at [16]. He continued:

> "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 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. …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."

20. In *HMRC v Axa UK plc* (C-175/09) [2010] ECR I-10701, [2010] STC 2825 ("*AXA CJEU*") (to which I shall return below) the CJEU made clear that although VAT exemptions must 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…".

21. Finally in relation to matters of general interpretation, the domestic legislation does not make any express reference to the exclusion of debt collection from the exemption. However, as this court made clear when *AXA CJEU* returned to it (see *HMRC v Axa UK plc* [2011] EWCA Civ 1607, [2012] STC 754 ("*AXA CA"*)), despite the absence of an express reference to debt collection in the UK legislation, the carve out applied as a matter of domestic law since "*Group 5, item 1 implements the whole of Article 13(B)(d)(3)*" (see Arden LJ at [49]). Accordingly the domestic legislation is compliant with the PVD and debt collection falls to be construed broadly.

The underlying facts

22. The underlying facts are not in dispute. The FTT made extensive findings about the services provided by Target at paragraphs 29 to 57. They were helpfully summarised by the UT at paragraphs 7 to 23, and for convenience I set out that summary below.

> "7. The relevant contract pursuant to which Target provided its services to Shawbrook was the Amended and Restated Master Servicing Agreement ('ARMSA') entered into in 2014. Supporting schedules to the ARMSA set out the Definition of Services ('DoS').
>
> 8. The recitals to the ARMSA describe Target as being "a provider of loan origination and account operation services" which "performs activities including the functions of: payment processing and servicing and portfolio management services".
>
> 9. Clause 3 of the ARMSA deals with the appointment of Target by Shawbrook to provide the "Services" in accordance with the terms of the agreement. It grants Target authority to do everything that, acting reasonably, it deems necessary or desirable in respect of the provision of the Services (provided that, without prior written consent, it does not exceed the scope of its authority). The "Services" provided by Target are described as the "operation of individual loan accounts, processing payments received from Borrowers and the administration of Loans". A loan account is separately defined as "an account operated by Target containing details relating to transactions occurring in respect of a Borrower's Loan including, inter alia, charges, payments, interest, arrears, and sundry fees".

10. Clause 4.5 of the ARMSA provides that Target will act as agent of Shawbrook for the purpose of providing the Services. Further, clause 23.2 of the ARMSA provides that, in carrying out the Services, Target has full authority to bind Shawbrook in accordance with the criteria and standards agreed with it, and that it shall conduct all correspondence on Shawbrook's letterhead and otherwise carry out all dealings and activities in Shawbrook's name and not in its own name. The FTT held, at [31], that Target acted as an undisclosed agent of Shawbrook.

11. Charges are dealt with principally in clause 8 of the ARMSA. The fee paid by Shawbrook is on a "per loan" basis. The amount payable per loan varies according to which of four portfolios of loans provided by Shawbrook it relates to and (except in the case of one portfolio) the number of loans outstanding in that portfolio. A higher figure is charged for each loan in arrears. The nature of the loans in each portfolio and the different amounts charged in respect of the different portfolios are not material to the VAT treatment of the supplies.

12. The DoS are relatively detailed documents which specify in detail how the Services are to be provided. The DoS also make clear what is out of scope, including marketing, requests to reissue cheques or instructions via BACS Payment Schemes Limited, previously known as the Bankers' Automated Clearing Services, ('BACS') in respect of the original advance, and further advances.

13. The DoS prescribe a "change control" procedure for initiating any changes. The FTT was shown an example where Target requested a change to the procedure for dealing with refunds due to customers, which resulted in Target being empowered to refund up to £300 without referral to Shawbrook. The change request included a significant level of detail about the proposed changes to the processes.

14. The DoS provide in detail how particular processes in relation to the operation of the accounts should be handled. Separate procedures apply to accounts in arrears. Target can agree forbearance in accordance with a mandate agreed with Shawbrook and also agree repayment plans with customers under which they make a series of payments towards their arrears balance. Any decision to write off a loan, however, is for Shawbrook, as is any decision whether to instruct solicitors to take legal action. Only Shawbrook can agree to amend the terms of a loan.

15. Target provides a full business process outsourcing service which, in the case of Shawbrook, starts with the creation of a loan account, immediately after a loan is made, and includes the day-to-day operation of the account and dealings with the customer up to the point of final repayment. Target maintains and continuously updates (and later reports on) the financial relationship and position between Shawbrook and its borrowers. Target does not provide loan origination services to Shawbrook, such as assessing credit worthiness, valuing potential

security or otherwise deciding whether to make a loan or processing the making of the advance.

16. Target's staff answer the phone as 'Shawbrook' and conduct correspondence on Shawbrook's letterhead. Target also uses its own specialised software (the "Centrac" system) to provide the services. In effect, Target provides the human and technical capability which Shawbrook does not need to resource. Without Target's service, Shawbrook would simply have granted credit but would lack the operational capability to calculate and recover repayments, apply fees and charges and deal with interactions with borrowers.

17. In providing its services to Shawbrook (and with an immaterial exception), Target operates under the "umbrella" of Shawbrook's regulatory approvals rather than its own.

18. The loan accounts maintained by Target are the sole record of the financial relationship between Shawbrook and its borrowers. They are effectively ledgers which evidence the level of indebtedness, capture repayments and record other financial information including fees and interest charged. Target credits and debits the loan accounts with all relevant amounts (payments, fees and interest etc).

19. Target operates bank accounts on behalf of Shawbrook. Target is responsible for matching payments to individual loan accounts and identifying missing payments. The vast majority of payments are made by direct debit. Target is responsible for generating the instructions for direct debit payments, in the form of a BACS file produced by Target's systems which contains electronic payment instructions to banks operating the borrowers' bank accounts, which BACS processes automatically. Target also accepts payments otherwise than by direct debit, eg by debit card payments and cheques.

20. As well as regular payments, Target processes irregular payments, for example where a borrower is in arrears and is seeking to pay amounts towards clearing the arrears, makes an overpayment or is paying off a loan early. Target reconciles and credits the payments to the loan accounts. Target has authority to transfer funds paid by borrowers into an incorrect account to the correct account. It uses both the BACS and CHAPS payment systems, which process instructions issued by Target (on behalf of Shawbrook), to move funds between Shawbrook's bank accounts where required, or to repay sums to the borrower where an overpayment has been made.

21. Target is also responsible for calculating the amounts of interest and principal repayments due, and for calculating and applying any fees. Where Shawbrook makes an additional advance to a borrower, Target follows the same processes as for a new loan with the new outstanding loan amount replacing the previous balance. Where a borrower wishes to repay a loan early, Target is responsible for providing an early

> settlement quote. It also handles the entire process for any loan repayment, including discharge of security (using Shawbrook's approved panel of solicitors) and closure of the account.
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> 22. Target also deals with missed payments and arrears. For any default, a letter is produced in Shawbrook's name providing formal notification to the borrower and advising them of the fee that will be applied. Target is provided with a certain level of authority by Shawbrook to negotiate how missed payments will be made up, with any longer-term forbearance being referred to Shawbrook. Any changes to the terms of a loan, e.g. an extension to the loan period, are also a matter for Shawbrook. If an account remains in arrears, the decision whether to take legal action or write off a loan is solely a matter for Shawbrook. If Shawbrook decides to take legal action, Target will work with a firm of solicitors on a Shawbrook approved panel, providing information, keeping records and continuing to handle contacts with the borrower.
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> 23. Target also deals with any overpayments. Generally, borrowers can overpay a certain percentage of the balance, e.g. 10%, in any year without incurring an early repayment charge. Target amends the loan balance and term as appropriate and issues a letter confirming the overpayment. Alternatively, borrowers may be eligible for a refund if they overpay which Target will process. As mentioned above at [13], Target has authority to process refunds of less than £300 without reference to Shawbrook."

23. The FTT dismissed Target's appeal as indicated above. The FTT did not have the benefit of the CJEU's judgment in *DPAS*, which had not been released at the time of its decision in this case.

24. In both tribunals below it was agreed that the services provided by Target to Shawbrook comprised a single (composite or complex) supply for VAT purposes rather than multiple separate supplies. The argument concerned how the supply should be classified and whether it was exempt or standard-rated. The FTT held that "*the starting point is to identify the individual elements of a single complex supply*" and *"whether that supply falls to be treated as exempt will generally (but not necessarily exclusively) be determined by reference to predominance, but this might either be a single predominant element or in some cases a combination of elements*" (see [81]). Neither party objected to this approach and the UT was content to adopt it for the purposes of this appeal, as am I. Moreover, neither party sought to go behind the findings of fact made by the FTT which are binding on the parties. The question of law for this court is whether on the findings of fact made by the FTT, the UT erred in law in concluding that Target's supplies did not fall within any of the limbs of the financial services exemption in issue.

25. In relation to the question of how the supply should be classified, the FTT first considered whether the single complex supply included "*transactions … concerning … payments, transfers, debts*" (or the equivalent in Item 1 of Group 5, Schedule 9 VAT Act). Secondly, it considered whether what is supplied included the operation of current

accounts. Thirdly, it considered the scope of the debt collection carve out. Finally, the appropriate description of the single supply in this case was addressed. On each of these issues, the FTT's essential reasoning and conclusions can be summarised as follows.

26. On the first question, the FTT held that Target's supplies to Shawbrook included elements that were "*transactions … concerning … payments, transfers*". In particular, relying on *ATP PensionService A/S v Skatteministeriet* [2014] EUECJ C-464/12 12 March 2014), [2014] STC 2145 ("*ATP*") the FTT held that the concept of transfer did not require any physical transfer of funds so that accounting entries were sufficient, and accordingly, "*the operation of the loan accounts, and specifically the crediting and debiting of entries to those accounts, involved changes in the legal and financial situation between Shawbrook and the borrowers which fulfilled the specific, essential functions of payments or transfers, going beyond a mere physical or technical supply*" (see [84]). The FTT regarded as significant the fact that Target itself used BACS and CHAPS payment systems rather than effectively instructing or requesting a financial institution to do so. In addition, the FTT concluded that Target assumed responsibility or liability for achieving a transfer or payment in those situations so that Target's services went beyond an exchange of information or a request for payment (see [87]).

27. On the second question, the FTT held that Target did not operate current accounts because the loan accounts did not have the same functionality as a current account, and the economic purpose of the account with Shawbrook was quite different, namely to lend a fixed amount to the borrower on specified terms. The FTT held: "*The loan account is no more than a ledger which records the current and historic position as between the lender and borrower in terms of the amounts paid and the amounts due or falling due*" (see [92] subparagraph (8)).

28. As for the exclusion for debt collection, the FTT held, in light of *AXA CJEU*, that debt collection covers amounts as they fall due rather than simply amounts that are overdue, so that it followed that the payments or transfers processed by Target were properly described as the collection of debts: the main objective of Target's supplies, and the predominant nature of the services supplied by Target to Shawbrook, was the collection of debts as they fell due (see [103] and [110]).

29. Each of those conclusions was in issue in the UT and is now in issue on this appeal. I shall address the reasons given by the UT for its decision under each of the relevant grounds on this appeal. Before addressing the arguments advanced by Mr Cordara it is necessary to consider in more detail the principal authorities cited both to the UT and to this court on the scope of the financial services exemption in subparagraph (d).

The development of the jurisprudence relating to the exemption in article 135(1)(d)

SDC

30. I begin with *SDC* where the ECJ first considered the scope of the exemption then contained in article 13B(d) of the Sixth Directive, now in article 135(1)(d) of the PVD.

31. SDC was an association of Danish member banks. It provided financial services to its member banks, including the execution of transfers of funds and the management of deposits, purchase contracts and loans. A typical service consisted of a number of components which, taken together, constituted a service supplied to the bank for a fee.

The Danish court referred a number of questions arising out of SDC's claim to exemption under article 13B(d)(3) and (5). In answering the questions, the ECJ gave guidance on the proper approach to interpretation of the exemptions including as follows:

(i) The linguistic differences between the various language versions of article 13B(d)(3) meant the scope of the phrase "transactions … concerning [payments, transfers, debts etc]" could not be determined on the basis of an exclusively textual interpretation, and reference had to be made to the context in which the phrase occurs and the structure of the Sixth Directive ([22]).

(ii) Transactions that are exempt under article 13B(d)(3) are defined by the nature of the services provided, not by who or to whom they are provided, except where they cover services which, by their nature, are provided to customers of financial institutions ([32] and [48]).

(iii) The manner in which a service is performed, whether electronically, automatically or manually, does not affect the application of the exemption ([37]).

(iv) Nor is the wording of the exemption restricted to relevant services which a financial institution provides to the end customer. Rather the wording of the exemption is sufficiently broad to include services provided by operators other than banks to persons other than their end customers ([56] and [57]).

(v) A transfer is "*the execution of an order for the transfer of a sum of money from one bank account to another*", and is characterised by the fact that "*it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks and, in some cases, between the banks*" ([53]).

(vi) It is only the transaction that produces the change in the legal and financial situation that is the transfer, and since a transfer is only a means of transmitting funds, the functional aspects, rather than the cause of the transfer, are decisive for determining whether a transaction constitutes a transfer for these purposes ([53] and [66]).

(vii) The fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt: to be exempt, a package of services must "*viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions*" of an exempt transaction ([65] and [66]).

(viii) It is necessary to distinguish between an exempt service and a "*mere physical or technical supply, such as making a data-handling system available to a bank*", or "*technical and electronic assistance to the person performing the essential, specific functions".* These are not exempt and "*the national court must examine in particular the extent of the data-handling centre's responsibility vis-à-vis the banks, in particular the question whether its responsibility is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions*" ([66]).

32. The meaning and application of those requirements was considered domestically by this court in two cases involving data-handling centres like those in *SDC, FDR* and *EDS*.

FDR

33. The facts of *FDR* were complicated and what follows is a simplified summary only. FDR provided data-handling and other services to customer banks which enabled the movement of funds between banks by a number of different methods, including by netting off amounts within account ledgers maintained by FDR, and by moving money between banks by FDR instructing BACS to make transfers following debit and credit card transactions (by instructing BACS to debit the account of each acquirer and credit the accounts of its merchant customers). HMRC (or in fact, the predecessor body) contended that neither the netting off process nor the transfer of funds effected through BACS constituted relevant "transfers" within the meaning of the financial services exemption in article 13B(d) of the Sixth Directive; and in any event, the core supply made by FDR was in the nature of book-keeping or accountancy services and so was taxable. The tax tribunal concluded that the principal service supplied by FDR to the banks was that of processing all their credit card transactions and settling their liabilities and claims under these transactions, and accordingly, the services were within the exemption and the appeal was allowed.

34. On appeal, this court agreed, holding that the transfers effected through BACS were "transfers" within the meaning of the exemption, and that this service was a single supply with the making of transfers a core element of it. Giving the lead judgment, Laws LJ described and considered in detail the BACS process (see [23] and [25] in particular). He recorded the argument advanced on behalf of HMRC as follows:

> "34. Mr Paines [counsel for Customs and Excise Commissioners] submits that a 'transfer' is constituted by the *execution* of an instruction that the transfer should take place, and never merely by the *instruction* itself (see paragraph 53 of the judgment in *SDC* ([1997] STC 932 at 954, [1997] ECR I-3017 at 3058)). In line with this is his submission appearing in his skeleton argument –
>
> '… the distinction drawn by the ECJ in paragraphs 65 and 66 of the judgment is between a service which is indispensable for the performance of an exempt supply by another (which is *insufficient* for exemption) and a service which itself contains the essential elements of an exempt supply defined in Article 13B(d) and thus is an exempt supply. It is only the latter service which qualifies for exemption. In particular, a "transaction concerning transfers" is one that has the effect of transferring funds.'
>
> Mr Paines was concerned to emphasise that there may be many commercial and professional services which on the fact of it seem well within some or other part of the Article 13B(d)(3) rubric: thus general accountancy services such as negotiation on a client's behalf with the Inland Revenue would, as a matter of ordinary language, readily fall within "transactions, including negotiation, concerning … payments, transfers"; but it is beyond contest that such services are not exempt. Something altogether more intimate to the actual process of moving money is required."

At [35] Laws LJ expressed his agreement with this argument in general terms, but on the particular facts of this case, he took a different view:

> "35. In general terms, I agree with this. It is plain that ordinary accountancy services are not exempt from VAT, and that the exemptions granted by the provisions contained in art 13B(d) are much more narrowly confined. It is well recognised that commercial transactions whose essence involves the movement of money are in many cases, for conceptual reasons, ill-suited for the application of the VAT regime, and it seems likely that this is what lies behind the Article 13B(d) exemptions. Mr Paines was in my judgment right to submit that while the court's reasoning in *SDC* relating specifically to 'transfers' implies a narrow approach to the exemption's reach, it would be no less inappropriate to open the statutory exemptions to services which are distant from the actual movement of money merely by reference to other words in the provision, such as 'transactions, including negotiation, concerning deposit and current accounts ... debts, cheques and other negotiable instruments'. In particular I think he was right to submit that FDR's instructions to BACS would not constitute a transaction concerning a current account: if FDR does not effect transfers through BACS, it enjoys no other route (vis-à-vis BACS) to exemption under Article 13B(d)(3). But all this, I conceive, is no more nor less than the consequence of the well-established requirement to read the statutory exemptions strictly; and I do not suppose that Mr Cordara [counsel for FDR] would disagree. I must test what FDR actually do against the reasoning in *SDC*, and do so in three areas, (a) transfers and BACS, (b) transfers and netting-off, and (c) transfers and the cardholder/merchant accounts."

35. So far as the concept of a transfer itself is concerned, Laws LJ referred to two earlier cases (including *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 at 750E-H) which considered the modern mechanism of moving money through account transfers, and concluded:

> "37. … a transfer of money *means no more nor less than* the entry of a credit in the payee's account and the entry of a corresponding debit in the payor's account."

36. In relation to payments through BACS, at [42] Laws LJ held:

> "42. On this aspect of the case, it is in my judgment of the first importance to recognise that BACS for its own part exercises no judgment or discretion whatever. Once the relevant tape is prepared (and that is admittedly done by FDR) and delivered to BACS, the process is, as I have said, automatic. Moreover the inevitable outcome is a redistribution of the rights and obligations of payor and payee—a 'change in the legal and financial situation'—the very circumstances which in my judgment constitute a transfer of funds for the purposes of art 13B(d)(3). As far as I can see that result would only not be arrived at if the BACS hardware or software were to break down,

> or if (assuming this were possible) FDR were to countermand its instructions during the BACS payment cycle. In those circumstances BACS is in my judgment merely the agency by which FDR effects transfers, in the four situations I have identified. Any other conclusion would be contrary to the good sense of the general law: *Qui facit per alium facit per se* (he who does a thing through another does it himself). And I cannot in this see the least affront to the reasoning in SDC: quite the contrary: it is a conclusion which conforms to the letter and spirit of art 13B(d) as it was explained in that case."

37. So far as transfers and netting-off was concerned, Laws LJ dealt with this at [43] to [45] as follows:

> "43. The tribunal held (see p 45, paragraph 183):
>
> 'The fact is that the daily netting off procedure involves an account being struck of the debits and credits of each client bank. The netting off procedure involves a credit in that daily account and in economic terms clearly involves both a payment and a transfer. In any event on any normal use of language the satisfaction of the Issuer's obligation to the payment system or the Acquirer is clearly a transaction involving the debt (or créance) to which the creditor is entitled. It would be wholly illogical if netting off fell within point 3 when viewed from the creditor's side but not when viewed from the debtor's.'
>
> 44. The pooled arrangements by which FDR net off the mutual liabilities of issuers, acquirers and payment systems were described by Mr Paines in his reply as amounting to no more than a 'calculation'. Their eventuation in day-to-day practice was 'merely declaratory of what the true legal and financial situation is'. In his skeleton argument he had submitted that netting-off 'is simply the striking of an account of mutual debits and credits. It avoids pro tanto the need to make a transfer or payment'. Mr Paines' submissions upon this point are very elegant but entirely misconceived. They depend upon a hidden premiss, namely that for a transfer to take place something has to happen *over and above* a change (to put the matter in summary form) in the relevant parties' legal relationship constituted by corresponding credit and debit entries in their respective bank accounts: there has to be, in some sense, a *real* transfer, which must, presumably, be different in kind from the change in parties' bank account entries. But the premiss is false. There is, as I have explained in para 36, no such extra happening. It is not unlike the story of the Emperor's New Clothes, in which the little boy realised that what everyone else said they saw—the Emperor's supposed finery—was not there at all.
>
> 45. The reality is that the netting-off process achieves precisely the same result as would be attained – unspeakably more laboriously – if, as between all the acquirers, issuers and payment systems, each debt owed by any one to any other were the subject of individual credit and debit entries in the bank accounts of the two of them. If FDR effected such transactions, then subject to his argument about BACS Mr Paines would as I understand it accept that FDR indeed made transfers. But that is

> wholly unreal. It cannot be right that the most inefficient way of doing X constitutes an exempt supply, but the most efficient way of doing it constitutes a taxable supply. On this issue the tribunal was in my judgment entirely right."

38. In conclusion Laws LJ said at [64]:

> "64. … For what it is worth I would have categorised the essential commercial activity here in very simple terms. It consists in the movement of money between cardholder, merchant, issuer and acquirer, for the convenience of the cardholder and the profit of the other three parties. Under the contractual arrangements which the tribunal examined at great length, that activity is essentially (with variations) 'outsourced'—a word not to be used without quotation marks—to FDR. So regarded, the supplies which FDR makes plainly fall within art 13B(d)(3)."

EDS

39. A similar approach was adopted in *EDS*, although in *EDS* unlike in *FDR*, EDS provided a package of services consisting of loan arrangement and execution services for its clients (who were banks) and its clients' customers (who were borrowers), but, significantly, these included providing the loan service itself on behalf of the lending bank.

40. EDS was the contact point between the bank and its customers and received and processed applications for loans and validated them using the bank's credit-rating system. Following validation, EDS produced a loan agreement, signed on behalf of the bank, and forwarded it to the borrower together with a direct debit mandate and other documents. EDS verified the documentation received from the borrower and, once verified, released the agreed funds to the borrower it had received previously. The maximum and minimum amount of the loan and the interest rate payable were fixed by the bank. Once the loan was made, EDS collected payments from the borrower using the direct debit system. EDS operated two accounts with the bank as the bank's trustee; the funds in those accounts were the bank's funds.

41. HMRC (or again, the predecessor body) rejected EDS's claim that its services were exempt within article 13B(d)(3). The tax tribunal allowed the appeal and this court upheld that conclusion. At [135] Jonathan Parker LJ (with whom the other members of the court agreed) summarised the guidance to be taken from *SDC* as it applied to EDS, concluding:

> "135. In the instant case: (1) the contractual links between the bank and its customers do not affect the question whether the services supplied by EDS to the bank are exempt under art. 13(B)(d)(3) (para. 55); (2) to fall within that exemption, the services provided by EDS 'must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions of' an exempt transaction (para. 66); (3) they must 'entail changes to the legal and financial situation' (para. 66); and (4) EDS's supply must amount to more than a supply which is 'restricted to technical aspects' (paragraph 66)."

Applying that guidance, Jonathan Parker LJ held that EDS's supplies were exempt transactions concerning payments and transfers, holding:

> "136. 1. That the expression 'loan arrangement and execution services' is an apt general description of the package of services supplied by EDS under the 1999 agreement.
>
> 2. That, within that package, the 'core supply' (to use one of the expressions referred to earlier) is that of administrative services in connection with ('concerning') the making of loans. That is the specific essential function of the supply.
>
> 3. The package of services is properly to be regarded as forming a 'distinct whole', and it would be thoroughly artificial to attempt to split it into separate elements, whether on economic or on any other grounds.
>
> 4. The performance of the package of services crucially and inevitably involves the making of payments and transfers of funds: such transactions are not merely essential but absolutely central to the 'core supply'.
>
> 5.The functional aspects of the movements of money effected by EDS in performing services under the 1999 agreement result in changes in the legal and financial situation of the relevant parties."

42. As already emphasised, the services provided by EDS were described as "loan arrangement and execution services" and the focus was clearly on the initial arrangements to put the loan in place. This is clear from the description of the "*core supply*" or "*specific essential function*" as one of "administrative services in connection with (in other words, concerning) the *making* of loans" (see above [136(2)], my emphasis). The services provided by EDS included EDS being furnished with the cash required for the initial draw-down stage of the loan, in order for EDS to make the loans to the banks' borrowers. The making of payments and transfers of funds was seen as "*absolutely central*" to the core supply ([136(4)]. Target on the other hand, made no loans, and had no involvement whatever in loan origination. That, in my judgment, is a critical factual distinction between these two cases.

Nordea Pankki

43. The ECJ applied the principles established in *SDC* in three situations outside the banking sphere that are relevant to this appeal. First, *Nordea Pankki Suomi Oyj* [2011] EUECJ C-350/10(28 July 2011), [2011] STC 1956 ("*Nordea*") was concerned with interbank payments and transactions in securities, where the means by which payment orders were transmitted from one financial institution to another was SWIFT[2], the secure electronic messaging service. The question for the ECJ was whether the SWIFT services were exempt on the basis that they were used in payment transaction and security transaction settlements between financial institutions. The ECJ reiterated that a "transfer" is "*a transaction consisting of the execution of an order for the transfer of*

[2] SWIFT stands for the Society for Worldwide Interbank Financial Communication

a sum of money, characterised in particular by the fact that it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks" (see [25]). In relation to SWIFT, it held:

> "31. Even if it were accepted that, as Nordea submits, SWIFT services are, on a number of markets, essential and the only services available, the mere fact that a constituent element is essential for completing an exempt transaction still does not warrant the conclusion that the service which that element represents is exempt (SDC, paragraph 65).
>
> 32. It is also not disputed that, although orders for transfers of funds or those which are intended to effect certain transactions in securities must be transmitted via computer systems approved by SWIFT in order to guarantee their security, ownership rights as regards those funds or, as the case may be, those securities is transferred only by the financial institutions themselves in the context of legal relations with their own clients.
>
> 33. It is also clear from the case-law cited in paragraphs 24-26 of this judgment that the legal and financial changes which are such as to characterise a transaction exempt from VAT result only from the transfer of ownership, actual or potential, in funds or securities, without it being necessary for the transaction thereby performed to be effective against third parties.
>
> 34. Accordingly, if Swift Services are electronic messaging services which are simply intended to transmit information, they do not by themselves perform any of the functions of one of the financial transactions referred to in Article 13B(d)(3) and (5) of the Sixth Directive, that is to say those which have the effect of transferring funds or securities, and do not therefore possess the character of such transactions."

44. The ECJ held accordingly that the SWIFT services did not fall within the exemption.

Bookit II and NEC

45. Following *Nordea* UK tax tribunals experienced some difficulty in determining what kinds of activity were covered by the exemption in article 135(1)(d) (as the ECJ recorded, see *Bookit II* at [20], referred to below). On 26 May 2016 the ECJ gave judgment on the same day on two separate references for preliminary rulings in relation to the scope of the exemption: *Bookit v HMRC* [2016] EUECJ C-607/14 (26 May 2016) ("*Bookit II*") and *National Exhibition Centre Ltd* v *HMRC* [2016] EUECJ C-130/15(26 May 2016), [2016] STC 2132 ("*NEC*"), both card handling services cases in which the focus was on the taxpayer's role in card transactions for purchases, and in particular its relationship to the merchant acquirer, and whether the fee charged for card handling services supplied by the taxpayer was exempt as a transaction concerning payments or transfers within article 135(1)(d) of the PVD.

46. Bookit[3] had previously successfully litigated the applicability of this VAT exemption for card handling fees charged by it to Odeon cinema customers, though there were some differences in the way the services were organised. In the later proceedings, Bookit, acting in the name of a cinema operator (Odeon), sold cinema tickets to customers who paid by debit or credit card. Bookit charged customers the price of the tickets and a card handling fee. Bookit obtained the customers' card details and transmitted them, through another company (DataCash), to a merchant acquirer which, in turn, sent them to the relevant card issuer. Subject to checks, the card issuer provided an authorisation code to the merchant acquirer which provided it to Bookit, thereby authorising the sale. At the end of each day, Bookit sent a settlement file containing details of all card transactions during the day, to the merchant acquirer. The merchant acquirer sent these details to the relevant card issuers who transferred payments to the merchant acquirer. The merchant acquirer transferred the funds to Bookit's account. Bookit subsequently transferred the ticket sales revenue to Odeon and retained the card handling fees for itself.

47. The referring court (the First-tier Tribunal) expressed uncertainty as a matter of principle as to what factors distinguished a service consisting of the provision of financial information without which a payment would not be made but which did not fall within the exemption (such as in *Nordea*), from a data handling service which functionally had the effect of transferring funds and which the ECJ had identified in *SDC* could fall within the scope of the exemption. The questions referred for a preliminary ruling were directed at these points of principle.

48. Having referred to and reiterated the principles established in *SDC* and *Nordea* (as summarised above), the ECJ gave guidance in *Bookit II* on how exempt and non-exempt transfers should be distinguished, as follows:

> "41. It must also be stated that, since the functional aspects are decisive to the determination of whether a transaction concerns a transfer for the purposes of Article 135(1)(d) of the VAT Directive, the test that makes it possible to distinguish a transaction that has the effect of transferring funds and bringing about changes in the legal and financial situation within the meaning of the case-law cited in paragraphs 38 to 40 of this judgment, which falls within the scope of the exemption concerned, from a transaction that does not have such effects and therefore, is outside its scope, is whether the transaction under consideration causes the actual or potential transfer of ownership of the funds concerned, or fulfils in effect the specific, essential functions of such a transfer.."

[3] Bookit v HMRC [2006] EWCA Civ 550, [2006] STC 1367. In these earlier proceedings and by virtue of the fact that Bookit transmitted the card information with the necessary security information and the card issuers' authorisation codes to the merchant acquirer, at that time, Girobank, the CA upheld the tribunal's conclusion. Just as in *FDR* sending the file to BACS was held to have effected the transfer, here sending the file containing the card details and the issuers' authorisation codes to Girobank was held to have effected the transfer because Girobank was bound to act on the information by automatically crediting Bookit's account.

49. The ECJ made clear that the critical question is whether the transaction causes the actual or potential transfer of funds in the sense of functionally effecting it. The focus is on what is done by the supplier and whether it effects the transfer of funds:

> "42. In that regard, while the fact that the service provider concerned may directly debit and/or credit itself an account, or again act by means of accounting entries in accounts belonging to the same account holder, allows, in principle, the conclusion that condition is met and that the service under consideration is exempted (see, to that effect, judgment of 13 March 2014, *ATP PensionService*, C-464/12, EU:C:2014:139, paragraphs 80, 81 and 85), the mere fact that that service does not directly involve such a task does not however mean that the possibility of its being within the scope of the exemption at issue should be immediately ruled out, given that the interpretation described in paragraph 38 of this judgment does not presuppose any particular method for effecting transfers (see, to that effect, judgment of 13 March 2014, *ATP PensionService*, C-464/12, paragraph 80). "

50. At [44] the ECJ recognised expressly that a card handling service like Bookit's service had the effect of leading to the execution of a payment or a transfer and could be regarded as indispensable (the ECJ used the word "essential" in *Bookit II* but "indispensable" in *NEC*, and the meaning is clear) to that execution or transfer, given that without the transmission of the settlement file at the end of each day, the process of payment or the transfer of money would not have taken place.

51. However, at [45] to [53] the ECJ held that the mere fact a service was indispensable to the completion of an exempt transaction did not lead to the conclusion that the service was itself exempt. The functions of obtaining data relating to a payment card, transmitting that data, receiving an authorisation code provided by the card issuer, and retransmitting the settlement file at the end of the day, were not (whether taken individually or together) regarded by the ECJ as the performance of a specific and essential function of a payment or transfer transaction within the exemption because Bookit did not itself "*directly debit or credit the accounts concerned"* and did not *"act by accounting entries*" or even *"instruct such debit or credit, since it is the purchaser who, by using his or her payment card to make a purchase decides that his or her account will be debited in favour of a third party*." The retransmission of the settlement files was nothing other than a "*request to receive a payment electronically"* and could not be regarded as *"executing the payment or transfer concerned or as fulfilling in effect the specific and essential functions*." The authorisation code contained in the settlement file represented only an authorisation to proceed with a sale and had no impact on any function essential to the transfer of ownership of funds (see [48] and [49]).

52. At [50] the ECJ observed that it was not apparent from the order for reference that Bookit assumed any liability for the achievement of changes in the legal and financial situation characteristic of the existence of an exempt transaction of transfer or payment under article 135(1)(d). Although Bookit might have had obligations to the purchaser and possibly to Odeon, to ensure due performance of the sale and the card handling service associated with the sale, that liability did not mean that Bookit assumed liability

for achieving changes in the legal and financial situation characteristic of an exempt transfer or payment transaction.

53. Accordingly, the ECJ held:

> "51. It follows from all the foregoing that the provider of a card handling service, such as that at issue in the main proceedings, plays no specific and essential part in achieving the changes in the legal and financial situation that are the result of a transfer of ownership of the funds concerned and that, according to the Court's case-law, can be said to be characteristic of a transaction concerning payments or transfers that is exempted under Article 135(1)(d) of the VAT Directive, but does no more than provide technical and administrative assistance for the obtaining of information and the communication of that information to its merchant acquirer, and to receive, by the same means, the communication of information that enables it to effect a sale and to receive the corresponding funds.
>
> 52. … the fact that such a service is provided by electronic means, and in particular the fact that the transmission of the settlement file entails the automatic triggering of the payments or transfers … cannot alter the nature of the service provided …."

54. The service provided consisted in essence of an exchange of information between a trader and its merchant acquirer with a view to receiving payment for a product or service supplied for sale and could not fall within the scope of the exemption ([53]).

55. The ECJ's judgment (given by the same constitution on the same day) in *NEC* was to similar effect. The steps taken by NEC to process card payments following sales of tickets on behalf of promoters who staged exhibitions and events at NEC venues were essentially the same as those taken by Bookit. The ECJ reached the same conclusion for the same reasons in NEC as it had done in *Bookit II*: it was the purchaser (and not the service provider) who, by using a payment card for a purchase, decided that his account would be debited in favour of a third party's account. Further, the settlement files presented by a services supplier to its merchant acquirer bank (with or without authorisation codes) were nothing more than a demand for payment in electronic form, and forwarding such files at the end of each day could not be regarded as executing the payment or transfer concerned ([42]). It was also not apparent that NEC assumed responsibility in relation to the making of the legal and financial changes which characterise the existence of an exempt transfer or payment transaction ([45]). It followed that a service provider such as NEC did not participate specifically and essentially in the legal and financial changes giving rise to a transfer in the ownership of the funds concerned, but rather, by technical and administrative means, it collected and communicated information to and from the merchant acquirer bank, enabling it to make a sale and receive the corresponding funds ([46]). At [47] the ECJ emphasised (as it had done in *Bookit II*):

> "47. In that regard, it should be borne in mind that the automated nature of such a service and, in particular, the fact that

> the sending of the settlement file automatically triggers the payments or transfers under consideration, cannot alter the nature of the service supplied and, consequently, has no bearing on the application of the exemption in question (see, to that effect, judgment of 5 June 1997 in *SDC*, C-2/95, EU:C:1997:278, paragraph 37)."

56. Given its conclusion on the question of exemption, the ECJ did not consider it necessary to answer the second referred question on whether the services supplied by NEC constituted "debt collection" and were thus excluded from the exemption for transactions concerning payments and transfers.

AXA CJEU

57. The third situation in which the exemption has been relevantly considered concerned payment collection or handling services performed, first on behalf of dental surgeries (in *AXA CJEU*) and secondly, on behalf of dental patients (in *DPAS*). DPAS (or "Denplan" as it was referred to in the AXA proceedings) is the acronym for "Dental Plan Administration Services" and designed, implemented and managed dental plans in the UK, providing an arrangement under which the dentist agreed to provide dental care to the patient, who agreed in return to pay a specified monthly sum agreed between dentist and patient. Until 1 January 2012, the contractual arrangements implementing the dental plans were concluded solely between Denplan (AXA was the representative member of a VAT group to which Denplan belonged) and the dentists. (There was a separate contract relating to insurance cover.) Under the contract with the dentists, patients made monthly payments from their bank accounts by direct debit to Denplan which accounted to the dentist for payments received after deducting a fee for its services. The dispute was as to whether VAT was chargeable on the fee. This court referred a number of specific questions to the ECJ about the scope of the exemption and the ECJ reformulated the questions raised into a more general issue concerning the applicability of the exemption.

58. The service provided by Denplan of "collecting payments" was described by the ECJ as consisting of:

> "19. … the collection, processing and onward payment of sums of money due from third parties, namely patients, to Denplan's clients, namely, dentists. That service consists, in particular, in transmitting information to the third party's bank calling for the transfer of a certain sum of money from the third party's bank account to the service supplier's bank account in reliance on a standing authorisation given by that third party to his or her bank, and subsequently giving an instruction to the service supplier's own bank to transfer funds from its account to the client's bank account. Meanwhile, the service supplier sends to its client a statement of the sums received and contacts third parties from whom it has not received a transfer of the sum requested."

59. Although neither party nor the domestic tax tribunals below had raised the potential application of the debt collection exclusion, the ECJ held:

> "28. …its purpose is to benefit Denplan's clients, namely dentists, by the payment of the sums of money due to them from their patients. 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 art 13B(d)(3) of the Sixth Directive, unless it is "debt collection or factoring"…"

60. At [32] the ECJ concluded that the services described were excluded from the exemption in article 13B(d)(3) because they were covered by the term "debt collection and factoring" and were therefore liable to VAT at the standard rate, holding at [36]:

> "36. Article 13B(d)(3) of the Sixth Directive is to be interpreted as meaning that the exemption from VAT provided for by that provision does not cover a supply of services which consist, in essence, in requesting a third party's bank to transfer to the service supplier's account, via the direct debit system, a sum due from that party to the service supplier's client, in sending to the client a statement of the sums received, in making contact with the third parties from whom the service supplier has not received payment and, finally, in giving instructions to the service supplier's bank to transfer the payments received, less the service supplier's remuneration, to the client's bank account."

61. As just indicated, the application of the "debt collection" exclusion to Denplan's services had not previously been considered in the domestic proceedings because the dispute had centred on whether or not the exemption applied at all to the services provided by Denplan. HMRC had contended that the exemption simply did not apply and had placed no reliance on the debt collection exclusion. Accordingly, the ECJ's decision was somewhat unexpected (as is apparent from observations of this court on its return, reported at [2012] STC 754, and see for example [59]). Nonetheless, this court unanimously concluded that despite the absence of an express reference to "debt collection" in the UK legislation, the debt collection exclusion applied as a matter of domestic law and, moreover, the ECJ had understood the material facts and concluded that the services were more properly regarded as a service of debt collection.

DPAS

62. Following the ECJ's judgment in *AXA CJEU*, the dental plan contracts were restructured with the intention of making supplies of services, not only to dentists, but also to patients. The contract between DPAS (as it was referred to) and the dentist for the provision of dental payment plan services was split into two separate contracts: first, a contract between DPAS and the dentist for the provision of dental payment plan services, liable to VAT; and secondly, a contract between DPAS and the patient for the provision of dental payment plan 'facilities', which would remain exempt from VAT. Part of the monthly amount paid by the patient to DPAS by direct debit would be retained by DPAS as a charge for its services to the patients in managing and administering patient dental plan payments, supplementary insurance cover and a dental emergency helpline. Notwithstanding the contractual changes, there was no

dispute that the services provided by DPAS were the same or very similar to those described in the judgment in *AXA CJEU*.

63. HMRC did not accept the VAT consequences claimed by DPAS, and concluded that the dental plan management services provided to patients constituted either a single supply of services for dentists, subject to VAT at the standard rate; or a supply of services for dentists, subject to VAT at the standard rate, and a provision of services for patients, also subject to VAT at the standard rate. HMRC also claimed that the contractual arrangements effective from 1 January 2012 constituted an abusive practice within the meaning of *Halifax Plc v Customs and Excise Commissioners* (C-255/02) [2006] ECR I-1609, [2006] STC 919. DPAS challenged that decision relying, among other things, on the conclusion in *AXA CJEU* that the services fell within the exemption subject only to the carve out for debt collection. The First-tier Tribunal held that DPAS supplied a service to patients in return for consideration. This involved a transaction concerning payments which was exempt from VAT and it did not involve debt collection, as the service at issue was provided to the debtor and not to the creditor. It also ruled out the existence of an abusive practice.

64. The Upper Tribunal agreed with those conclusions but did not reach a final conclusion on whether the services provided by DPAS to patients were exempt from VAT. The Upper Tribunal instead expressed the view that the judgment in *AXA CJEU* supported DPAS's argument that those services constituted a transaction concerning payments, and were therefore exempt, but noting *Bookit II* and *NEC* which suggested that a different assessment was possible, and expressing uncertainty as to how they should be reconciled. The Upper Tribunal stayed the proceedings and referred the following questions to the CJEU for a preliminary ruling (case law references are excluded):

> "(1) Is a service, such as that performed by the taxpayer in the present case, consisting of directing, pursuant to a direct debit mandate, that money is taken by direct debit from patient's bank account and passed by the taxpayer, after deduction of the taxpayer's remuneration, to the patient's dentist and insurance provider, an exempt supply of transfer or payment services within Article 135(1)(d) of the … VAT Directive? In particular, do the decisions [of .. *Bookit* … and *National Exhibition Centre* ..] lead to the conclusion that the exemption from VAT in Article 135(l)(d) [of the VAT Directive] is not applicable to a service, such as that performed by the taxpayer in the present case, which does not involve the taxpayer itself debiting or crediting any accounts over which it has control but which, where a transfer of funds results, is essential to that transfer? Or does the decision [of .. *AXA UK* …] lead to the contrary conclusion?
>
> (2) What are the relevant principles to be applied for determining whether or not a service such as that performed by the taxpayer in the present case falls within the scope of "debt collection" within Article 135(1)(d) [of the VAT Directive]? In particular, if (as the Court decided in […*AXA UK*...] in relation to the same or a very similar service) such a service would constitute debt collection if provided to the person to whom the

> payment is due (i.e. the dentists in the present case and in [the case which gave rise to that judgment]), does that service also constitute debt collection if such a service is provided to the person from whom the payment is due (i.e. the patients in the present case)?."

65. Both the Advocate General (AG Saugmandsgaard Øe) and the CJEU (which I note was constituted in the same way as the court which heard *Bookit II* and *NEC*) answered the first question in the negative and found it unnecessary in those circumstances to answer the second question.

66. 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, rather than in terms of the person supplying or receiving the services. The CJEU held at [31]:

> "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. …"

67. At [33] the CJEU reiterated and endorsed the conclusion reached in *SDC* that:

> "33. … 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. It is 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 art 135(1)(d) of the VAT Directive. …"

68. At [38] the CJEU endorsed the observations of the Advocate General that it followed that:

> "38. … a supply of services may be regarded as a 'transaction concerning transfers' or as a 'transaction concerning payments' within the meaning of art 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. …"

69. Applying those principles to the facts, and again endorsing observations to similar effect made by the Advocate General, the CJEU concluded 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:

> "41. 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.
>
> 42. …a supply of services such as that at issue in the main proceedings is merely a step prior to the transactions concerning payments and transfers covered by Article 135(1)(d) of the VAT Directive. …"

70. In the course of its judgment in *DPAS*, the CJEU referred extensively to *Bookit II*, and at [45] and [47], held that the services provided by DPAS were administrative in nature only and did not effect the legal and financial changes which characterise the transfer of a sum of money. In particular, asking financial institutions to carry out those transfers was comparable to the card handling services charged for in *Bookit II* and could not come within the exemption in article 135(1)(d) of the PVD for transactions concerning payments and transfers.

71. At [48], echoing the conclusions expressed by the Advocate General at paragraphs 59 to 63 of his Opinion, the CJEU clarified its earlier decision in *AXA CJEU*, stating in effect that it had not intended to suggest that such services could fall within the exemption (subject to the exclusion for debt collection):

> "48. … in that judgment, the Court did not examine whether the supply of services at issue in the case which gave rise to it met the criterion established by the Court's previous case-law for the purpose of identifying a transaction concerning payments and transfers, from which it was already clear that the relevant criterion in that regard was whether the supply of services at issue had the effect of making the legal and financial changes which are characteristic of the transfer of a sum of money … but focused its analysis on the question of whether that supply of services was covered by the concept of 'debt collection' within the meaning of art 13B(d)(3) of the Sixth Directive, now art 135(1)(d) of the VAT Directive."

Issue 1: payments and transfers

72. In light of the authorities to which I have just referred, which were discussed at length by the UT, the UT held as follows in relation to the payment and transfer issue:

> "74. The decision of the CJEU in DPAS is, in our judgement, 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.
>
> 75. In the present case, every transfer of funds made by a borrower to Shawbrook is effected by the borrower's financial institution debiting the borrower's account by the relevant amount and Shawbrook's bank crediting a matching sum to Shawbrook's account (together with matching debits and credits effected by other banks sitting between one or other of the borrower's and Shawbrook's bank and the Bank of England, as explained by Laws LJ in FDR at [37]). Target's role is limited to passing the necessary information to BACS to enable it to give the relevant instructions to the borrower's bank and Shawbrook's bank so that the transfer of funds can take place. That is indistinguishable from the role played by Denplan – so far as payments made by the patients are concerned – in giving the relevant instruction to the patient's bank pursuant to the direct debit mandate in order for patient's bank to cause the payment to be made to Denplan's bank.
>
> 76. Mr Cordara submitted that the analysis offered by Laws LJ at [42] of FDR nevertheless holds good and that it is Target, therefore, that effects the transfer of funds from the borrower's bank account to Shawbrook's bank account. He relies in support on the fact that there is nothing in the decision of the CJEU in DPAS which interferes with the conclusion reached in SDC and the fact that FDR and EDS were merely applying the principles set out in SDC. We reject this submission. While it is true that the CJEU in DPAS confirms and restates the principles stated in SDC, it provides further elaboration of those principles which is inconsistent with the conclusion reached (expressly) in FDR and (tacitly) in EDS that a party who provides instructions to BACS to transfer funds between bank accounts can be said to be effecting the transfer of those funds. As noted in Bookit (and also in Case C-130/15 National Exhibition Centre v HMRC [2016] STC 2132 at [47]), the fact that the procedures are automated does not alter the nature of the service supplied. Specifically, we do not consider that the fact that BACS is pre-authorised (no doubt pursuant to the terms its participating banks have agreed with it as part of the terms and conditions of membership) to effect debits and credits from the accounts of the participating banks alters the legal conclusion that it is BACS and/or the banks themselves that effect the transfer of funds and not the entity (Target, in this case) that provides the instruction to BACS containing the necessary information upon which BACS can act."

73. The UT rejected Target's arguments which sought to distinguish the decision in *DPAS*. It rejected as immaterial the fact that the recipient in the present case was a bank, and concluded that Target's placement between the borrower and Shawbrook as compared

to Denplan's situation was also irrelevant as the material actions in issuing instructions to BACS to effect payment were effectively the same (see [78] and [79]).

74. The UT also rejected the alternative argument advanced by Target that the mere inputting of accounting entries by Target in the loan account was sufficient to effect a transfer or payment, in the sense of making the legal and financial changes which are characteristic of the transfer of a sum of money, distinguishing Target's case from those of *FDR* and *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728. The UT held that the loan account was no more than a ledger, recording the effect of payments made by customers to Shawbrook but not effecting such payments. The UT also distinguished *ATP*, on the basis that ATP was responsible for creating and crediting pension accounts, and its services were found to have established rights of pension customers vis-à-vis the pension funds (see [86]-[87]).

75. In challenging the reasoning and conclusions reached by the UT on this issue, Mr Cordara QC's essential submissions can be summarised (without I hope any disservice to the comprehensive arguments he presented) as follows:

    i) The services supplied by Target to Shawbrook were "transactions … concerning … payment, transfers …" within article 135(1)(d) of the PVD by reason of its involvement in (i) procuring, through instructions to BACS, payments from borrowers' bank accounts to Shawbrook's bank accounts; and/or (ii) inputting entries into the borrowers' loan accounts with Shawbrook and maintaining a ledger recording details such as charges, payments, interest, arrears, and fees in relation to each borrower's loan.

    ii) At the heart of Target's submissions in relation to (i) is the proposition that, by giving direct instructions to BACS to transfer funds from a borrower's bank account to Shawbrook's bank account in circumstances where all steps following Target's instructions occurred automatically and inevitably, Target "effected" the transfer of funds (just as FDR was found to have done).

    iii) In support of this proposition, he relied on *SDC, FDR, EDS* and *AXA CJEU*. *SDC* makes clear that the exemption in article 135(1)(d) (then article 13B(d)(3) of the Sixth Directive) is broadly stated and not confined to services supplied by financial institutions. Moreover, the ECJ expressly confirmed that a data handling system can (in appropriate circumstances) provide exempt supplies.

    iv) While acknowledging distinctions between *FDR* and Target's case the reasoning of Laws LJ in *FDR* ought to apply nonetheless: FDR and Target both "kept the bank's books". Like FDR, which printed statements and, when there was a direct debit, curated the extraction of funds, Target kept ledgers, sent statements and drew money through direct debits. In both cases, BACS was "merely the agency by which" transfers were effected by the taxpayer (see [42] *FDR*). If and in so far as the CJEU's judgment in *DPAS* does not properly reflect the fact that BACS operates in the UK in the manner described by Laws LJ to move money, that is a factual matter which this court can put to one side. The facts are a matter for the national court, and nothing said by the CJEU dislodges the factual context for the operation of BACS set out in that case. The findings in *FDR* set the factual context for the VAT question at issue, and have a status that remains unaffected by the subsequent judgment in *DPAS.*

v) In the same way, the activities undertaken by EDS (save in relation to the initial loan), (as listed in sub-paragraphs (5)-(12) in the Appendix to the judgment at [23]) are directly analogous or parallel to Target's case, and so the same conclusion as was reached in *EDS* ought to follow here too. The same is true of *ATP*, which was a curator of employee rights under private pension schemes, and like Target, sat between employer and employee, and established who was owed what and received payments in and out of the schemes.

vi) Further in relation to (ii) inputting entries into borrowers' loan accounts with Shawbrook, Target undoubtedly operated loan accounts which provided the sole record of transactions, and in this respect was in precisely the same position as FDR, EDS and ATP. Moreover, Shawbrook authorised Target to be the point of receipt of money owed to it, and to perform an agency role in receiving and giving good receipt for the money owed, thereby discharging the borrower. In this regard, Target was in an identical position to ATP, establishing in a legally significant way, the ever-changing positions of the debtor-creditor relationship (the loan borrowing). Target had control, though not ownership, of the funds as they moved, and reflected those movements in the ledgers it kept. Target's responsibility therefore extended "beyond technical aspects to the creation of credit and debit entries" (as the FTT found at [84]) in a way that was sufficient (as it was in *ATP*) to effect transfers.

vii) The CJEU judgments in the line of cases from *Bookit II* and *NEC* to *DPAS* do not alter the principles laid down in *SDC*, but rather the later cases were determined in their own factual context and do not establish points of general principle. Lord Reed's statement in *HMRC v Loyalty Management UK Ltd* [2013] UKSC 15, [2013] STC 784 at [56] identifies that there are limits to the pre-eminence of judgments of the CJEU, and supports the distinction drawn between CJEU rulings on matters of general principle that are not open to question, and CJEU rulings which cannot be dispositive because they are based on an incomplete evaluation of the facts or are confined to their own factual context. As Lord Reed explained at [68], a small change in the factual situation involved can render the legal answer to a VAT question in one case inapplicable in another. The UT failed to recognise this or to distinguish Target's specific contractual situation (running all aspects of the bank's loan relationships) from the facts in either *Bookit II* or *DPAS*.

viii) Unlike in *Bookit II, NEC* or *DPAS*, Target's clients are banks, which provide financial services in an exempt commercial environment, and Target has not been driven to carve out a purported exempt supply from a taxable situation (such as selling cinema tickets or NEC events) in an endeavour to render that supply non-taxable. The essence of the relationship between Shawbrook and its customers is one which has the effect of altering their legal and financial situation through the movement of money in an exempt business, and Target "curates" that relationship. There is no reason why the exemption should not be retained. As the FTT found conclusively, Target had full authority to bind Shawbrook and there is nothing more Target could do, save for becoming a bank itself, to get closer to the exempt supplies made by Shawbrook (see [31] FTT decision).

ix) Moreover, neither Bookit nor NEC involved the sending of electronic messages into an account like the BACS system; rather they concerned supplies in which an authorisation code was sent to allow the merchant acquirer bank to be comfortable in making the payment. In neither case was there an assumption of responsibility for the particular movement, transfer or payment. Both concerned card handling services, which are not by their nature financial transactions.

x) Mr Cordara accepted that there is a frontier where facilitators of services who transmit data have been held to be taxable (for example, *Nordea*). The key question in those cases was the nature of the responsibility of the service provider to whom the obligations are delegated or "outsourced". In *Nordea*, the taxpayer was merely the messenger (through the SWIFT system). In this case, it is significant (as the FTT found) that Target is the author of the instructions through which transfers are executed; Target makes the decisions when to collect in the money owed, alter interest rates, and occasionally make refunds. Taken together those functions effect legal and financial changes and are qualitatively different from the messaging services in *Nordea*. Moreover, Target assumes responsibility or liability for achieving a transfer or payment.

xi) *DPAS* is also distinguishable: it did not involve an intermediary dealing with the interface of the banking system like Target does, but involved an attempted carve out from an otherwise taxable supply. Further, DPAS was not responsible for any failure of payment by direct debit. Still further, while the CJEU did not suggest that the taxpayer needed to be a bank to fall within this exemption, if the taxpayer was in the financial services industry, that inevitably assists. Target has no difficulty in this regard, unlike DPAS (see [45] *DPAS*).

xii) Accordingly the UT was wrong at [74] to exclude the giving of an instruction to a financial institution to effect a payment from exemption, even though the instruction is an indispensable step for the payment to be made. By insisting that the taxpayer must itself undertake all steps in the payment process, the UT misunderstood the reality of payment processes and set the bar to exemption so high that it has unlawfully constricted the payments and transfers exemption as described by *SDC*, depriving it of any reasonable effect. Further, the UT was wrong at [76] to treat BACS as making the entries (when it does not) and to dismiss the importance of the pre-authorised context in which data messages, once sent, will be acted on automatically. The UT has rendered the concept of "the execution of an order" redundant for fiscal purposes, contrary to settled case law of the CJEU. The UT's blanket approach (that a party who provides binding instructions to BACS regarding the transfer of funds between bank accounts is ineligible for exemption) effectively hollows out the exemption for the movement of money, given that in all cases (save where a bank is both creditor and debtor) "movement" is effected by messages passed along a chain through BACS or its equivalent. The UT was also wrong to conclude that recording receipts of sums by an agent of the payee, where the sums were under the control of the agent and there was no other record, and where the agent was (implicitly) held out to the payer as the person authorised to give good receipt, did not amount to effecting a transfer (see UT at [85]). All the factors identified should, properly considered, have led to the conclusion that Target fell within the exemption, like ATP.

76. Those submissions are resisted by HMRC. Ms McCarthy QC submitted that the UT was right, for the reasons it gave, to find that Target's services did not involve transactions concerning payments and transfers. Again, in summary, she submitted:

i) The fundamental point established by *SDC*, and amplified subsequently by the CJEU in the cases culminating in *DPAS*, is what is meant by the requirements that to qualify for this aspect of the exemption, there must be "*execution of an order for transfer*" of a sum of money by the taxpayer ([53]) and that the services supplied must have the "*effect of transferring funds*" and "*entail changes*" in ownership ([66]).

ii) The tension between *FDR*, *EDS* and *AXA CJEU* on the one hand, and *Bookit II* and *NEC* on the other, was clear in the questions asked of the CJEU in *DPAS*. The CJEU was asked to resolve that conflict (see *DPAS* at [22]). In *DPAS* the CJEU did precisely that and resolved the conflict in favour of the *Bookit II* and *NEC* line of reasoning. While the CJEU was not asked to consider precisely the same questions as were referred in *AXA CJEU*, it would have been aware of those questions and it is informative that the Advocate General (expressly at [56]-[65]) and the CJEU (implicitly at [48]-[50]) said that *AXA CJEU* was wrong on the payments/transfers point, but not on the debt collection point. *FDR* should not be followed in light of the subsequent jurisprudence of the CJEU on the payments/transfers issue.

iii) The *DPAS* line of case law establishes the generally applicable principle that a mere instruction, even in the context of an automated process in which a transfer or payment is the inevitable outcome, is not to be treated as the execution of that transfer or payment. These were not decisions on their own facts. These principles apply to Target's supplies which are not exempt in consequence. BACS (not Target) executes the transfers/payments from and into the loan accounts.

iv) Target does not itself receive any funds. Its role is limited to giving instructions to BACS or to financial institutions. Target merely requests that someone else executes the transfer and alters the legal and financial situation. This is functionally similar to the role played by the taxpayers in *DPAS*, *NEC* and *Bookit*. As correctly noted by the UT, the CJEU's decision in *DPAS* on this point is clear and unambiguous: giving an instruction to a financial institution to effect payment does not constitute an exempt supply even though it may be an indispensable step in order for payment to be made (see the UT decision at [74]).

v) Further, debits and credits posted to the loan accounts by Target in this case, do not effect any payment or transfer and do not result in any change in the legal or financial position of the parties. As the UT correctly held, the loan account is no more than a record of the effect of payments (see UT decision at [80]).

vi) To the extent that other elements of Target's services are relied on as satisfying the terms of the exemption (for example, the "operation of bank accounts on behalf of Shawbrook" or the movement of funds between Shawbrook's bank accounts), those elements do not satisfy the terms of the exemption either. In particular, a customer of a bank (including Shawbrook, which banked with RBS

and NatWest) does not effect a financial transaction by instructing their bank to make transfers or payments. Equally, a person who has the authority to make those instructions on behalf of the bank's customer does not provide an exempt financial service (see the AG in *DPAS* at [45]).

vii) Furthermore and in any event, whilst it is common ground that Target's various activities fall to be treated as a single supply, even if one element of the services performed by Target could satisfy the CJEU case law criteria to be a transaction concerning payments or transfers, it simply does not follow that the whole of Target's services fall to be treated as an exempt payment service.

viii) In that regard, the FTT recorded the wide range of Target's services. Standing back, Target's involvement in processing payments or transfers is not an accurate characterisation of its services as a whole nor is it the essence of what Target supplied to Shawbrook. The better view is that Target supplied a broader debt collection service, the management of credit by someone other than the grantor, and/or the operation of loan accounts. All such supplies are taxable and it does not matter to what extent Target's services may be (or have been) a combination of all three.

ix) In light of *DPAS* (and the other cases referred to), the UT was correct in its analysis at [74]-[76]. In particular, the UT correctly analysed Target's role; Shawbrook and the borrowers' banks are responsible for debiting and crediting the accounts while Target itself does not reach into the banks' internal systems. This is entirely analogous with DPAS' role. The UT also dealt correctly with *FDR* and *EDS* in observing the fact that the procedures the taxpayer may use are automated does not alter the nature of the service supplied, and correct to find that it was either BACS or the banks themselves who effect the transfer of funds and not Target. In doing so, the UT was not saying that it can only be banks that effect the transfer of funds, the UT was simply saying that it was not Target.

77. In light of the guidance given by the CJEU (as summarised above), the starting point is that the financial services exemptions contained in article 135(1)(d) have an autonomous EU law meaning (in order to avoid divergences in the application of the VAT system as between member states); and are to be strictly construed, though that is not to be equated with a restricted construction. In other words, the exemptions are to be construed in a way that does not have the effect of extending their scope beyond the fair meaning of the words used, having regard to the context and the objective of the common system of VAT.

78. Nor is an exclusively literal interpretation appropriate: for example, although general accountancy services that include conducting negotiations on a client's behalf with HMRC, would, as a matter of ordinary language, appear on the face of it to fall within "*transactions, including negotiation, concerning … payments, transfers*", nobody doubts that such services are not within the exemption. As Laws LJ put it in *FDR*, "*Something altogether more intimate to the actual process of moving money is required*."

79. More specifically, following *SDC* it is clear that the exemption is determined by reference to the nature of the services provided, and not by reference to the person supplying or receiving the service. To fall within the exemption, the transactions in

question must be financial transactions in nature, and not administrative or technical transactions in nature.

80. The decisive feature of a transaction concerning payment or transfer is the existence of a transaction consisting of the execution of an order for transfer of a sum of money, involving a change in the legal and financial situation as between the relevant parties. Although a complex supply of services can be broken down into separate services which then constitute "transactions concerning transfers", to be within the exemption the transactions must form a distinct whole that has the functional effect (irrespective of cause) of making the legal and financial changes that are characteristic of the transfer of a sum of money.

81. Moreover, as the CJEU has said repeatedly, there is a distinction between a service which is indispensable for the performance of an exempt supply by another (which is *insufficient* for exemption) and a service which itself contains the essential elements of an exempt supply defined in article 135(1)(d) and is therefore an exempt supply. The mere fact of being an indispensable constituent element to completing an exempt transaction does not alter that position.

82. Since article 135(1)(d) does not prescribe or envisage any particular method for effecting the transaction, the transaction may be a transfer effected by the actual transfer of funds, or depending on the facts of the particular case, a transfer effected by accounting entries, as occurred in *ATP*. However, the mere physical or technical supply of software or a data-handling system to a bank that does not effect a transfer of funds with a change in the legal and financial position (for example, ownership), will not fall within the exemption.

83. In *FDR* this court accepted that approach, and that in general, a transfer is constituted by the execution of an instruction that the transfer should take place and not merely by the instruction itself (see Laws LJ at [34] and [35] set out above). This court also accepted that inherent in the concept of a transfer within the meaning of the exemption is the notion of a "change in the legal and financial situation" of the paying and receiving parties.

84. However, a central feature of the court's reasoning in *FDR* (and one that made all the difference in that case) was that the BACS process was purely automatic in its operation and involved no independent exercise of judgment or discretion whatever. This meant that where BACS performed without interruption, the inevitable outcome of its process would be the redistribution of rights and obligations as between payor and payee, so that the instruction to BACS was regarded as sufficient to constitute a transfer by FDR within the meaning of the exemption. In other words, FDR's instruction to BACS was the execution of an order for the transfer of a sum of money from one bank account to another, because FDR was executing the order itself through BACS' automatic agency. *AXA CJEU* and *Bookit* followed this approach, and involved a rejection of the case consistently advanced by HMRC that making a request or giving an instruction, however automatic a process leading to the transfer of funds that followed, was insufficient to constitute a transfer.

85. But, as the discussion of subsequent decisions of the CJEU in *Nordea, Bookit II* and *NEC* above demonstrates, the CJEU confronted and addressed as a matter of general principle the question whether giving instructions that triggered an automatic process

leading inevitably to payment was or could be sufficient. These cases elaborated on the principles established by *SDC*. They make clear, as did *SDC*, that where a company 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 135(1)(d). However, in *Bookit II, NEC* etc, such a finding was not possible: the exemption did not apply because the services supplied could not, taken individually or together, be regarded as performing a specific and essential function of a payment or transfer transaction for the purposes of EU law because the supplier did not itself directly debit or credit the accounts concerned, or act by means of accounting entries; nor did the supplier assume any liability as regards the achievement of the changes in the legal and financial situation that are characteristic of the existence of an exempted transfer or payment transaction.

86. The CJEU concluded, clearly and unambiguously, that actual execution is necessary to qualify as a transaction concerning transfer or payment, and the mere giving of an instruction is not sufficient in itself, even if the instruction or order is indispensable to the transaction taking effect, and even if the instruction triggers an entirely automatic process leading to payment: electronic messaging services in a payment chain, that merely transmit information or instructions but do not themselves perform any of the functions of transmitting funds to constitute a transfer, do not fall within the exemption.

87. Both the Advocate General and the CJEU in *DPAS* identified the obvious tension between the two lines of authority and the debate that had existed as to whether an instruction to another party to effect a transfer was sufficient. Having done so, both deliberately followed the *Nordea/Bookit II* line of reasoning, concluding that the services supplied by DPAS (involving instructions to transfer funds through the direct debit system) were administrative only and did not effect the transfer and the legal and financial changes which characterise a transfer of a sum of money. In *DPAS* issuing instructions to financial institutions to carry out a transfer was regarded as comparable to the card processing services in *Bookit II* and *NEC*. All were merely preparatory steps or steps prior to the transfer, and the importance of the financial consequences of such steps to the transaction as a whole, was not relevant. That conclusion as a matter of general principle (and not merely as application to the particular facts) is reinforced, as Ms McCarthy submitted, not only by the fact that the court was identically constituted in these three cases, but also by the statements in *DPAS* that *AXA CJEU* cannot be relied on any longer in relation to the payment/transfer point (see the Advocate General's Opinion at [56]-[65] and [48]-[50] of the CJEU's judgment).

88. I reject the submission that these cases can be distinguished on the basis that they involved tax avoidance, as Mr Cordara, at one stage, appeared to suggest. The *Halifax* doctrine (which reflects the EU approach to tax avoidance) formed no part of the CJEU's reasoning in any of these cases. Nor do I accept that they can be confined to their own factual context as Mr Cordara also suggested. None of the differing factual backgrounds (including as to different payment routes or methods) impacted in any way on the clear statements of general principle made by the CJEU.

89. The critical factual distinction Mr Cordara sought to draw between a party who is a mere communications interface, and a party who, in the context of operating a continuing financial relationship through the provision of loan accounts, constructs and delivers binding instructions for money to be moved between accounts, is unsustainable in light of *DPAS*. In both cases, however legally significant the service is in a chain of

binding messages, if the taxpayer's role is limited to instructing another party to make the transfer and effect the change in payor/payee positions, that is not sufficient to fall within the exemption.

90. This conclusion is further reinforced by the narrow approach adopted by the CJEU to the definition of a "transfer" for these purposes in *Finanzamt Trier v Cardpoint GmbH* [2019] EUECJ C-42/18. The CJEU rejected Cardpoint's case that its supplies including in relation to the release of payments of cash to cardholders using ATM machines and the maintenance of a daily record of transactions, constituted exempt transfers. The CJEU recognised that unlike the factual position in the earlier cases (including *Bookit II*) the services provided by Cardpoint were not limited to an exchange of data between the issuing bank and the bank operating the ATM in question, but also concerned the physical distribution of cash. However, the withdrawals from an ATM did not constitute a transfer of ownership from Cardpoint to the user of the ATM: they did not involve the legal as opposed to the purely physical, transfer of the money, and as the Advocate General explained, transfer of the legal ownership of the money was contingent upon authorisation from the bank that issued the card and the transaction's subsequent entry in the accounts. In other words, it was the "*bank that issued the card that authorised the withdrawal, debited corresponding amounts to the user of the machine's bank account and transferred the ownership of the money directly to that user*". The services provided by Cardpoint were confined to forwarding the customer's request for payment and giving technical effect to that payment.

91. On the question of responsibility or liability, again I do not accept the submissions made by Mr Cordara. Target is neither responsible nor liable for payments or transfers (for example, the failure or cancellation of a direct debit mandate) in the sense in which the CJEU has used this phrase, because its involvement is limited and it does not execute the transfer that entails a change in the legal or financial situation. (A similar argument advanced in *Nordea* was rejected by the ECJ for this reason: see [35] to [38].) Execution is critical to the question of responsibility and liability. In this regard, Target's role in procuring payments from borrower bank accounts to Shawbrook's bank accounts, through instructions to BACS, is no different to the role played by DPAS in issuing instructions to BACS to effect payment from the patient's bank account to it before separately passing on an equivalent sum (less deductions) to the dentist. In neither case did these entities execute the transfer and in neither case were they responsible for any failure of the transfer. The fact that the relevant payment in *DPAS* represented only half of the service provided to the dentist (the second half being the onward payment from DPAS to the dentist) makes no relevant difference to the question whether the instruction to BACS itself effects the transfer of funds. Nor is it relevant that once data messages are sent, BACS operates automatically, as the CJEU confirmed in *Bookit II* at [52].

92. In my judgment *DPAS* and this group of cases reflect an evolution of the principles first established in *SDC*. In *DPAS* the CJEU confronted the tension between the conclusion at [42] of *FDR* (which is prima facie binding on us) and what was said about instructions to SWIFT and card processing services in *Nordea*, *NEC*, *Bookit II* and resolved the conflict in favour of the latter approach. The CJEU's reasoning in this group of cases, culminating in *DPAS*, is inconsistent with the reasons and conclusions of this court at [42] of *FDR*.

93. Ms McCarthy invited this court to follow the subsequent case law of the CJEU culminating in *DPAS* as to the proper interpretation of the exemption in article 135(1)(d). She submitted that resolution of the conflict between the two lines of authority requires this court to follow the relevant CJEU case law (subject only to the power to depart) and to depart from this aspect of the decision in *FDR*. I accept her submissions for the reasons she gave, which are, in summary, as follows.

94. As explained by the Supreme Court in *R (Miller & Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61:

> "64. Thus, EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, so long as the United Kingdom is party to the EU Treaties. *Similarly, so long as the United Kingdom is party to the EU Treaties, UK courts are obliged (i) to interpret EU* Treaties, Regulations and *Directives in accordance with decisions of the Court of Justice*, (ii) to refer unclear points of EU law to the Court of Justice, and *(iii) to interpret all domestic legislation, if at all possible, so as to comply with EU law (*see *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135). …
>
> 65. In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the "conduit pipe" by which EU law is introduced into UK domestic law. *So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.*" (Emphasis added)."

95. Furthermore, as Ms McCarthy submitted, section 3 of the 1972 Act provided for any question on the meaning and effect of the Treaties, or the validity, meaning or effect of any "Community instrument" to be treated as a question of EU law by the UK courts, and for such determination to be made in accordance with principles laid down by the CJEU or, if necessary, to be referred to the CJEU. Decisions of the CJEU as to the meaning of EU directives therefore take precedence over judgments of UK courts. The obligation in the 1972 Act to give effect to EU law as laid down by the CJEU, may require this court to refuse to follow its own earlier decision as to the meaning and effect of a Community instrument, or a judgment of the CJEU where interpretation, explanation or qualification by the CJEU in a later judgment leads to the conclusion that the earlier decision is wrong (as Chadwick LJ explained in *Condé Nast Publications Ltd v Customs and Excise Commissioners* [2006] EWCA Civ 976, [2006] STC 1721 at [44]).

96. That is plainly the position here given the conflict between this court's previous interpretation of article 13B(d)(3) of the Sixth Directive (now article 135(1)(d) of the PVD) in *FDR*, and the subsequent case law of the CJEU explaining those provisions and *SDC*. Had this appeal been heard prior to the UK's withdrawal from the EU, I have

no doubt that this court would have been required by the 1972 Act to apply the VAT Act in conformity with the subsequent EU law, irrespective of [42] of *FDR*.

97. However, although the 1972 Act was repealed with effect from exit day pursuant to section 1 of the European Union (Withdrawal) Act 2018, Parliament has by section 2 of the 2018 Act preserved the effect of EU-derived domestic legislation (such as the VAT Act). By section 5(2) of the 2018 Act the principle of supremacy of EU law in relation to domestic legislation passed or made before exit is preserved, so that domestic law must be interpreted, as far as possible, in accordance with EU law, subject only to the power of the court to depart from retained EU case law in the narrow circumstances provided for by section 6 of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained Case Law) Regulations 2020.

98. Applying the CJEU jurisprudence culminating in *DPAS*, and based on the findings of the FTT, all of the activities, taken together or individually, carried out by Target and viewed broadly, do not form a distinct whole that fulfils the essential functions of a financial transaction within the meaning of article 135(1)(d). First, Target does not provide loan origination services to Shawbrook: it does not assess credit worthiness, value potential security or otherwise decide whether to make a loan or process the making of any advances to borrowers. Instead, it provides an outsourced business process service that starts with the creation of a loan account once the loan is made, and includes the day-to-day operation of the loan account, and Shawbrook's bank accounts, and dealing with the borrower to the point of final repayment.

99. Secondly, although Shawbrook has delegated part of its functions to Target, and Target has full authority to bind Shawbrook, operates bank accounts on behalf of Shawbrook and is responsible for matching payments to individual loan accounts and identifying missing payments, it does not itself debit or credit an account directly, or intervene by way of accounting entries on the accounts of an account holder. The functions delegated to Target are limited to passing the necessary information to BACS to enable it to give the relevant instructions to the borrower's bank and Shawbrook's bank so that the transfer of funds can take place; and do not include the necessary steps ordinarily undertaken in effecting the transfer of funds or payments themselves. Just as a customer of a bank (including Shawbrook) does not effect a financial transaction by instructing their bank to make transfers or payments, equally a person with authority to give instructions on behalf of the bank's customer does not provide an exempt financial service. The transfers and payments are effected between the borrower's bank and Shawbrook's bank, and neither of these banks delegated any part of these functions to Target.

100. Thirdly and as noted, Target's role is limited to giving instructions or orders that are executed by a different party. Target generates instructions or requests for payment by direct debit, in the form of a BACS file containing electronic payment instructions to banks operating the borrower bank accounts, which are then processed automatically by BACS. In other words, Target triggers the chain of steps leading to a transfer, but does not itself execute or effect the legal and financial changes which are characteristic of the transfer of money. The fact that Target itself uses the BACS payment systems rather than instructing a financial institution to do so is a distinction without a difference. Likewise, that Target performs a "*legally significant service under authority within the chain of binding messages*" as Mr Cordara described it, which results in alterations to payor and payee accounts, is not sufficient to qualify for exemption, even

though it may be a necessary step in order for the payment to be made. Were it so, *DPAS* and the cases preceding *DPAS* (including *Nordea, Bookit II* and *NEC*) would have been differently decided.

101. Fourthly, Target does not assume responsibility or liability for achieving a transfer or payment in the services it provides, as Mr Cordara submitted. The service performed by Target does not go beyond an exchange of information or request for payment to somebody else to make the transfer or payment. That third party, and not Target, would be responsible for the failure or cancellation of, for example, a direct debit mandate. Target's role is a prior step and in this regard I can see no basis for distinguishing *DPAS*, *NEC* or *Bookit II*.

102. Target's reliance on its role in debiting and crediting the borrower loan accounts with Shawbrook is also misplaced. The debits and credits to loan accounts made by Target did not effect any payment or transfer, and did not result in a change in the legal and financial position of the parties, but simply recorded the consequence of transfers effected by others.

103. The accounting entries relied on in *FDR*, as a "netting off" process that effected changes in the legal and financial position, and were indistinguishable from an actual transfer of funds for the purposes of the exemption, are fundamentally different from the accounting entries in the loan account in this case. In *FDR* the tribunal found that the "*daily netting off procedure involves an account being struck of the debits and credits of each client bank*" and involved "*in economic terms both a payment and a transfer*" (see *FDR* at [43]).

104. But whether or not that conclusion remains a sustainable one in light of *DPAS*, in Target's case the position is different. As the UT put it, the accounting entries in the loan accounts made by Target merely recorded the consequence of transfers, which had taken effect elsewhere. This is clear from the findings of fact made by the FTT including as follows:

    i) At [42]: "…The loan accounts are the sole record of the financial relationship between Shawbrook and its borrowers. They are effectively ledgers which evidence the level of indebtedness, capture repayments and record other financial information including fees and interest charged. Target credits and debits the loan accounts with all relevant amounts (payments, fees and interest etc). It applies various calculations to work out expected payments. Loan accounts are used as a basis of reporting to Shawbrook as well as for the production of statements for borrowers. .."

    ii) At [50]: "Target is also responsible for calculating the amounts of interest and principal repayments due, and for calculating and applying any fees. Because of the way payment processes operate, expected payments are initially assumed to be made by applying credits to the relevant loan accounts. Where it transpires that payment was not made, these entries are reversed by adding the relevant amount to the outstanding balance (split between interest and principal, assuming the missed payment related to both), together where appropriate with a fee. …"

Thus, whatever the position in *FDR*, an entry in the ledger or on the loan account by Target did not itself transfer ownership of any funds or commute the rights of any party.

105. Moreover, I agree with the UT that there may be cases where a unilateral entry in a loan or other account might have the effect of making the legal and financial changes required to effect a transfer, but this is not such a case.

106. Mr Cordara relied on *ATP* as a comparable case and submitted that the services supplied by ATP could not be distinguished from those supplied by Target. I disagree. ATP provided services to pension funds and operated a single pension fund account at a financial institution into which pension contributions were paid by employers on behalf of their employee pension customers, using an online service or payment card. The employee pension customers did not have their own bank accounts. The employer paid contributions owed under the occupational pension scheme on behalf of its employees collectively as an aggregate sum into the pension fund bank account. Among other services provided by ATP, ATP opened a pension account (not a bank account) in the pension scheme system for each individual and credited the notional pension contribution made for that employee to that person's account by making an entry in the ATP system, thereby creating a right in the employee to that part of the fund. ATP regularly updated the pension accounts by reference to payments made into the fund so that the balance of any pension account was equal to the amount of retirement benefit accumulated in the pension fund for the individual concerned. ATP also initiated the withdrawal of amounts from the accounts of pension customers who were members of a pension fund by issuing instructions to a financial institution to pay such amounts to those pension customers. The pension funds themselves invested the contributions paid into the retirement schemes by the employers on behalf of their employees. The question in these circumstances was whether the creation of pension accounts for employee pension customers and crediting those accounts with contributions paid by their employer could constitute transactions concerning payments and transfers within the meaning of article 13B(d)(3) of the Sixth Directive. The ECJ held that it could:

> "70. It appears prima facie that some of those services are not of a purely technical nature; rather, through the opening of accounts in the pension funds system and the crediting to those accounts of the contributions paid, they establish the rights of pension customers vis-à-vis the pension funds. The transactions by which contributions are credited to the pension customers' accounts appear to have the effect of transforming the claim held by a worker vis-à-vis his employer into a claim that the worker holds vis-à-vis the pension fund."

107. That conclusion underpinned the conclusion at [82] that these services were not of a "purely technical nature" but appeared, as a matter of fact, to "establish" the rights of pension customers in the pension funds of which they were members rather than merely reflecting or recording them. Whether that was the ultimate conclusion of the Danish court when the case returned to it does not matter. On any view, it has no relevance to the entries made by Target in the loan accounts in this case. The act of inputting a credit entry in a loan account made no change in the legal and financial relationship between Shawbrook and the relevant borrower and simply recorded or reflected the transfer of funds from the borrower's bank account to Shawbrook's bank account that had occurred.

108. Nor do these conclusions hollow out the entirety of the exemption, or require a qualifying taxpayer to be a bank, as Mr Cordara sought to contend. Since the transactions described by the exemption are by their nature financial transactions, in many cases it will only be financial institutions that effect payments and transfers, though this is not necessarily the case. Moreover, the purpose of the exemption for financial transactions was "… *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*" (see *Velvet & Steel Immobilien* (Case C-455/05) [2007] ECR I-3225, [2008] STC 922 at [24]). In *Tierce Ladbroke SA* (Case C-231/07) and *Derby SA v Belgian State* (C-232/07) [2008] EUECJ C-231/07 the CJEU suggested that the availability of the exemption would be in doubt in situations where such difficulties were absent because VAT could be applied to the remuneration received by the supplier. There is no suggestion that the VAT liability of Target's services to Shawbrook presents any such difficulties; indeed it is likely to be capable of easy calculation and determination.

109. In conclusion, like the UT, I consider that the services supplied by Target to Shawbrook are not transactions concerning payments or transfers within article 135(1)(d) of the PVD and would therefore uphold the UT's decision in this regard.

Issue 2: Transactions concerning debt

110. The UT did not separately consider the question whether Target's services were transactions concerning debts.

111. In writing, but not developed orally, Mr Cordara submitted that the CJEU "*has not … given a precise definition of the concept of 'debts' within the meaning of [article 135(1)(d)]*" but transactions concerning debts must nevertheless "*fulfil the specific, essential functions of a financial service*" (see observations made by Advocate General Saugmansgaard Øe in *Paulo Nascimento Consulting* (C-692/17) at [66] and [68]). He submitted accordingly that the test established by *SDC* regarding the need to demonstrate legal and financial changes, applies. He also relied on what Arden LJ said in *AXA UK* at [49], to the effect that "*the full scope of the [article 135(1)(d)] exemption … may hypothetically be taken to be normal retail banking activities*". On that footing, he submitted in the alternative, and in addition to his submissions on payments, that Target's supplies were "*transactions concerning debts*" within the scope of "*normal retail banking*".

112. I do not accept that Target's supplies were transactions concerning debt for all the reasons just given in relation to transactions concerning payment or transfer.

113. The wording of the exemption in article 135(1)(d) makes clear that each of the transactions referred to concern services or instruments that operate as a way of transferring money. The object is to treat rights regarded in the course of trade as being similar to money in the same way as payments of money for VAT purposes and to exempt them accordingly: see *Hedqvist* at [40]. Consistently with that, a transaction concerning debt is a reference to dealings in debt as Ms McCarthy submitted. It would cover, for example, the transfer of a debt instrument or the assignment of an existing debt, which have the effect of changing the legal and financial situation of the respective parties to the transaction. Since for the reasons given above, Target's services do not effect legal and financial changes, this alternative submission falls to be rejected.

114. To the extent that Mr Cordara relied on an argument that Target's services "concerned" debts in a looser sense, because Target facilitated the collection of payments due to Shawbrook, debt collection is expressly excluded from the exemption.

Issue 3: Transactions concerning deposit and current account

115. Target has not contended that the loan accounts it operated were deposit accounts. Instead, its case before the tribunals below was that the borrowers' accounts with Shawbrook were current accounts because they were a running account between the bank and its customer; there was automatic set-off; and absent special agreement, there was a need for either party to make a demand before seeking to recover.

116. In agreement with the FTT, the UT held that "*the essential characteristic of both deposit and current accounts is that the customer is able to deposit and withdraw funds in varying amounts. Current accounts have the additional feature, not found in deposit accounts, that the account holder can pay amounts from the account to third parties by way of cheque or transfer* …" (see UT at [46]). Those features were missing here: money paid into the loan account was only as specified or allowed by the loan agreement and could not be withdrawn (though a new loan or an advance could have been agreed). Further, payments could not be made from the loan account to a third party.

117. Mr Cordara challenged those conclusions. He submitted that there is no EU law definition for the autonomous concept of a "current account" but the sense (having regard to the French "*comptes courants*", the Italian, "*conti correnti*", and the Spanish, "*cuentas corrientas*") is that these are "running accounts". A running account involves a constant setting off and adjustment in the financial relationship, reflecting the mutual debt/credit position in real time. He relied on the FTT's finding at [92(3)] that "*the loan accounts* [operated by Target] *are running accounts*". Moreover, Shawbrook's borrowers are clients of a bank, holding accounts with a bank. They receive statements of account, as would be the case if they had borrowed from a clearer. Target held the only record of the transactions between the customer and the bank and controlled the flow of money from the customer to Shawbrook, and within the Shawbrook account.

118. As for the features relied on by the UT, the deposit/withdrawal functionality was present in the Shawbrook accounts, but simply in the reverse order: the initial drawdown (withdrawal) was followed over time by a series of deposits (as might be the case for a current account in overdraft) and the sequence in which these events occur cannot be fiscally significant. As to the ability to pay third parties, this additional requirement should not have been grafted onto the concept of a "current account" when it cannot apply to a "deposit account" (where ordinarily direct payments to third parties are not permitted). The inferred requirement for third-party payment functionality for one aspect but not the other, was not explained or justified by the FTT or UT. He submitted that there is no rational explanation why the exemption would exclude borrowing or loan accounts which are current accounts in the sense that they are a running expression of the position between the parties as it evolves over time.

119. I do not accept these submissions and have no doubt that the FTT and UT were correct for the reasons they gave on this question.

120. Clearly the term "current account" in article 135(1)(b) must be given an EU law meaning and in construing this concept, it is necessary to consider the context in which it appears, conjoined with "deposit account" (and "savings account" in the VAT Act). The concept is not legally defined and takes its meaning from the commercial context in which it operates. Moreover, there must be a distinction between current accounts, deposit and savings accounts, otherwise the legislation could simply have referred to "bank accounts". On the approach advanced by Mr Cordara any distinction between these accounts disappears and the reference to "deposit accounts" in article 135(1)(b) becomes redundant.

121. I reject Mr Cordara's submission that a current account (and indeed a deposit or savings account) is just a "running account". That is saying no more than it is an account in which debits and credits are recorded to reflect the mutual debt position at any point in time. It is not a definition of a current account. Whether an account is a current account must be determined by the functions of the account. In agreement with both of the tribunals below, it seems to me that the essential characteristic of a current account and the functionality that distinguishes a current account from a loan account, is the customer's ability, not only to pay in and draw out funds by any one of a number of possible methods, but also and importantly, the ability of the customer to pay third parties by drawing on funds or credit available in the account.

122. The loan accounts in this case do not have that functionality. A borrower cannot withdraw monies paid into a loan account and while a borrower could ask Shawbrook to increase the amount of the loan, that is not the withdrawal of monies paid in, and there is no possibility of any amounts being paid from the loan account to a third party.

123. No assistance is to be gained by reliance on the observations of Laws LJ in *FDR* at [49] that "*one might categorise the cardholder/merchant accounts as current accounts … with no great offence to linguistic usage*". Quite apart from the fact that he did not decide the case on that basis, there are material distinctions between the cardholder accounts in *FDR* (which could be used to make payments to third parties) and the loan accounts in this case. Moreover, as Ms McCarthy submitted, Laws LJ had already concluded that the debits and credits added to the accounts in *FDR* were exempt and so it was unsurprising that he saw the transactions as concerning current accounts. The position here is quite different.

124. Finally, I accept Ms McCarthy's submission that to treat the operation of any running account as a "transaction concerning current accounts" would impinge on the precisely framed exemption for the management of credit. Properly understood, the loan account is part of the supply of the grant of credit, i.e. the loan, which is exempt under article 135(1)(b) of the PVD and the operation of loan or mortgage accounts amounts to much the same activity as credit management. The supply by Shawbrook of the operation of the loan account would be an exempt supply of the management of credit by the person granting it. But since article 135(1)(b) restricts the exemption to the management of credit by the person granting it, such services are taxable where, as here, the supplier (Target) is not the party also granting credit.

125. In light of this conclusion, it is not necessary to consider whether Target's supplies are transactions concerning such current accounts.

Issue 4: Debt collection

126. Given those conclusions it is strictly unnecessary to deal with the exclusion of debt collection from the exemption in article 135(1)(d) of the PVD and I have concluded that it would be preferable not to do so.

127. In my consideration of this aspect of the appeal, I have found it difficult to see clearly where the line is drawn between collecting money and debt collection, and see the force of Mr Cordara's submission that almost every movement of money in the financial system is made to discharge a debt. If "debt collection" is to be given the wide meaning given by the FTT, so as to include supplies by intermediaries in connection with the receipt of payment by creditors, then it is difficult to see why every financial institution that offers clients any service relating to the receipt of money is not making taxable supplies of debt collection. However, resolution of this difficult question is not necessary for the disposal of this appeal, and I prefer in those circumstances to leave this question to another case.

Conclusion

128. In conclusion, for the reasons given above, if my Lords agree, I would dismiss this appeal, subject to the determination of Target's application to rely on the additional argument referred to at paragraph 10 above (as set out in its Supplementary Skeleton Argument); and if granted, of the issue raised by that argument.

Henderson LJ:

129. I agree.

Underhill LJ:

130. I also agree.