Neutral Citation [2013] IEHC 103

THE HIGH COURT

COMPETITION

[2005 No. 532 J.R.]

BETWEEN

BUPA IRELAND LIMITED AND BUPA INSURANCE

APPLICANTS

AND

THE HEALTH INSURANCE AUTHORITY, THE MINISTER FOR HEALTH AND CHILDREN, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 7th day of March 2013

Introduction

1. On the 23rd day of November, 2006, the Court (McKechnie J.) gave a judgment dismissing the claims originally advanced in this judicial review proceeding, which had sought to challenge the introduction by the respondent Minister of a risk equalisation scheme (the "2003 Scheme"), in the provision of medical health insurance cover by insurers operating in that sector of the market in the State, under a series of statutory instruments made pursuant to the Health Insurance Acts 1994 - 2001.

2. The judgment and order of the Court were appealed by the applicants to the Supreme Court. No notice under Order 58 Rule 10 of the Rules of the Superior Courts was given by the respondents of an intention to contend that such of the findings in that judgment as might have been considered to have rejected positions adopted by them at the High Court hearing should be varied. (The references below to the "respondents" relate to the second and third named respondents, except where otherwise stated, as they alone are concerned in the claim for damages. The Voluntary Health Insurance Board (VHI) had been a party to the proceedings, but was discharged from them following the Supreme Court judgment.)

3. In the High Court proceedings, a series of declaratory reliefs had been claimed directed at the alleged illegality of the 2003 Scheme as thus introduced. In essence, the claims alleged that the scheme was unlawful in that, *inter alia*, it infringed: Articles 40.3 2° and 43 of the Constitution; the provisions of the Third Non-Life Directive; and Articles 43, 49, 82 and 86 EC of the European Treaties.

4. Although no order of *certiorari* to quash the statutory instruments in question was originally sought in the judicial review proceedings, a declaration had been claimed that they were *ultra vires* the relevant statutory provisions, together with (amongst other reliefs,) declarations that s. 12 of the Health Insurance Act of 1994 (the "1994 Act") and the promulgation of the 2003 Scheme were invalid as unconstitutional. A major issue at the High Court hearing turned upon the validity of the particular risk equalisation scheme, as imposed by the statutory instruments on the basis of s. 12(10) of the 1994 Act (as amended by the Health Insurance Act of 2001), having regard to the definition of "community rating" contained at ss. 2 and 7 of the 1994 Act.

5. The 2003 Scheme, as adopted, had been based upon the concept of "community rating across the market", in which so-called "inter-generational solidarity" was assessed and imposed by reference to the risk profiles of the entire community of holders of private health insurance policies. The applicants maintained that what was authorised by the 1994 Act (as amended) was something different, namely, inter-generational solidarity by reference to the risk profiles of policy holders when assessed in respect of each distinct category or type of insurance contract or plan, described as "community rating within the plan". This dispute as to the correct construction of the relevant statutory provisions was thus central to the case and was the acknowledged starting point for the conclusions reached by McKechnie J. (see paragraph 32 of his judgment) on the above alleged infringements.

The Legislative Context

6. The terms of the Treaty articles, the provisions of the Third Non-Life Directive, the technical concepts and methodologies relating to the two types of community rating at issue in the proceedings have been set out and examined in considerable detail in both the judgment of the High Court and that of the Supreme Court, and it is unnecessary to repeat such detail here. It may nevertheless be useful, for the consideration of this aspect of the preliminary issues now before this Court, to briefly summarise the legislative history of the instruments concerned and the policy context in which these issues arise.

7. Until 1996 The Voluntary Health Insurance Board, which had been established as a public body under the Voluntary Health Insurance Act, 1957, was the sole provider of private medical health insurance in the State. That monopoly was required to be abolished by the provisions of the Third Non-Life Directive and the Act of 1994 in its original form was enacted for that purpose. Section 12 of that Act conferred on the Minister a power to prescribe a "risk equalisation scheme" containing such terms and conditions of the type listed in the section as he considered necessary and expedient. Such a scheme was first promulgated in 1996, but never came into effect and was revoked in 1998. In 2003, following amendment of the Act of 1994 by the Health Insurance (Amendment) Act 2001 (including amendments to the definition of "risk equalisation" and to sections 2, 7 and 12), a new scheme (the "2003 Scheme") was introduced by S.I No 261 of 2003 as amended by S.I. No.710 of 2003. In April 2005 the first-named respondent recommended to the Minister that the scheme be implemented with effect from 1st July, 2005, but this was not acted upon at that time. The applicants commenced a first judicial review proceeding (the proceeding in the present title), challenging the validity of that recommendation, of the Scheme in question, and of s.12 of the Act of 1994, but this was not pursued at the time, following the Minister's decision not to act on the recommendation.

8. On 27th October, 2005, the first-named respondent again recommended that the risk equalisation obligations be put into effect and on 23rd December, 2005, the Minister acted on that recommendation and directed commencement of the payment obligations with effect from 1st January, 2006. On 30th January, 2006, the applicants commenced a new judicial review proceeding (2006/112JR) and were granted leave to seek judicial review of the new recommendation and of the Minister's decision of 23rd December, 2005. The two sets of proceedings were subsequently consolidated as the present proceeding by order of the Court (McKechnie J.) of 24th July,

2009.

9. Because the relevant Treaty articles have changed in numbering since the adoption of the Third Non-Life Directive in 1992 and once again since they were the subject of the analysis in the High Court and Supreme Court judgments; and because much of this judgment is concerned with the analysis of those decisions, the Treaty of Amsterdam numbering (from 1 May 1999) used in those judgments is retained here in order to avoid confusion. For ease of reference the evolution of the numbering of the articles principally concerned is as follows:

Original From 1.5.1999 TFEU

Art. 52 (Establishment) 43 49

Art. 57 (Council directives) 47 53

Art. 59 (Services) 49 56

Art. 66 (Services directives) 55 62

Arts 85&86 (Competition) 81 & 82 101 & 102

Art. 90 (Public undertakings) 86 106

Arts 92 – 94 (State Aid) 87-89 107-109

10. Article 43 gave effect to the right of establishment as one of the fundamental activities of the Community (as it then was) for the achievement of an internal market as envisaged in Article 3 EC. Article 49 EC similarly give effect to the freedom to provide services. Article 47.2 EC conferred legislative competence on the Council to issue the directives necessary for coordination of the provisions required to give effect to the right of establishment. Article 55 EC had the effect of conferring the same legislative power on the Council for the purpose of Article 49 EC.

11. The process of harmonisation or the coordination of laws, regulations and administrative provisions governing the exercise of these rights and freedoms, in relation to insurance services, was pursued in a number of directives in the distinct areas of direct life insurance and non-life insurance, which culminated in the adoption in 1992 of a third directive in each field being respectively Council Directive 92/96/EEC (the "Third Life Assurance Directive") and Council Directive 92/49/EEC (the "Third Non-Life Insurance Directive" or the "Directive"). These third Council directives had the effect of completing the establishment of the single market in the insurance sector. (The Commission Interpretative Communication: "Freedom to provide services and general good in the insurance sector" (2000/C43/03), referred to in the judgment of McKechnie J. at para. 175, begins with the sentence: "The Third Council Directives 92/49/EEC and 92/96/EEC completed the establishment of the single market in the insurance sector.")

12. The result of the harmonisation process which culminates, insofar as non-life insurance is concerned, in the Third Non-Life Directive, is that individuals and undertakings are conferred with rights which the Member States are bound to respect, by refraining from imposing on the conduct of non-life insurance business any incompatible requirements, controls or conditions, whether by means of national laws, regulations or administrative decisions. Thus, since 1st July, 1994, undertakings are entitled, in the territories of the Member States, to conduct business on an inter-state basis on foot simultaneously of the right of establishment and the freedom to provide services. In other words, an undertaking established in a home Member State can write policies for customers in a second Member State on the basis of the freedom to provide services and can also, if it chooses, do so by making use of one or more offices established in the second or host Member State for ancillary or support services such as claims assessment, legal services, actuarial services and so on.

13. Financial and prudential regulation is provided for on the basis of the single authorisation from, and supervision by, the competent authority of the Member State in which the undertaking has its head office. Thus, while the Directive contains, for example, notification requirements to the host member state when interstate business is to be conducted, those arrangements are purely for the purpose of exchange of supervisory information between the competent authorities and cannot be used by the host Member State to delay or obstruct the conduct of such business, nor does the entitlement of the host Member State to obtain such verification affect the legality of business written. The essential consequence of the completed establishment of the internal market in the non-life insurance sector, accordingly, is that a host Member State has no entitlement to impose on an undertaking established in a home Member State any additional national regulatory requirements or conditions for the conduct of non-life insurance business, whether undertaken by virtue of the right of establishment or on foot of the freedom to provide services, unless a derogation in that regard is permissible under the terms of the Third Non-Life Directive. This became the central issue between the parties in the hearing before McKechnie J.; namely, whether the restrictions and obligations of the 2003 Scheme came within what was permissible under the Directive and particularly under Article 54 thereof.

The 2005-2008 Proceedings

14. The High Court held that the concept of "community rating" for the purposes of a risk equalisation scheme, based upon a distinct meaning for the purpose of s. 12 of the Act of 1994, was within the power delegated to the Minister and that the 2003 Scheme was thus *intra vires* the power of the Minister to adopt in that form.

15. The High Court further held that, although the 2003 Scheme in requiring health insurers in the market, notably the applicants, who had a below average risk profile "across the market" to make substantial compensatory payments to other health insurers with above average risk profiles (in effect to the VHI), had potentially market distorting and anti-competitive effects and could be taken as intruding upon constitutional rights of property, it was nevertheless "objectively justified" and did not therefore infringe the rights or protections invoked under European or constitutional law by exceeding what was justifiable in the interests of the common good.

16. The applicants' appeal to the Supreme Court was successful, but solely on the definition issue and the competence of the Minister to impose the particular "across the market" scheme. The Court held that the 2003 Scheme in those terms was *ultra vires* the power of the Minister because the only scheme authorised to be imposed under the Act was a risk equalisation scheme based upon the "within the plan" concept of community rating, since that alone was the type of community rating defined for the purposes of the Act by virtue of the terms of ss. 2 and 7.

17. The judgment of the Supreme Court, given by Murray C.J., ended (at page 41) with the conclusion that:-

"The risk equalisation scheme having been introduced on the basis of or having regard to a matter which was erroneous in law the scheme must be considered *ultra vires* the power of the Minister (as indeed all parties acknowledged would be the inevitable consequence if such an error of law was so found) and therefore should be set aside. In the light of the foregoing conclusion the other issues raised in the proceedings do not require to be addressed. Accordingly I would propose that the appeal be allowed and that the Order of the High Court be substituted by an Order quashing the decision of the Minister and the relevant statutory instruments which introduced the risk equalisation scheme."

18. The order of McKechnie J. of 23rd January, 2007, made on foot of the High Court judgment of 22nd November, 2006, apart from its rulings in relation to costs, had contained a single operative provision ordering that "the proceedings herein be dismissed."

19. The order of 17th December, 2008, on foot to the Supreme Court judgment, made after detailed submissions for the purpose by the parties, provides (so far as relevant to present issues) that "the appeal be allowed and that the said order of the High Court be set aside save for so much thereof as awarded the first named respondent its costs against the applicants which order do stand and in lieu of the orders of the High Court hereby set aside

1. the Court doth grant an Order of Certiorari in respect of the decisions of the second named respondent to make the statutory instruments listed in the Schedule to this order and in respect of the said Statutory instruments

2. in lieu of directing that that an order of Certiorari do issue IT IS ORDERED that the aforesaid decisions and Statutory Instruments be quashed without further order [And]

3. that the issue of whether there is any liability by the second, third and fourth named respondents for damages and if so the quantification of any such damages be remitted to the High Court for determination …".

The Preliminary Issues

20. Upon the remittal of the matter and after hearing the parties, the Court considered it prudent to attempt to focus the issues to be determined by trying a number of preliminary issues as follows:-

A. The effect of the Supreme Court order.

(1) Whether the finding that the introduction of the Risk Equalisation Scheme ("RES") by the orders listed in the Schedule to the order of 17th December 2008 was unlawful as *ultra vires* has the effect of setting aside or otherwise negating the findings in the judgment of the High Court of 23rd December 2006 to the effect that the introduction of the scheme was objectively justified for the purpose of the claims of infringement of:

(a) Articles 43 and 49 EC and the Third Non-Life Directive;

(b) Article 82 EC in conjunction with Article 86 EC; and

(c) Articles 40.3 2° and 43 of the Constitution.

(2) If so, whether some or all of the claimants are entitled to recover damages in respect of losses, if any, incurred as a result of those infringements?

(3) If so, what is the measure in law to be applied in assessing the quantum of damages?

B. Effect of the *Ultra Vires* finding.

(1) If the claims in respect of the above infringements are not maintainable, are the claimants entitled to recover damages in respect of losses, if any, incurred as a result of the unlawful introduction of the RES as found by the Supreme Court?

(2) If so, what is the measure in law to be applied in assessing the quantum of such damages?

(3) In the quantification of damages on either basis what effect, if any, is to be attributed to the fact that the business the subject of the R.E. scheme was disposed of in March 2007 prior to the date on which payments under the scheme became payable?

21. The remittal of the matter to this Court thus presents first, the issue as to how the Court should approach the adjudication of a claim for damages where it is the issue of "liability" which has been remitted and not merely the assessment of quantum based upon a liability finding made by the Supreme Court. To what extent have any High Court findings related to liability been overturned or left standing as a result of the ruling by the Supreme Court on the *ultra vires* question? To what extent, if any, are the findings of the High Court judgment on issues as to the effect of the 2003 Scheme upon competition in the private medical insurance market; or on constitutional or European Union law rights; or as to their objective justification either binding upon or available to be relied upon by the parties now before this Court? Or, is the Court required to embark upon a full plenary re-hearing of the evidence on some or all of those issues in order to rule upon BUPA's claim that the State is liable to it for damages by reason of the outcome of the case in the Supreme Court, or otherwise?

22. Clearly, the starting point for an examination of these issues is the conclusion reached by the Supreme Court at the end of the judgment of Murray C.J. and already quoted in part above, as follows:-

"Accordingly, since s. 2 of the Act of 1994, as amended, specifies that the term community rating shall be construed in that Act in accordance with s. 7(1)(c) the correct interpretation to be attributed to the phrase community rating in s. 12 of the Act, is community rating within the plan across the market.

Therefore, it is in that sense that the best overall interest of health insurance consumers must be construed for the purposes of a risk equalisation scheme. Community rating within the plan means that such community rated contracts

provide an element of intergenerational solidarity, not obviously to the ambit as would flow from community rating across the entire insured population, side by side with the other pillars to which the learned trial judge adverted to; namely, open enrolment, lifetime cover and minimum benefits which, as he pointed out, are provided for in sections 8, 9 and 10 of the Act respectively.

It follows from all of the foregoing that the scheme of risk equalisation adopted by the Minister in 2003 was founded upon an erroneous interpretation of subsection 10(iii) in s. 12. That is to say the scheme was introduced on the basis that community rating meant community rating across the entire insured population and not as defined in the Act." (Page 40)

23. It is therefore clear that the only determination made by the Supreme Court on the appeal was that relating to the error in the interpretation of the definition of "Risk Equalisation Scheme" in s. 12 of the 1994 Act, rendering the statutory instruments which introduced the scheme *ultra vires*. The "other issues raised in the proceedings" were not addressed or made the subject of any ruling in the order. That being so, the Supreme Court has not altered expressly any findings made in the High Court out of which "the other issues raised in the proceedings" might be said to have arisen. In the order made on foot of its judgment on 17th December, 2008, the Supreme Court directed that "the issue of whether there is any liability by the second, third and fourth named respondents for damages" and the quantification of any such damages, be remitted to the High Court for determination.

24. As the proceedings stand following the remittal to the High Court, therefore, the applicants have a claim for damages following upon a finding that the measures and decisions which they challenged have been found to have been made or imposed without lawful authority. They also can and do point to findings made in their favour in the judgment of McKechnie J. as to the effects of the 2003 Scheme on their rights under the headings listed in para. 3 above; while the respondents claim that the outcome of that judgment has been that the 2003 Scheme was nevertheless found to be lawful and did not infringe the rights in question.

25. More specifically, the applicants argue that the High Court has found that the 2003 scheme distorted competition and would have resulted in BUPA making a loss by being forced to transfer to the VHI each year substantial sums greater than its annual profits. In the absence of an objective justification, therefore, there was finding of breach of the provisions in question and of unlawful interference with constitutional rights of property. The effect of the Supreme Court judgment, it was submitted, has been that the objective justification found by the Supreme Court has "fallen away" and BUPA is accordingly entitled to damages for those infringements.

26. The respondents, on the other hand, contend that the applicants are not entitled to relitigate entirely those findings made by the High Court and not reversed by the Supreme Court. They submit that it had been open to the applicants to invite the Supreme Court to rule upon the grounds of their appeal relating to the findings made by McKechnie J. as to the existence of objective justification, but they did not do so. They submit that the only issue arising on the remittal, therefore, is whether the applicants are entitled to damages by reason of the *ultra vires* adoption of the 2003 Scheme by mistake of law.

The Pine Valley/Glencar Principle.

27. Insofar as the *ultra vires* finding is the first basis upon which the claim for damages is now made against the respondents, the position in law is clear. The mere fact that such decisions were made and such measures introduced or imposed without lawful authority does not of itself give rise to a liability in damages on the part of the respondents. The *ultra vires* exercise of a statutory power does not provide a basis for a claim in damages unless the claimant can show that the *ultra vires* act also gives rise to one of the recognised causes of action. The law in this regard was settled by the judgments of the Supreme Court in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 and reaffirmed by the judgments in *Glencar Explorations plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84. In the judgment of Finlay C.J. in the earlier case, a statement of the law in this regard in Wade on "*Administrative Law*" (5th Ed.) was cited with approval as follows (at page 36):-

> "The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:-
>
> 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.
>
> 2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.
>
> 3. If the authority knows that it does not possess the power which it purports to exercise."

The learned Chief Justice then added:

> "I am satisfied that there would not be liability for damages arising under any other heading. It is, of course conceivable that proof of what has been submitted in this appeal as a gross abuse of the exercise of statutory power of decision, or proof of a wholly unreasonable exercise of that power, would be taken by a court to be evidence that the authority knew or must have known that it did not possess the power that it purported to exercise. I am quite satisfied, however, that the exercise by the defendant of this power in 1997, in the manner in which he did, and having regard to the legal advice which he sought and obtained prior to doing so, could not possibly constitute such a gross abuse of power or wholly unreasonable exercise of power as to lead to an inference that he was aware that he was exercising a power that he did not possess. [….] Not only am I satisfied that this is the true legal position with regard to a person exercising a power of decision under a public statutory duty, but it is clear that there are and have always been weighty considerations of the public interest that make it desirable that the law should be so. Were it not, then there would be an inevitable paralysis of capacity for decisive action in the administration of public affairs."

28. In his judgment in that case (at page 40 of the above report) Henchy J. stated:

> "Breach of statutory duty may occur in a variety of circumstances and with a variety of legal consequences. Here we are concerned only with a breach of statutory duty in the making of a decision which has been committed by statute to the decision-maker. The weight of judicial opinion as stated in the decided cases suggests that the law as to a right to damages in such a case is as follows. Where there has been a delegation by statute to a designated person of a power to make decisions affecting others, unless the statute provides otherwise, an action for damages at the instance of a person adversely affected by an *ultra vires* decision does not lie against the decision-maker unless he acted negligently, or with malice (in the sense of spite, ill-will or such like improper motive), or that the decision would be in excess of the authorised power; see for example, *Dunlop v. Woolahra Municipal Council* [1982] AC 158; *Bourgoin S.A. v Ministry of Agriculture* [1985] 3 All E.R.585. While the law as I have stated it may be lacking in comprehensiveness I believe it

reflects, in accordance with the requirements of public policy, the limits of personal liability within which persons or bodies to whom the performance of such decisional functions are delegated are to carry out their public duties."

29. The above citation from Wade was repeated and the above judgment of Finlay C.J was followed as an authoritative confirmation of the law in this regard in the judgments of Keane C.J and Fennelly J. (with whom the other members of the Supreme Court agreed) in *Glencar Exploration plc v Mayo County Council (No.2)* [2002] 1 I.R. 84 at pp 127 and 156 respectively. Clearly, therefore, the fact that the respondent Minister has been held to have acted in excess of the power in that behalf committed to him under the Health Acts when purporting to sign into law the statutory instruments which introduced the 2003 Scheme, does not give rise to a liability for damages on the part of the Minister or the State unless it is found that the imposition of the scheme also involved the commission of a recognised tort or civil wrong. (These two authorities are referred to in further detail below at paras 93-95)

30. In their points of claim delivered in respect of the present issues, the applicants seek to bring themselves within these criteria by asserting that the unlawful imposition of the 2003 Scheme involved actionable wrongs, in that the respondent infringed:-

(a) The applicants' right of establishment and freedom to provide services under Articles 43 and 49 of the EC Treaty;

(b) Article 86 EC in conjunction with Articles 10 and 82 EC; and

(c) Infringement of the rights of the applicants under Articles 40.3 2° and 43 of the Constitution to carry on business and their rights of property. (For sake of brevity, these three heads of actionable wrong will be referred to collectively below as the "three alleged wrongs".)

31. However, in expanding upon their claims in written submissions and in oral argument at the hearing, the applicants emphasise that their claim to damages does not rest exclusively upon the finding that the 2003 Scheme was invalid, as were the HIA recommendation and the Minister's decision to require commencement of payments under the it. They rely additionally and independently upon the three above alleged wrongs as causes of action which give rise to a claim for damages. By this the Court understands that if, for example, the 2003 Scheme had not been quashed but had simply been withdrawn and not applied at some point after the judicial review proceedings had been commenced but before any determination of issues had been made by either Court, the respondents would still have committed the alleged wrongs and should be answerable in damages.

The Findings in the High Court Judgment

32. Because the above claims of infringement have already been the subject of specific findings between the parties in the judgment of McKechnie J. in the High Court, it is necessary, in the view of the Court, to consider first the nature and effect of those findings and the basis upon which they were reached. In particular, it is necessary to consider the extent to which, if at all, the relevant findings in relation to the claims of infringement in question can be said to have been dependent upon the 2003 Scheme having been considered to have been correctly defined and interpreted by the respondents as a scheme "across the market", and not a scheme "within the plan". It is then necessary to examine whether and to what extent such findings in relation to the alleged infringements can or should be considered to have been affected (either negatively or positively) by the Supreme Court judgment. This appears to be necessary because, as will appear below, there are a number of passages in which Murray C.J. refers to findings made by McKechnie J. from which the possible implication might be drawn that the findings in question had been viewed by the Supreme Court as having been correctly made.

33. In the lengthy judgment, having first set out in detail the relevant provisions of the domestic legislation, the provisions of the Constitution and of the EU Treaties and secondary legislation concerned, the learned High Court judge reviewed extensively a number of technical reports that had been commissioned by the Minister, a government White Paper and other technical papers which examined the implications of, and the problems involved in, restructuring the health insurance market following the removal of the VHI monopoly. He did so with particular reference to the analysis that had been done and the advices given on the importance of ensuring stability and competition in the health insurance market, and the resulting need to provide for risk equalisation between insurance undertakings. He then considered and determined the claims and issues made in the proceedings by approaching them under six headings as follows:

(1) Delay/laches;

(2) The correct legal interpretation of "community rating";

(3) Unauthorised delegation of legislative power;

(4) Breach of the Third Non-Life Directive;

(5) Alleged breach of Articles 43 and 49 of the Treaty;

(6) Alleged breach of Articles 86 and 82 of the Treaty;

(7) Alleged breaches of Article 43 and Article 40.3 of the Constitution.

34. Having regard to the outcome of the case before the Supreme Court, the present judgment is not concerned to re-examine the issues addressed under the headings (1), (2), or (3) above. It is to be noted, however, that the learned High Court judge concluded his findings in relation to the second issue as to "community rating" by saying:

"I therefore believe that the respondents/notice party's interpretation of community rating for the purpose of s. 12 is correct."

and adding:

"This conclusion has considerable significance for several other major issues in this case. For example, a great deal of the expert evidence called on behalf of BUPA was premised on the applicants' understanding of this phrase for Risk Equalisation purposes. Obviously therefore such evidence can no longer apply given the conclusions above reached."

35. In other words, the expert evidence adduced on behalf of BUPA in relation to the other major issues which were before the Court at that point was discounted or, at least, considered flawed for the purpose of making findings on the issues which follow in the judgment, because it had been based on the mistaken premise of the incorrect definition.

36. In the judgment, McKechnie J. had dealt separately with issue No. 3 "Breach of the Third Non-Life Directive" (paras. 162/193) and the issue of the "Breach of Articles 43 and 49 of the Treaty" (paras. 194/200). At para. 199, he concluded in respect of the latter issue that the question was determined by his decision on issue No. 3, with the result that no separate ground of challenge could arise based upon the alleged infringement of those Treaty articles. In the absence of any doubt being cast upon that approach by the Supreme Court, it is not open to this Court to be other than satisfied that the conclusion thus reached by McKechnie J. was correct. As he pointed out, BUPA had not in fact been obstructed in exercising its Treaty rights to establish a branch in the State or to provide services. What was at issue was the entitlement of the State to change the conditions under which the business in question was already being carried on by private health insurance undertakings (including BUPA) and that was clearly a matter to be determined by reference to the limitations and obligations of the Third Non-Life Directive.

37. That this is the correct approach to reliance upon Treaty articles, in circumstances where secondary legislation has implemented the Treaty objectives in question, is also supported by the case law of the Court of Justice. The general rule is that where a particular commercial activity, coming within the scope of the Community policies on free movement of goods, persons and services has been the subject of harmonising secondary legislation, usually by directive, then the secondary legislation supersedes the general provisions of the Treaty Articles. The rule originates in the judgment of the Court of Justice in the *Tedeschi v. Denkavit Commerciale Srl* (Case 5/77) [1977] E.C.R. 1555 and has been reaffirmed in many later cases (see for example *Bristol-Myers Squib v. Paranova A/S (Case C-427/93)* [1996] ECR I-3457; and *Pytheron International SA v. Jean Bourdon SA (Case C-352/95)* [1997] E.C.R. 1-172 at para. 17).

38. The rationale of the principle is that the provisions of the harmonising secondary legislation have as their purpose the achievement of the internal market and must therefore be regarded as giving effect, in the particular area of activity, to both the principles of freedom of movement and to the limitations of the principle contained in articles such as Article 45 of the Treaty on activities connected with the exercise of official authority. The European Commission in its "Guide to the application of Treaty Provisions Governing the Free Movement of Goods" (2010) put the point as follows at para. 3.1.1:-

> "This is due to the fact that harmonising legislation can be understood as substantiating the free movement of goods principle by establishing actual rights and duties to be observed in the case of specific products. Therefore, any problem that is covered by harmonising legislation would have to be analysed in the light of such concrete terms and not according to the broad principles enshrined in the Treaty."

39. The same principle applies to provisions such as those contained in the Third Non-Life Directive which, as its recital (1) indicates, was adopted as: "necessary in order to complete the internal market in direct insurance other than life assurance from the point of view of both the right of establishment and of the freedom to provide services …"

40. The key finding of the High Court judgment, accordingly, was that contained in the consideration of issue no. (3): "Breach of The Third Non-Life Directive". The learned judge first points to the overall objective of the Directive (and its predecessors in the field) in seeking to complete the internal market in non-life insurance by requiring the Member States by 1st July, 1994, to abolish any existing monopolies and to install a system of financial and prudential oversight based upon authorisation and regulation by the authority of the home Member State in which an insurer has its head office. He points out that, under that system of single authorisation and supervision by the competent authority of the home Member State, the authorities of other Member States are precluded from impeding the inter-state provision of the relevant insurance services by imposing additional controls or requirements, save to the extent that derogation is permitted by the terms of the Directive.

41. Thus, the issue before the High Court turned effectively upon Article 54 of the Directive and the question as to whether the 2003 Scheme, as introduced by the Minister, came within the scope of the derogation permissible under that Article. At para. 164 of his judgment, the text of Article 54 is cited and McKechnie J. then proceeds to consider its correct construction in the light of the submissions made and having regard especially to the recitals to the Directive which he cites at para. 166. In particular, the submissions made by BUPA challenging the compatibility of the 2003 Scheme with what was permitted under Article 54 focused on the issue as to whether, in Ireland, the insurance contracts covering the risks identified in Article 54.1 served "as a partial or complete alternative to health cover provided by the statutory social security system" and whether the Minister's Scheme obligations could be said to be necessary "to protect the general good in that class of insurance". BUPA's case had been that, for the series of reasons summarised by the judge, the Scheme was incompatible with the Directive and was not saved by the terms of derogation permitted under Article 54.

42. In addressing these submissions, McKechnie J. had regard to information and material as to the types of social security system operated in various other Member States in assessing whether the system for private medical insurance in Ireland was to be characterised as a substitute for, or an alternative to, the cover provided by the State social security system, as opposed to be being a supplementary system. He also had regard to "the general background", described in paras. 177/178, in endeavouring to discern what the legislator (the Council) had in mind, as an aid to determining the correct meaning of the Directive. McKechnie J. also took into account the fact that, in advance of the enactment of the Health Act 1994, the European Commission had considered and assessed a draft equalisation scheme as then envisaged and had expressed the view that, in Irish circumstances, a private health insurance plan did constitute an "alternative", where it provided for at least the same type of benefit as that available under social security.

43. It was the possibility for derogation in this regard provided by Article 54 of the Directive which was the principal focus of the submissions made in the High Court and which forms the basis of the analysis set out at paras. 165 – 193 of the judgment of McKechnie J. Paragraph 1 of that Article provided that, for insurance contracts covering the risks identified in class 2 of point A of the Annex to Directive 73/239/EEC, a Member State in which such contracts "may serve as a partial or complete alternative to health cover provided by the statutory social security system" might require that the contracts comply with "the specific legal provisions adopted by that Member State to protect the general good in that class of insurance". This part of the judgment was therefore, concerned with a detailed analysis of the essential elements upon which that possibility for derogation was formulated, including in particular the scope and effect of the notion that such contracts serve as a partial or complete alternative to the social security system cover, and the requirement that the specific legal provisions of the host Member State had as their purpose "to protect the general good" in the class of insurance concerned.

44. Having examined the basis upon which the public health sector is operated in the State and taking into account the equivalent systems in a variety of other Member States, he concluded at para. 184 that: "the Irish PMI system acts as an alternative, either partially or completely, to the public health system operating in this country". There is, accordingly, a clear finding on the mixed issue of fact and of interpretation of Article 54 made on foot of the detailed analysis of the provisions and in the light to extensive evidence put before the Court at the hearing.

45. From para. 190 onwards, McKechnie J. then considered the element of "general good" as a requirement to be met if the specific national legal provisions were to be permissible on the basis of Article 54. For this purpose, the judge had regard to consideration given to the concept of "general good" in the jurisprudence of the Court of Justice as distilled by way of summary in the interpretative communication already mentioned above, and set out in para. 190 of the judgment. He thus held that, in order for the specific legal provisions adopted in the form of the Risk Equalisation Scheme to be deemed necessary "to protect the general good", they had to be shown to meet the requirements that they: come within a field which has not been harmonised; must pursue an objective of the general good; must be non discriminatory; must be objectively necessary; must be proportionate to the objective pursued; and the objective must not be one which is already safeguarded by rules to which the undertaking is already subject in the Member State of establishment.

46. Taking into account various policy documents, including the Government White Paper as quoted in the judgment, McKechnie J. concluded that a risk equalisation scheme for the purpose of supporting the particular form of community rating - that is, community rating across the market - was sought to be introduced by the Minster in order to protect the general good for the purposes of Article 54.1.

47. The other requirements of protection of the general good were then separately examined from the point of view of objective justification and proportionality as part of the assessment of the issues raised under Articles 43 and 40 of the Constitution and Articles 86 and 82 EC.

48. It is important, of course, to bear in mind that while the Third Non-Life Directive completed the attainment of the internal market for non-life insurance services by coordinating the laws, regulations and administrative provisions applicable to such business, it did so in respect of some aspects of the activities concerned only at the level of minimum standards. In those areas where the coordination was at that level, the Member States remained entitled to define stricter standards when exercising their authorisation powers for the setting up of an insurance undertaking in the home Member State as described in recital (8). McKechnie J. had therefore to consider whether the introduction of the 2003 Scheme by statutory instrument in this case constituted "specific legal provisions" of the kind envisaged in Article 54.1. He concluded that it did, by reference to the explanatory terms of recitals 22 – 24 of the Directive and particularly to that part of recital (24) which described such measures as potentially including provision for:

> "Open enrolment, rating on a uniform basis according to the type of policy and lifetime cover; that . . . requiring undertakings offering private health cover or health cover taken out on a voluntary basis to offer standard policies in line with the cover provided by statutory social security schemes at a premium rate or at below a prescribed maximum and to participate in loss compensation schemes . . ."

49. On that basis McKechnie J. concluded that a risk equalisation scheme could come within the concept of "loss compensation scheme", and as such within the ambit of "specific legal provisions", within the scope of the permissible derogation of Article 54. It is notable that, in reaching the conclusion given in para 192 of the judgment, he did so on the basis that the pursuit of the general good objective by the Minister, in introducing the 2003 Scheme, was predicated on the recognition, as expressed particularly in the White Paper, that inter generational solidarity played a key role in supporting community rating which, as he put it: "[…] in this context, has its s.12 meaning". In other words, the finding as to the characterisation of risk equalisation as a "loss compensation scheme" for the purpose of Article 54 is made on the basis that the particular scheme introduced was an "across the market" scheme.

Articles 86 and 82 EC

50. In the section of his judgment between paras. 201 and 236, McKechnie J. addresses the claim made to the effect that the imposition of the 2003 Scheme in the statutory instruments infringed Article 86 of the Treaty, in that it had the effect of depriving the competition rule on abuse of dominance contained in Article 82 of its effectiveness. It was submitted on behalf of BUPA that the 2003 Scheme distorted competition by deterring new entrants; by forcing smaller undertakings to alter pricing strategy while leaving the VHI unaffected; and by effectively expropriating assets from smaller undertakings for transfer to the dominant undertaking, the VHI. It was further submitted that any attempt at putting forward an objective justification for this distortion of competition was unfounded. Any scheme which required an undertaking with a 20% market share to make very large financial transfers to the dominant undertaking could not, almost by definition, pass scrutiny under any proportionality test. Further, it was submitted that no defence was available to the State under Article 86(2) EC because the VHI had not been "entrusted" with a "service of general economic interest".

51. In analysing these claims McKechnie J. had particular regard to the opposing evidence on the part of the experts called by the parties as to whether the scheme distorted competition. At para. 230 he concluded that "this scheme involved some elements of anti competitive behaviour in that the pricing structure of the market is interfered with and entry is less attractive . . . Therefore competition is distorted". He declined, however, to accept the characterisation of the financial transfers under the scheme as amounting to expropriation or confiscation. They were designed to compensate for a loss of disadvantage and to restore the profile balance between the undertakings. On that basis he reasoned (para. 231) that it fell to the State to prove the existence of an objective justification for this impact on competition or to satisfy the Court that the State could rely upon para. 2 of Article 86. He identified five factors as requiring to be satisfied if there was to be an "objective necessity defence":-

> 1. The measure imposed must satisfy the proportionality test;
>
> 2. The aim of the measure must be defined;
>
> 3. The chosen means must be suitable to achieve the aim;
>
> 4. The measure must be indispensable to the aim in the sense that the result cannot be achieved by any alternative measure which is less anti competitive or of shorter duration;
>
> 5, The measure must constitute an appropriate response in the context of Article 82.

As the consideration of these factors arose also under the heading of the constitutional challenge, they were dealt with in the judgment in the latter context.

52. McKechnie J. then dealt with the reliance placed by the State on Article 86(2). It was not seriously disputed, he considered, that the provision of private medical insurance within a statutory scheme is both a service and a service of economic nature and was both directed at the general population and availed of by a large section of it. He concluded that "community rating, open enrolment and lifetime cover could not operate in this country, in economically acceptable conditions, without the presence of a Risk Equalisation Scheme" with the result that the restrictions by way of impact on competition were necessary in order to ensure that the services in

question could be carried out in economically viable conditions. At para 234, he said: "So long as there is a fundamental State commitment to community rating across the market, no sustainable case exists, or has been made out, even by BUPA that such a system can survive without some form of Risk Equalisation Scheme". He added:

> "There is no obligation on the State to satisfy the Court that the Irish system is the only conceivable way of providing medical insurance in this jurisdiction
>
> . . . Rather the question is, given the established and preferred state method of providing private cover, enjoying as it does a margin of appreciation in this regard, are the resulting restrictions proportionate to the aims. In my view they are, because if one were to apply the Treaty Rules on Competition, the provision of such a service could only take place and certainly could not take place in conditions of economic acceptability. Accordingly I believe that Article 86(2) is available in this case."

53. Again, therefore, the High Court judgment, following a detailed trial on the merits comprising extensive expert evidence and very thorough legal argument, concluded that there had been no infringement of the Treaty rules in question.

54. As already indicated, the question of "objective justification", both in the context of compatibility with the Third Non-Life Directive and for the purpose of the arguments based on Articles 86 and 82, was dealt with in the judgment under the heading of the claims made of interference with constitutional rights under Article 43 and Article 40.3 of the Constitution.

55. Central to the issue as to the compatibility of the Scheme with the limitations imposed by the Articles of the Constitution on encroachment on property rights was a question of the proportionality of the apparent impact which the scheme would have. The respondents had argued that, if the 2003 Scheme and s. 12 of the Act of 1994 (which was impugned as invalid) were held to be compatible with the Third Non-Life Directive, and therefore held to represent permissible conditions on the applicants' entitlement to conduct non-life insurance business in the State, it could not be said that there had been any unlawful interference with their property rights. McKechnie J. declined, however, to accept the respondents' submission that the financial effect of the 2003 Scheme on BUPA was to be ignored for this purpose. At para. 249, he cited the evidence that had been given as to the projected liability which BUPA would incur and concluded:-

> "Even allowing for BUPA's historical understating of its anticipated profits and building in a capacity for price increases, which would not unduly effect its revenue generating capacity, there can be no doubt but that on these figures it would be difficult for the applicants, without major structural changes and with its current business model, to cover payments and also obtain an acceptable return on capital. Therefore it is likely that in the short term the scheme will have a significant impact on, at least their profitability, if not also on their reserve fund."

He added:-

> "I am therefore satisfied that with their current business regime, the financial liability resulting from equalisation payments will have a significant impact on BUPA. Accordingly in my view and without any necessity to further elaborate on the evidence, it is safe to proceed on the basis that there is a *prima facie* infringement of the applicants' constitutional right to property. Therefore the State must justify."

56. There then follows an extensive portion of the judgment in which McKechnie J. addresses the "general good" requirement of Article 54, the "objective justification" element of Article 82 and what is referred to as the "obstruct" component of Article 86.

57. This includes a detailed consideration of the expert actuarial, economic and accountancy evidence given on either side as to the alleged deficiencies and detrimental effects of the scheme and the responses given to those criticisms. (See paras. 264/278). As a significant and important part of the evidence relied upon by BUPA was that given by the economist Dr. Koboldt, it is relevant to note an observation made upon it in this context by McKechnie J. at para. 279:-

> "In the first place, he offered a view that community rating, in the sense of community rating within plan (or the s. 7 definition) did not require a risk equalisation system to support it. There is no dispute about this proposition. However, his report and his evidence are crucially defective in this central area because both proceeded on a basis that community rating had no meaning other than that just described. Therefore a great deal of his evidence is virtually redundant given my finding on the correct legal meaning of community rating for the purposes of s. 12 of the 1994 Act, and of course for the purposes of the risk equalisation scheme."

58. Crucially, therefore, as has been submitted on behalf of BUPA to this Court, McKechnie J. has there effectively rejected an important part of the evidence relied upon by BUPA at the original High Court hearing and has done so because it was considered to have proceeded on the basis of community rating as defined in s. 7 which McKechnie J. considered mistaken but which the Supreme Court has now definitively ruled to have been correct. It is also obviously significant that the Court appears to have accepted that there was no dispute as to the proposition that, if what was intended and authorised by the provisions of the 1994 Act was "community rating within the plan", a scheme of risk equalisation such as that purported to be introduced in the 2003 Scheme ("across the market") was not required. This has obvious implications for any assessment of the necessity, proportionality and therefore of the objective justification for the 2003 Scheme.

59. In this part of the judgment, McKechnie J. considers also the evidence of the expert witnesses called on behalf of the respondents and particularly that of the two economists, Dr. Walker and Dr. O'Toole, which he preferred and accepted. In the concluding passages of the judgment, from para. 290 onwards, McKechnie J. sets out his essential conclusions on these issues. He held that, on the basis of the economic evidence which he accepted, the market in question is potentially unstable without risk equalisation in the Irish system, and that the 2003 Scheme was therefore "absolutely necessary to support the present system". He held that, moreover, "it is fair, reasonable and proportionate and the respondents (*recte* the applicants') evidence has not undermined this view".

60. He then dealt with further issues that had been raised, such as whether BUPA had followed a policy of "shadow pricing" since entering to the market and whether it had earned "super profits" in it by doing so. As regards the former, he expressed the view that the evidence suggested that, at least on some occasions, BUPA had adopted a practice very close to shadow pricing, as it indicated that the level of price increases was significant and appeared to be inconsistent with BUPA's claim that the parity of increases with VHI increases was largely due to similarity of input cost. In regard to the latter issue, he found that BUPA appeared on the evidence to have earned percentage profits which were substantially in excess of any other relative indicator in the sector.

61. Finally, at para. 295, McKechnie J. referred again to the decision of the European Commission of 13th May, 2003, under the State aid provisions of Article 87 EC, following the State's notification of the 2003 Scheme under that provision. He described the decision as "highly relevant for [the Commission's] views on the necessity and proportionality of the Risk Equalisation Scheme". (He referred particularly to paras. 50-59 of the decision). He concluded by saying that he respectfully agreed with the Commission's decision that the 2003 Scheme had passed both the necessity and the proportionality test and in the final paragraph of the judgment concluded:-

> "For the reasons above given I am satisfied that the respondents have discharged the justification and the objective justification test which they must in order to succeed in defending these proceedings. Moreover the impact upon BUPA's constitutional rights are required within the terms of Article 43 and therefore do not amount to an unjust attack under Article 40.3."

62. It has been necessary to set out in some detail the above salient aspects of the High Court judgment in order to identify both the specific conclusions reached on the individual issues which remain relevant so far as concerns the liability issue now before this Court, and also to illustrate the extent to which those findings arose out of a full hearing of the claims on the merits following a consideration of detailed evidence, both factual and expert, and a very extensive consideration of legal submissions as to both the requirements and effects of national and EU law.

The Supreme Court Judgment

63. It is next appropriate, accordingly, to look briefly at the basis upon which the Supreme Court, in the judgment of Murray C.J., had regard to those particular findings when arriving at its ruling that a mistake had been made in the interpretation of the definition of "community rating", with the result that the statutory instruments were *ultra vires* and were thereupon quashed.

64. As already indicated in para 16 in this judgment, the applicants' appeal against the High Court judgment was successful, but upon the sole ground that the interpretation of the definition of community rating by reference to ss. 2, 7 and 12 of the Act of 1994 was mistaken, such that the 2003 scheme was *ultra vires* the powers of the Minister to make the statutory instruments. Nevertheless, in assessing the effect of the Supreme Court order to remit the question as to liability of the respondents for damages in these circumstances for consideration by this Court, regard must be had to the implications of observations made in the judgment of Murray C.J. on some of the above findings of McKechnie J. in relation the evidence given and the analysis made in the High Court.

65. Under the heading of "Impact of the Risk Equalisation Scheme" Murray C.J. said:

> "It is quite clear, and the learned trial judge so held, that the risk equalisation scheme as introduced by the Minister, with its concomitant version of community rating of premiums across the entire market in the sense argued for by the Minister, would have serious impact on the economic and trading position of BUPA and potentially for any other recent or new entrant to the market of private health insurance."

The conclusion of McKechnie J. in para 230 of his judgment (see para. 51 above) that competition was therefore distorted is quoted by Murray C.J. He then observed:-

> "It is of course the case that such negative impact on competition in the market may be objectively justified and indeed the learned trial judge found that it was so."

Murray C.J. pointed out that it was for the legislator in the first instance to determine the extent to which competition could be interfered with, having regard to the legislative objectives, and then said:

> "I make reference to the potential effects of the Risk Equalisation Scheme on competition in the private health insurance market not for the purpose of examining the extent of or the justification for such measures but simply for the purpose of highlighting one of the important and potentially far reaching effects which legislation providing for the establishment of such a scheme may have."

66. Given that there had been no cross appeal by the respondents against the findings adverse to them made by McKechnie J. as to the damaging impact of the Scheme upon the commercial interests of the applicants and its distorting effects on competition, together with the fact that in the appeal the applicants had contended that McKechnie J. had erred in underestimating the severity of the impact and anti -competitive effect, these observations of the Supreme Court can, in the view of the Court, only be taken as reaffirming the findings in question so far as they were in favour of the position of the applicants, while at the same time refraining from making any finding on the question of the contended justification for the scheme as a defence to the claims.

67. The Supreme Court judgment continues with some comments on the findings made in the High Court in relation to the important implications for BUPA's trading position and profitability of the 2003 scheme once it came to be applied. It notes that McKechnie J. did not accept the applicants' claim that the required payments would have made it unprofitable for BUPA to remain in the market. Murray C.J. observes:-

> "Leaving aside the constitutional issue as such, it is nonetheless evident that the scheme in question, established pursuant to the provisions of s. 12, would have serious effects on the trading profitability of BUPA and inevitably have implications for any undertaking considering entering the market in the future."

BUPA's argument was that McKechnie J. should have concluded that the impact on profitability would have been far greater. It was not necessary for the Chief Justice to address that issue and he mentions it only as a matter to be taken into account when interpreting s. 12 in the light of sections 2 and 7. There is then the explicit statement:-

> "I consciously refer to potential impact on constitutional rights, as I do not think it is necessary, for present purposes, to determine whether such rights have actually been limited and if so whether such limitation is justified."

68. It clearly follows that the judgment of the Supreme Court must taken as containing no finding which either reaffirms or casts doubt upon the assessment made in the High Court on the issue as to the alleged infringement of constitutional rights, which, as pointed out above, incorporated the assessment made by McKechnie J. of the issues of objective justification, necessity, proportionality and protection of the common good.

69. Later in the judgment Murray C.J. refers again to the impact of the 2003 Scheme, with its concomitant component of community rating, and to the argument that the learned trial judge had underestimated the effects, pointing out that: "the respondents did not challenge those findings although they argued against some of their implications and said they were in any event objectively

justified". He then adds the comment: "Justified or not, from any point of view a scheme based on community rating across the entire market has actual and potentially serious implications for undertakings in the market". In the judgment of this Court, these passages can only be read as an affirmation on the part of the Supreme Court that the evidence before the High Court and the assessment made of it by McKechnie J. was at least capable of supporting his findings as to the seriousness of the adverse impact of the 2003 Scheme upon the commercial position of BUPA, and as to its anti-competitive implications and effects. It was only in respect of the issue as to whether such consequences could be excused and rendered lawful as objectively justified that the Supreme Court judgment stops short of expressing any view on the High Court judgment. In reaching the conclusion on the definition issue, the judgment also made this observation:-

> "It may well be that the best and most effective, and perhaps even the only effective, means of achieving certain policy objectives is to provide by statute for a form of community rating across the whole market of insured persons and one which is not confined to community rating within the plan. That is a choice for the Oireachtas to make particularly when it has to be balanced with other policy considerations such as the admitted anti-competitive effects of a scheme based on such a form of community rating."

70. This observation would seem to indicate that it was considered to be, in principle, within the competence of the Oireachtas to overcome the problem which the Supreme Court identified in the definition of "community rating", by legislating to provide for an appropriate power to impose a risk equalisation scheme based upon community rating across the entire market. The judgment contains, however, no express finding one way or another as to whether the imposition of such a scheme would ultimately prove permissible as an objectively justifiable interference with property rights under the Constitution, or as a measure compatible with the Third Non-Life Directive under its Article 54 and with Article 86 EC.

71. The outcome of the cumulative effect of the High Court and the Supreme Court judgments so far as concerns the position of this Court on the issues now before it, appears to be as follows. The High Court has made a series of clear findings on issues of fact and of mixed fact and law in relation to the detrimental effects contended for by the applicants as to the impact of the 2003 Scheme on BUPA's commercial position, viability and profitability and as to its distorting effects on competition. These have not been set aside or put in doubt by the judgment of the Supreme Court and, indeed, as indicated above, might be considered to have been in some respects impliedly affirmed. On the other hand, the Supreme Court has expressly refrained from making any finding or giving any view on the findings made by McKechnie J. to the effect that the introduction of the 2003 Scheme was nevertheless not unlawful because, for the purposes of issues Nos. 3, 4 and 5 above, the restrictions and burdens which the scheme brought about for undertakings, including BUPA, were considered necessary, proportionate and objectively justified for the protection of the general good.

Res Judicata

72. As already indicated, the respondents strongly contend that it is not now open to the applicants to seek to relitigate the High Court findings made as to the objective justification which saved the 2003 Scheme. This is, in effect, a plea of *res judicata*. It is, however, a plea based upon issue estoppel rather than action estoppel, in that the only action between the parties remains before the Court and has not been determined. Nevertheless, as Denning L.J. said in *Fidelitas Shipping v. V/O Exportchleb* [1966] 1 Q.B. 630 at 640: "Within one cause of action, there may be several issues raised which are necessary for the determination of the whole case." That was obviously so in the present litigation, in that McKechnie J. was obliged to determine a series of complex issues of fact and law, including the issues which are again before the Court as relied upon by the applicants in the three alleged wrongs.

73. The elements necessary in order to successfully plead issue estoppel are not in doubt. They were summarised by O'Neill J. in *Sweeney v. Bus Atha Cliath* [2004] 1 I.E. 576 at 581. He said:

> "The ingredients necessary to invoke the doctrine of *res judicata*, on this ground, were summarised in the following passage in the judgment of Keane J. as he then was, in the case of *McCauley v. McDermot* [1997] 2 I.L.R.M. 486 at p. 492 as follows:-
>
> 'While the doctrine of what has come to be called 'issue estoppel' has been the subject of explanation and analysis in many modern decisions, its essential features were helpfully summarized as follows by Lord Guest in *Carl Zeiss Stiftung v. Rayner and Keeler Limited* [1967] 1 A.C. 853 at p. 935A:
>
> The requirements of issue estoppel still remain
>
> 1. That the same question has been decided;
>
> 2. That the judicial decision which is said create the estoppel was final; and
>
> 3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.'"

That summary of the ingredients was approved as "careful and accurate" by the Supreme Court on appeal. ([2004] 1 I.R. 576; see the judgment of Keane C.J. at p. 589).

74. There is no doubt that, in the situation now before this Court, these same questions have been considered and have been the subject of the judicial decision of McKechnie J., and that the parties are the same persons. The issue, accordingly, is whether, in these particular circumstances, the decisions of McKechnie J. are properly characterised as final decisions in the above sense. The respondents point to the fact that the findings of objective justification were the subject of grounds of appeal before the Supreme Court, but, obviously, the Supreme Court expressly refrained from making any ruling upon them and the applicants did not seek to invite the Supreme Court to rule upon those grounds. (They refer in this regard to the approach that had been adopted by appellants in the case if *Dellway Investments Limited v. National Asset Management Agency* [2011] I.E.S.C. 3.)

75. Although the situation is unusual, the Court is satisfied that it would be a questionable extension of the concept of issue estoppel to treat these particular issues as having been the subject of final judicial decision in this litigation. In the first place, that does not appear to have been the intended consequence of the Supreme Court determination of the *ultra vires* issue, for example, in the passages quoted in paras. 64 to 68 above, where Murray C.J. expressly refrains from making any comment upon the questions of objective justification and as to whether the limitation on constitutional rights would be justified.

76. More importantly, however, it is clear, as already adverted to in the above review of the judgment of McKechnie J., that his findings were explicitly predicated on his view of the correct interpretation of the definition of "community rating". As already pointed

out, he acknowledged that his conclusion had "considerable significance for several other major issues" and he felt obliged to discount important parts of the applicants' expert evidence as a result. (See paras. 34 and 35 above). A further crucial element in the conclusion reached by McKechnie J. was that adverted to in para. 52 above; namely, his understanding that "there is a fundamental State commitment to community rating across the market". However, it is now clear from the judgment of the Supreme Court that, while there may well have been a fundamental commitment to community rating across the market on the part of the Minister and her advisers, it was based upon a mistaken view of the type of community rating which the Oireachtas had authorised in the Act of 1994. The observation by McKechnie J. to the effect that there was a fundamental commitment of the State is clearly vitiated by the construction given to the Act by the Supreme Court. Insofar as the commitment evinced by the State is that legislated for by the Oireachtas in ss. 2 and 7 of the Act of 1994, it is a commitment to community rating "within the plan". Clearly, therefore, there was a crucial connection between the finding of objective justification in the High Court judgment and the understanding that there was a "fundamental State commitment" to community rating across the market on the basis that such a risk equalisation scheme was essential to the operation in economically acceptable conditions of a system of community rating based upon open enrolment and lifetime cover. As pointed out in para. 52 above, the finding in favour of the respondents that "Article 86(2) is available in this case" was thus bound up with the acceptance of the proposition that the 2003 Scheme was necessary in order to give effect to the State commitment to community rating across the market.

77. Furthermore, as pointed out in paras. 54 – 58 above, this view of the definition of community rating and of the commitment to community rating across the market as fundamental to the sustainability of the system sought to be achieved, was also considered by McKechnie J. to underpin the conclusion reached that the respondents had discharged the objective justification test for the purposes of the applicants' reliance upon their constitutional rights of property and that, of course, formed a part of his rulings under the other headings also.

78. The Supreme Court, in finding that the 2003 Scheme was *ultra vires* the 1994 Act, clearly envisaged, depending upon the terms in which the Oireachtas might ultimately legislate to provide for the introduction of a scheme based on community rating across the market, that such a scheme might well be shown to be capable of objective justification notwithstanding the obvious impact which it would have on competition and on the commercial positions of other insurers in the market. Obviously, issues as to the reasonableness, proportionality and objective justification of any scheme will be dependent upon or influenced by the nature and extent of the impact of a scheme on competition in the market and on the interests and rights of other undertakings.

79. Furthermore, in refraining from expressing any view on the issue of objective justification, the Supreme Court was clearly alive to the possibility that amending legislation, designed to cure the flaw in the Minister's power to introduce community rating across the market, might not necessarily result in a scheme being introduced which fully replicated the 2003 Scheme, so that considerations of reasonableness, proportionality, objective justification and impact on other undertakings would fall then to be assessed according to the nature and effect of the actual scheme and the market conditions prevailing at the time. That however is not a relevant factor here because the applicants' claim for damages is directed at the 2003 Scheme as provided for under S.I. 260 of 2003 and as purported to be put into practical effect by the Minister's decision of 23rd December, 2005, to require commencement of the payment obligations on 1st January, 2006. It was only as and from the latter date that BUPA began to incur a need to make accounting provision for a prospective liability.

80. In remitting the issue of liability to the High Court, in circumstances where the Supreme Court acknowledged the findings made by McKechnie J. as to the distorting effect of the 2003 Scheme on competition and its adverse impact on BUPA's commercial position, while refraining from expressing any view on the issues of objective justification, the Supreme Court must be taken as having intended the High Court to examine the liability issue by reassessing the question as to the objective justification of the 2003 Scheme in the light of the impact of the finding as to the correct interpretation of the statutory definition on the conclusions previously reached on those questions.

81. Given the importance attached by McKechnie J. to what he considered to be the fundamental commitment of the State to community rating in the s. 12 form, it must follow that the effect of the Supreme Court judgment has been to require the High Court in determining the issue of liability to reassess the questions as to whether the 2003 Scheme was capable of objective justification, had it been competently adopted. That however, must in turn necessarily involve, should the applicants so require, the reopening of the findings made by McKechnie J. as to the nature and extent of the adverse, detrimental and distorting effects of the 2003 Scheme. BUPA had contended before the Supreme Court that the High Court had underestimated these effects, and would presumably argue that the more serious the effects are found to be, the greater is the difficulty in demonstrating that the Scheme could be objectively justified. If the applicants are not estopped from reopening the issue of objective justification, there does not appear to be any basis for holding that the respondents are estopped from reopening the related findings of *prima facie* infringement or incompatibility at which the objective justification question was addressed. Issue estoppel cannot, in the view of the Court, operate on a piecemeal basis by application to the constituent findings within the issue which has been determined. In this instance, the High Court determined the three issues as to infringement of the Directive, of Articles 86 and 82 and of the constitutional rights. Each of those determinations involved two or more constituent findings. For example, the issue as to the infringement of the Directive involved a series of findings as to the characterisation of private health insurance in the State as alternative to health cover provided by the social security system; as to whether the 2003 scheme was a "specific legal provision" of the kind envisaged by Article 54.1 and as to whether the scheme was necessary "to protect the general good". (See above paras. 41 – 49).

82. In the view of the Court, it is impossible, for the purpose of applying the principle of issue estoppel, to subdivide such findings within the determination of a given issue. It is the determination of the substantive issue as a whole to which the principle can apply.

83. This situation is further complicated by the fact that the issue of liability now falls to be determined by this Court and not by McKechnie J., as might otherwise have been the case. It seems to the Court that had the issue fallen to be determined by the trial judge he would have been entitled to reassess the issues on the basis of the evidence as originally presented to him, without retrial, and in the light of the Supreme Court ruling on the definition of "community rating". Not having heard that evidence, this Court cannot adopt that approach – at least in the absence of the agreement of the parties – without resorting to a potentially unfair procedure. By the same token, however, if it is correct to regard the findings on the objective justification questions as no longer tenable, it would appear equally unacceptable that the applicants should be deprived of the opportunity of having those questions re-determined on the basis of the evidence they rely upon as to the disproportionate and excessive effects and impact of the 2003 Scheme and in support of their contentions that it was incapable of being saved by considerations of necessity, justification and pursuit of the common good.

84. Accordingly, in the judgment of the Court, the effect of the Supreme Court judgment in this regard is that, should it be necessary to do so, the determination of the issue of the respondents' liability for damages, if any, will necessarily involve a re-examination of those claims of infringement, and, in the changed circumstances that now exist, to a rehearing of the relevant evidence, unless the parties agree otherwise.

The Alleged Wrongs
85. Notwithstanding that conclusion it appears to the Court to be both appropriate and necessary to address the preliminary issues identified in the Court's order in paragraph 20 above at A.(2) and B.(1). As explained above at paragraph 29, the applicants rely in their claim for damages on the three alleged infringements both as recognised torts or wrongs for the purpose of the *Pine Valley/Glencar* principle and as wrongs committed independently of any error of law in the *ultra vires* adoption of the statutory instruments.

86. There is no doubt that, as a matter of both Irish law in relation to infringement of constitutional property rights and of European Union law in relation to the infringement of rights conferred by that law which Member States are bound to respect, an entitlement to compensation by way of damages for losses incurred may arise and that the High Court is competent in both cases to award them, provided that the essential criteria of liability are proven to exist. (See, for example, Emerald Meats Limited v. Minister for Agriculture & Ors. [1997] 1 I.R. 1 and Maxwell v. Minister for Agriculture, Food and Forestry [1999] 2 I.R. 474)

87. The question therefore arises as to whether, in the particular circumstances of this case, those criteria would be established if it is assumed that, on any re-examination and/or rehearing of evidence (should such be necessary) as to the three alleged wrongs, it was determined that the 2003 Scheme had adverse effects on BUPA's commercial position, on property rights and on competition, as least as detrimental and distorting as that previously determined by McKechnie J., and that the defence of objective justification failed to save it from being unlawful? This question arises because of two particular factors which are peculiar to the situation of the parties. These are, first, the fact that the effect of the Supreme Court order has been to quash the statutory instruments upon which the legal and practical impact of the 2003 Scheme depended, thereby rendering them void *ab initio*. Secondly, BUPA never actually made any transfers on foot of the payment obligations of the Scheme prior to its being quashed, although, of course, it claims to have sustained loss in having been compelled to mitigate its prospective future loss by disposing of the business for a value less than that it would have had in the absence of the purported imposition of the 2003 Scheme. If the 2003 Scheme never had effect in law, because it was void *ab initio* as the applicants had contended from the outset, and if the stage was never reached at which actual transfers were compelled to be made, such that the distorting effect on competition of the transfers never occurred, has any justiciable wrong in the senses of the necessary ingredients of the three alleged wrongs actually been committed? Even if it is shown, for example, that the 2003 Scheme would have been unjust if implemented, has any actual attack on property rights taken place if the payments were never made? It is necessary, therefore, to consider the essential elements which must be established in order to maintain a claim for damages under each of the headings of the three alleged wrongs.

88. Because of the relationship, as explained below, between the institutions of the European Union and the Member States, so far as concerns non contractual liability for losses caused through infringement of rights protected or afforded by European law or the provisions of European Treaties and legislation, it is appropriate to consider first the position in Irish law in relation to claims of tortious infringement of constitutional rights.

The Constitutional Wrong
89. That position is not in doubt. Since at least the judgments of the Supreme Court in *Byrne v. Ireland* [1972] I.R. 241, it has been clear that a right guaranteed by the Constitution carries with it its own right to a remedy even if the action to enforce it does not fit into any of the ordinary forms of action. (See, for example, the judgment of Walsh J. in *Meskell v. C.I.E.* [1973] I.R. 121). The entitlement gives rise, however, to a discrete cause of action for damages for infringement of constitutional rights only where the harm alleged to have been sustained is not already remediable by an available cause of action under common law or statute. (See for example the judgment of Costello J. in *W. v. Ireland (No. 2)* [1997] 2 I.R. 141). It is also clear that where the circumstances of the infringement indicate that it was accompanied by elements of deliberation, of particular oppression or other factors rendering the defendant's position reprehensible, compensatory damages may be enhanced by aggravated or punitive damages. (see, for example, *Kennedy v. Ireland* [1987] I.R. 587 and *Herrity v. Associated Newspapers (Ireland) Limited* [2009] 1 I.R. 361)

90. Furthermore, it is settled law that in the case of alleged infringements of the rights of property, the protection of Articles 43 and 40.3 2° extends to artificial entities such as limited companies. (See the judgment of Keane J. in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321). Next, it is also well settled that not every encroachment by the State upon private property amounts to an "unjust attack" in the sense of Article 40.3 2° of the Constitution. That article falls to be read in conjunction with Article 43, and particularly para. 2 of the latter, which recognises that the State "may as occasion requires delimit by law the exercise of the said rights with the view to reconciling their exercise with the exigencies of the common good". In *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, Walsh J. said: "I think it is clear that any State action that is authorised by Article 43 and conforms to that Article cannot by definition be unjust for the purposes of article 40.3 2°". This approach has been followed in several subsequent cases including by Murphy J. in *Lawlor v. Minister for Agriculture* [1990] 1 I.R.356 and by the Supreme Court in *O'Callaghan v. Commissioners for Public Works* [1985] I.L.R.M. 364.

91. It is to be noted, however, that in all of those cases and in others where legislative provisions or administrative decisions have been challenged as unlawfully encroaching on the property rights protected by Article 40.3 2°, the Courts have been considering instances in which the impugned provisions have had actual effect, such that there had been, or there was liable to have been, an actual encroachment upon the property rights in question. In the judgment of the Court that is not the case here. As already alluded to above, the 2003 Scheme was originally promulgated in June 2003, and signed by the Minister on the 26th of that month. It had been notified to the European Commission under the State aid provisions of the Treaty and been approved by a decision of the Commission on the 13th May, 2003, as not constituting State aid. The Scheme had been opposed from the outset by the applicants, who brought an action for annulment of that decision before the Court of First Instance of the EC under the title of *British United Provident Association Limited and Others v. Commission (Case T-289/03).* Their application was ultimately, on 12th February, 2008, refused by that Court.

92. Under the provisions of the 2003 Scheme, health insurers were required to submit periodic returns of quarterly data to the first named respondent, and on the basis of that information the first named respondent was empowered to make a recommendation to the Minister as to whether the obligation to commence payment of Risk Equalisation transfers should be commenced. When the present proceeding was originally initiated in 2005, a stay was obtained upon the implementation of payments under the scheme by the Minister, but that relief became moot when the Minister decided not to implement the recommendation at that point. It was only, accordingly, on 1st January, 2006, that the payment obligations came into effect. No payments in fact came to be made by the applicants, and when the High Court judgment was given on 23rd November, 2006, further implementation of the 2003 Scheme was stayed by McKechnie J. pending the filing of a notice of appeal. That stay was subsequently continued by the Supreme Court pending the determination of the appeal. In the meantime, the applicants had announced their decision to leave the Irish market on 14th December, 2006, and they subsequently disposed of their business in the State in March 2007. In these circumstances, in the judgment of the Court, the combined effect of the quashing of the 2003 scheme as *ultra vires* and the fact that no actual payments came to be made has the result that no actual attack upon property rights of the applicants or the right to carry on business has in fact occurred. To the extent that the applicants' claims from the outset have been based upon their constitutional entitlement to

protection of those rights, their claims have been vindicated by the relief obtained from the Supreme Court.

93. Claims for damages analogous to the present claim have been considered by the Courts in a number of cases in different circumstances. Two of them have already been referred to above. *In Pine Valley Developments v. Minister for Environment* [1987] I.R. 23, concerned an *ultra vires* decision of the respondent to grant permission for a development of the plaintiff's lands, in which it was accepted that it had probably contributed to the diminution in value of the land in question. The claim for damages was rejected, however, by the Supreme Court, Finlay C.J. saying (at page 38):-

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act bona fide and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

94. This approach was followed in the judgments of the Supreme Court in *Glencar Explorations plc v. Mayo County Council* (No. 2), already referred to above, in which a "mining ban" imposed by the respondent's decision to include the applicant's lands in a Co. Mayo development plan was held to be *ultra vires*. Keane C.J. held (at page 128):-

> "The remedy available to persons affected by the commission of an *ultra vires* act by a public authority is an order of certiorari or equivalent relief setting aside the impugned decision and not an action for damages, to allow which, in the case of public officials, would be contrary to public policy for the reasons set out by Finlay C.J. in the passage just cited."

95. It is to be noted that, in that case, the applicants were holders of prospecting licences which had been granted to them for the areas in question by the Minister for Energy, and considerable sums had been expended by them in prospecting on foot of those licences, resulting in the discovery of gold deposits in commercial quantities. As a consequence, a commercial partner had been found for development of the project that was willing to contribute a substantial investment. The result of the mining ban imposed by the respondent was that the partner in question withdrew and the investment expenditure had to be written off. The High Court had found as a fact that the mining ban had been the cause of the collapse of the project. In other words, the *ultra vires* act had been the cause of actual loss and damage to the applicants. In his judgment in the case, Fennelly J. underlined what he described as the "fundamental proposition" that there is no direct relationship between the doing of an *ultra vires* act and the recovery of damages for the act, as follows (at page 148):-

> "Firstly, an individual needs no power to perform a wide range of actions which affect others and with the potential to affect them adversely. An individual's activity is not actionable, however, unless it consists of the commission of some civil wrong, most usually a breach of contract or a tort. The fact that a public authority must act within the scope of the powers conferred upon it has no necessary connection with loss which may be suffered by persons affected by it. Many people or bodies corporate are affected for better or worse by the actions of public authorities in the performance of their statutory duties. However, the incidence of gain or loss to individuals is unrelated to the validity of the decisions made. A valid decision is no more or less likely to cause loss than an invalid one."

96. This line of authority was also considered in great detail by Budd J. in his judgment in *An Blascaod Mor Teo v. Commissioners of Public Works (No. 4)* [2000] 3 I.R. 565, in circumstances which bear some analogy to those of the present case. In an earlier judgment in that litigation, Budd J. had declared invalid as unconstitutional the statute entitled An Blascaod Mor National Historic Park Act 1989, in essence because its provisions for compulsory acquisition of lands upon the island in question were unlawfully discriminatory and failed to vindicate the property rights of the plaintiffs. His judgment was upheld by the Supreme Court and the matter came back before him to determine a number of preliminary issues in relation to the plaintiffs' claim for damages. Having reviewed extensively the domestic case law in relation to the entitlement of an individual to damages against the State arising out of the adoption of a measure found to be invalid, and having also compared that line of authority with the corresponding position in relation to claims for damages for infringement of European Union law (which is also examined later in the present judgment); Budd J. concluded that the declaration of invalidity of the Act of 1989 adequately vindicated the claim for the constitutional rights of property advanced by the plaintiffs. He said (at page 590):

> "While I do not accept that the Oireachtas has total immunity in respect of legislation, since the courts are specifically given the mandate to review legislation for repugnancy, nevertheless for public policy reasons, it seems to me that there must be considerable tolerance of the legislature particularly when it has to weigh in the balance conflicting rights."

He then observed:

> "There is no case in point to give a guideline where damage is alleged to flow from the actual invalid enactment. It seems to me that the appropriate redress in this type of case is a declaration of invalidity. In the circumstances of this case redress should not extend to damages. Having heard cursory evidence, I have concluded that there are a number of imponderables in respect of the heads of damage and that there is a lack of the type of direct causal link necessary. The plaintiffs have never been dispossessed of their property on the island and indeed the publicity arising from the litigation may well have made the culture of the Great Blasket even more well known. . . . If the judiciary is to proceed resolutely but cautiously in relation to redress where a claim is brought in a recognised type of suit based on tort when an Act is found to be invalid, then the court should be all the more reticent where the claim is based on the effects of the actual enactment of an invalid Act."

97. Thus, Budd J. attached significant importance to the fact that, while the Act in question had been enacted and come into operation, its compulsory acquisition procedures had not in fact been applied to the plaintiffs, such that the practical consequence of actual dispossession by compulsory acquisition had not in fact occurred.

98. In other words, where the exercise of a delegated statutory power, whether to take an administrative decision or adopt and implement a statutory instrument, is found to be *ultra vires* the public authority in question, there is no automatic entitlement to damages on the part of a person affected, unless the act in question involves some identifiable civil wrong such as breach of contract or a tort, and resulting loss is thereby caused to the person concerned. Otherwise the remedy for a person affected by the *ultra vires* act is an order of *certiorari* or equivalent relief.

99. Accordingly, in so far as reliance is placed upon the third of the alleged wrongs; namely, the alleged unlawful infringement of the applicants' right of property and of the right to conduct a business, no liability on the part of the respondent could in any event arise, in the view of the Court, unless it was established that the adoption of the 2003 Scheme, either as such or in combination with the decision of 23rd December, 2005, to commence the payment obligations, involved also one or other of the two remaining alleged

wrongs.

The EU Law Infringements
100. It is necessary, accordingly, to consider whether the wrongs relied upon in the form of alleged infringements of the Directive and of Articles 86 and 82 EC could be characterised as recognised wrongs for the purpose of *the Pine Valley/Glencar* principle, or alternatively as giving rise to causes of action in their own right, independently of the finding of invalidity of the 2003 Scheme.

101. It is not in dispute that, as a matter of Irish law, such infringements can give rise to claims for damages by an injured party and that such infringements fall to be considered as equivalent to a civil wrong or tort in domestic law. It is necessary, however, to outline briefly the legal context which forms the basis of this position, because the evolution of European law in the area has brought about a situation in which the conditions or criteria for liability on the part of the Union for infringement of rights of individuals under that law have been assimilated to the criteria and conditions applicable to the liability of Member States.

102. Under the constitutional structure of the European Union and the prior European Communities, the Union (as the legal entity) and the Member States share responsibility for ensuring the proper implementation and enforcement of European law. Under Article 288 EC (now Article 340 TFEU) the Treaties had provided that the Union would be non-contractually liable for damage caused by the institutions or their servants in the performance of their duties "in accordance with the general principles common to the laws of the Member States". Article 235 EC (now Article 268 TFEU) conferred exclusive jurisdiction upon the Court of Justice to determine such claims.

103. Because the Member States contribute extensively to the implementation of European Union law, they too are answerable for compensation if they act unlawfully when doing so and cause damage or loss to injured parties. Under Article 10 EC (now Article 4.3 TEU), the Member States are required to take all appropriate measures, whether general or particular, "to ensure fulfilment of the obligations arising out of (the) Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty". These obligations include the obligation to make good the unlawful consequences of a breach of Community law. (See for example *Asia Motor France v. Commission (Case C-72/90)* [1990] E.C.R. 1-2181, paras. 14-15).

104. In the leading case of *Francovich and Others v. Italian Republic (Joined Cases C-6 and C-9/90)* [1991] E.C.R. 2-5357, the Court of Justice explained the rationale as being based upon the fact that the Treaty had created a legal system which is integrated into the legal systems of the Member States, to be applied by their Courts. The subjects of the legal system include the nationals of the Member States, who have rights conferred by Community law. As a result, "it has been consistently held that the national Courts whose task it is to apply the provisions of community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals". (Para. 32)

105. The full effectiveness of Community rules would be impaired and the protection of the rights which they confer would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of community law for which a Member State can be held responsible. (Para. 33) "It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law, for which the State can be held responsible, is inherent in the system of the Treaty". (Para. 35)

106. The *Francovich* case is also the leading authority for the proposition that, while the right of the injured party to reparation derives directly from Union law, it is by reference to the rules of national law that the liability is to be determined and assessed, but:-

> "The substantive and procedural conditions for reparation of loss and damage laid down by the national laws of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or accessibly difficult to obtain reparation". (Para. 43)

The Conditions for Liability
107. While the terms in which the conditions of liability of the Union for damages for infringement of Union law, and those in which the conditions applicable to the liability of Member States might be said to have been expressed differently in the earlier case law, it has been clear since at least the judgment of the Court of Justice in *Bergaderm and Groupil v. Commission (Case C-352/98P)* [2000] E.C.R 1-5291, that the conditions have now been brought into alignment, so that they are the same whether the rights of the injured party have been infringed by an act or conduct of the Union institutions, or of authorities or agencies for which a Member State is responsible. At para. 41 of that judgment, the Court said:-

> "The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification differ from those governing the liability of the community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage."

It then outlined the three essential conditions governing liability:-

> "As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties *(Brasserie du Pêcheur and Factortame [(Joined Cases C-46/93 and C-48/93)]* [1996] E.C.R. 1-1029)."

108. As far as the first of those conditions is concerned, the act impugned as unlawful must be one which infringes or conflicts with a superior rule of law intended to confer rights on individuals. Those superior rules of law include the provisions of the Treaties, the general principles of Union law and the Union measures upon which the impugned act is based. The general rules of law considered to be superior rules in that sense also include principles such as those of proportionality, equal treatment or non discrimination, the prohibition of misuse of powers, the right to be heard and fundamental rights including the right to property. (In relation to the last of these see, for example, *Biovilac v. E.E.C. (Case 59-83)* [1984] E.C.R. 4057 at paras 21-22). The rule of law relied upon by the injured party must be one "intended to confer rights on individuals", and these include the principles just mentioned amongst others.

109. In the context of the present case, therefore, it is clear that, when the provisions of the 2003 Scheme are considered, the provisions of the Third Non-Life Directive must be taken as containing a superior rule of law, in that it is a measure of secondary legislation at Union level which has as its objective the attainment of the Treaty right of establishment and the freedom to provide

services. Similarly, Article 86, when taken in conjunction with the prohibition of Article 82, must also be regarded as containing a superior rule of law intended to confer rights on individuals. Its explicit purpose is to protect undertakings against anti competitive behaviour, including anti competitive behaviour rendered possible by State measures.

110. The second condition is that the impugned act or conduct must be sufficiently serious. The purpose of this condition is to draw a distinction between loss or damage which flows from the mere exercise of policy choices on the part of Union institutions or State authorities and loss or damage resulting from a manifest and grave disregard by the institution or authority on the limits of exercise of its powers. (See for example *H.N.L. and Others v. Council and Commission (Joined Cases 83 and 94/76, 4, 15 and 40/77)* [1978] E.C.R. 1209, para. 6 and the *Bergaderm* case at para. 43). One of the factors to be taken into account in determining whether there has been such a manifest and grave disregard of the limits on the exercise of an institution's powers is whether the institution was acting in circumstances where it had a wide degree of discretion, as opposed to a very reduced or even no discretion. A further element which is of relevance in assessing this aspect of the condition is whether the irregularity identified in the act or conduct of the institution or State authority is one which, in comparable circumstances, would not have been committed by a normally prudent and diligent administration. Such a finding may lead to the conclusion that the conduct concerned was of sufficiently serious illegality to give rise to liability. (See for *example Medici Grimm v. Council (Case C-36403)* [2006] E.C.R. 2-81 at para. 79). It is relevant, also, to take into account the complexity of the situation with which the institution or authority was dealing, and any difficulties in the application or interpretation of legislation. In the last mentioned case, the Court was concerned with a claim that a failure of the Council to provide for retroactive effect of a regulation imposing an anti dumping duty on a specific product constituted a sufficiently serious breach of the Basic Anti-Dumping Regulation (Council Regulation (EC) No. 905/98). At para. 87 of the judgment, the Court ruled:

> "However, the Council's lack of discretion as regards the retroactive effect of Regulation No. 2380/98 is not sufficient to justify the conclusion that in the present case there was a sufficiently serious breach of Article 1(1) of the Basic Regulation such as to give rise to the liability of the community. It is also necessary as a second step, to take account of the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error of law made was inexcusable or intentional."

111. Finally, the third *Bergaderm* condition requires that the injured party must have sustained loss or damage and there must be a direct causal link between it and the impugned act or conduct on the part of the union institution or state authority concerned. In the wording of Article 288, the liability is to make good damage "caused" by the Community or its institutions. Thus, as in Irish law, issues can arise as to the remoteness of the cause from the loss or the breaking of the causal link by the intervention of some new act or event. For example, in *Holcim v Commission (Case T-28/03)* [2007] ECR I-2941, the Court of First Instance had previously annulled a Commission decision which had found that the applicant had infringed the competition rules, but the Court held that the undertaking could not claim compensation for costs it had incurred in relation to the provision of a bank guarantee, because the loss it sustained was the consequence of the undertaking's own decision not to comply with its obligation to pay the fine. (Where an undertaking appeals an infringement decision by applying to annul it, it remains obliged to pay the fine in accordance with the decision but may, with the agreement of the Commission, postpone payment pending the court ruling by undertaking to pay interest and putting in place a bank guarantee for the ultimate liability.)

112. The distinction between recoverable losses caused directly by the unlawful act on the one hand, and losses which are not eligible for compensation for lack of a direct causal link is well illustrated by the differing outcomes in the cases of *Dumortier Frères v. Council (Joined cases 64, 113/76, 167, 293/78, 27, 28 and 45/79)* [1979] E.C.R. 3091.

113. In an earlier proceeding before the Court as an application for preliminary ruling, the Court of Justice had annulled as unlawful a Council Regulation concerning certain production refunds under the Common Agricultural Policy, for infringement of the principle of equality or non discrimination. The provision in question had unlawfully discriminated between maize gritz for the brewing industry and maize starch. Affected producers then brought actions for damages against the Council. The gritz producers who had not received refunds, instead of increasing their prices to make up for the shortfall, took a commercial decision to sell at a loss in order to retain their markets rather than risk losing markets to the maize starch producers who were in receipt of the refunds.

114. The applicants were held to be entitled to damages equivalent to the production refunds they would have received, had they been entitled to the same payments as the maize starch producers during the relevant period. Certain of the applicants had made additional compensation claims based upon losses sustained due to a fall in sales and operating deficits. The Court rejected those claims on the grounds that those losses were not caused by the unlawful discriminatory treatment of the products in question. At para. 20 of the judgment, the Court said:-

> "Although it is beyond dispute that the figures submitted by the applicants clearly show such a fall (in sales to breweries) that fact can hardly be ascribed to the absence of refunds. In fact, as has already been said, the applicants have insisted on the fact that the selling prices of gritz were not increased on account of the abolition of the refunds. On the contrary, as the Court recognised when examining the development of the prices, the gritz producers chose to sell at a loss in order to retain their markets, and not to increase their prices at the risk of losing those markets. Thus, the inequality which existed between gritz and starch as regards the granting of refunds was not reflected in the selling prices. If in spite of that commercial policy, the gritz producers sales fell, the reason for this must be sought in something other than the inequality caused by the abolition of the refunds."

115. Some of the applicants had also advanced further claims based on losses incurred through factory closures. The Council had argued that the losses in question had been caused by other problems such as obsolescent plant and management difficulties. The Court ruled:-

> "The data supplied by the parties on that question in the course of the proceedings are not such as to establish the true causes of the further damage alleged. However, it is sufficient to state that even if it were assumed that the abolition of the refunds exacerbated the difficulties encountered by those applicants, those difficulties would not be a sufficiently direct consequence of the unlawful conduct of the council to render the community liable to make good the damage. In the field of non-contractual liability of public authorities for legislative measures , the principles common to the laws of the member states to which the second paragraph of Article 215 of the EEC Treaty refers cannot be relied on to deduce an obligation to make good every harmful consequence , even a remote one , of unlawful legislation."

116. It is clear, therefore, that an independent decision taken by a claimant affected by an unlawful legislative measure, when taken voluntarily for its own commercial reasons, will be sufficient to break the necessary causal link between the unlawful measure and the loss sustained.

117. This is accordingly, the context in which it is necessary to consider whether the above conditions could be shown to be met in the alleged infringements of the Third Non-Life Directive and Articles 86 and 82 EC, if it is assumed that the findings made by McKechnie J. as to the adverse and distorting affects of the 2003 Scheme were at least reconfirmed, and that the effects of incompatibility and distortion of competition were held not to be justifiable as having been necessary in pursuit of the common good.

Serious Breach of a Superior Rule of Law

118. So far as the first of the alleged wrongs - infringement of the Directive - is concerned, the first of the three *Bergaderm* conditions would clearly be met, in that the Directive, as already indicated, must be taken as comprising a superior rule of law intended to confer rights upon individuals or undertakings. In the judgment of the Court, however, it could not be held, in the particular circumstances of the case, that the invalid adoption of the 2003 Scheme amounted to a serious breach of European Union law. This is so for two reasons. First, it could not reasonably be said that the Minister was culpable of a manifest and grave disregard of the margin of appreciation available to the State under Article 54.1 of the Directive, in formulating and adopting a loss compensation scheme having regard to the nature and complexity of the subject matter involved. As the entire history of this legislative exercise since 1996 amply demonstrates, the ultimate decision to initiate the payment obligations of the 2003 Scheme was not reached in a manner which could be characterised as in any sense careless, arbitrary or lacking in preparation or planning. On the contrary, the extensive consultation of experts, the commissioning of reports, the publication of a White Paper, the consideration of the earlier recommendation of the first named respondent and the postponement and later reconsideration of commencement of the Scheme; all of these clearly contradict any suggestion that careful consideration was not given to the exercise of the powers available to the Minister, within the limits of Article 54.1.

119. Secondly, it is abundantly clear not only from the advices, reports and material made available to the Minister over the years in question, but also from the extensive expressions of opinion by experts and the expert evidence given before the High Court, together with the opposing legal submissions and the detailed legal analysis to be found in the judgments of McKechnie J. and the Supreme Court, that the matters with which the Minister was dealing were of very considerable complexity, from the point of view of the technicalities of insurance underwriting, the equilibrium of the private health insurance market and the interpretation of both the Directive and national law. In addition, the draft scheme had been notified to the European Commission under the State aid rules as mentioned above, and, while the applicants dispute the relevance of the Commission decision and the subsequent ruling of the Court of First Instance to the compatibility and competition issues upon which this claim for damages is based, the very fact that the Minister did so notify, and had the benefit of the analysis and approval of the Commission, must weigh heavily in negating any possible finding that there has been a manifest and grave disregard on her part, in the way in which the power to introduce such a scheme was exercised. While it is true that there was ultimately a mistake of national law in the construction of the domestic legislation concerned, it could not, in the judgment of the Court, be said that the manner in which the Scheme was prepared, formulated, reconsidered, postponed and ultimately commenced, was action or conduct which a normally prudent and diligent administration would not have undertaken.

120. Finally, in this regard, it is relevant when assessing the gravity of the alleged infringement, to take into account the nature, extent and gravity of the loss or damage caused. When the 2003 Scheme was promulgated and then implemented, what was clearly foreseeable on the part of the respondents as a consequence of the impact of the Scheme on undertakings such as the applicants, was the making of very substantial transfers of funds to the first named respondent for the ultimate benefit of the VHI. As already mentioned, that consequence did not actually materialise. No such transfers ultimately came to be made. It is true that the applicants may be in a position to claim and to prove that a loss was incurred in the disposal of the Irish business in January, 2007, as compared with the value the business would have had in the absence of the threatened imposition of the 2003 Scheme. Nevertheless, had the applicants waited until the outcome of the Supreme Court appeal and the vindication of their challenge to the Scheme that loss would not have occurred.

121. In the judgment of the Court, the intervention of the applicants' voluntary decision, however commercially justified and prudent it might have appeared to have been, had the effect of breaking the link of causation between the 2003 Scheme as an infringement of the two alleged wrongs one the one hand and any such loss on the other.

122. As illustrated by the circumstances of the *Dumortier* cases referred to above at para. 112, an intervening decision taken by a claimant for its own commercial reasons may have the effect of breaking the causal link between the wrongful act and the loss sustained. Although the High Court judgment resulted in the dismissal of the applicants claim, it had also established important findings in their favour as to the detrimental impact of the 2003 Scheme in distorting competition and in altering their commercial position. By deciding to dispose of the business in March 2007, and in so doing deciding the amount of the alleged loss they were prepared to accept, the applicants were taking a risk by not awaiting the outcome of the appeal. It was that choice of risk that caused the alleged lost value of the business, and, in the judgment of the Court, that is something that cannot be laid at the door of the respondents as the basis of a claim for compensation. It is possibly correct, as the applicants have submitted, that it must have been foreseeable to the respondents that the substantial transfers to the HIA which the 2003 Scheme would have required them to make would have an impact upon their commercial position and profitability, at least in the immediate and possibly medium term. It may also be true that the applicants had warned the Minister that they would exit the market rather than risk a further trading loss. It does not follow, however, in the judgment of the Court, that this has the necessary consequence of making the capital loss which the applicants claim to have sustained on the sale of the business a reasonably foreseeable consequence of the introduction of the 2003 Scheme, or the commencement of the payment obligations.

123. It follows, in the judgment of the Court, that neither the second condition as to a sufficiently serious breach, nor the third condition as to the direct causal link between the breach and the damage sustained, could be said to be satisfied in this case.

The Article 86/82 Infringement

124. Finally, it is necessary to consider the alleged infringement of Article 86 EC together with Article 82 EC, and in that regard the same considerations effectively apply. As already indicted earlier in this judgment, the arguments advanced under this heading were considered by McKechnie J. in his judgment at paras. 201 – 236 and culminated in the conclusion reached at para. 234: "Accordingly I believe that Article 86(2) is available in this case". Essentially, the judge's approach was to take as the starting point the fact that the VHI was a public undertaking for the purposes of para. (1) of Article 86 and then, having regard to its impact in distorting competition, to consider the evidence as to the compatibility of the 2003 Scheme with the prohibition in para. (1) against the enactment or maintenance in force of any measure contrary to the competition rules, including, in particular, the abuse of dominance rule in Article 82. Having considered the case law relevant to the issue and then examined the conflicting evidence of the expert witnesses on either side, McKechnie J. concluded that competition was distorted (para. 230), although he did not agree that the substantial transfer payments which the Scheme required to be made in favour of the VHI could be characterised as expropriation or confiscation. He then proceeded to examine whether the respondents could answer the applicants' challenge by proving "the existence of objective justification under Article 82 of the Treaty and/or satisfy the Court that Article 86(2) applies". (Para. 231). This he referred to as the "objective justification defence" and as that issue was common to the constitutional challenge, it was dealt

with later in the judgment. However, having found that the VHI was a "public undertaking" for the purpose of para. (1) of Article 86, and that the incompatibility of the 2003 Scheme with Article 82 had been *prima facie* established, he also examined the possibility asserted on behalf of the respondents that the derogation of Article 86.2 applied on the basis that the 2003 Scheme went no further than was necessary to avoid the VHI's performance of its statutory tasks being obstructed by the prohibition in Article 82.

125. For that purpose, he considered whether the VHI was an undertaking which had been "entrusted with the operation of services of general economic interest". He considered (para 233) that the provision of private medical insurance within a statutory scheme is a "service" and one of an "economic nature". At para. 234, he found that because community rating, open enrolment and lifetime cover could not operate in economically acceptable conditions without recourse to a risk equalisation scheme, the application of Article 82 would "obstruct" the performance by the VHI of the task assigned to it.

126. The Court has already indicated that it would be inappropriate in this judgment to embark upon any reassessment of issues that are dependent upon the evidence given before McKechnie J. as to the severity or otherwise of the impact of the 2003 Scheme upon the commercial position of BUPA or on competition in the relevant market. The issue that now arises, however, as to the applicability of Article 86.2, is not such an issue because it turns upon the construction of that paragraph in the light of the status and function of the VHI as established under the Health Acts. While it may not be strictly necessary to decide this issue for the purpose of considering the question as to the entitlement to claim damages for an infringement of these Articles, in view of the reasons given below, the Court considers that, for the sake of completeness and in case the issue should be taken further on appeal, the Court should express its view on this aspect of the case.

127. While it is undoubtedly true, as was found in para. 233 of the High Court judgment, that the provision of private medical insurance is both a service and an activity of an economic nature, it appears to this Court that it is not necessarily a "service of general economic interest" in the sense of Article 86.2. As adverted to by McKechnie J. in the cited authorities (including the Commission's Communication on Services of General Interest in Europe (2001)), the services which qualify for this characterisation are essentially ones which are provided for the benefit of economic activities generally. In particular, the services are frequently those of utilities or distribution networks, which are used or accessed by undertakings in a wide range of industrial or commercial activities. This characteristic can be illustrated by various cases in which the concept has been found to apply:

- Basic postal services – Case C-320/91 Corbeau [1993] ECR 1-2568;

- Distribution of electricity – Case C-393/92 [1994] 1ECR 1520;

- Operations of a cargo port – Case 10/71 Port of Mertert [1971] 739

- Employment recruitment services – Case C-41/90 Hofner [1991] ECR 1-2017.

128. Viewed in this way it is, in the judgment of the Court, questionable whether the tasks performed by the VHI in providing private medical insurance in a market which has been opened to competing non-public undertakings, can be classified as a service of general economic interest. It is a service in one section of a part of the insurance market; namely, the provision of private health insurance in the market for insurances other than life insurance. It is essentially a service availed of by individual persons rather than one which benefits the general commercial or industrial economy.

129. It follows that if it is assumed correct, if not inevitable, to find that the 2003 Scheme, if actually in operation, would have the effect identified in the High Court judgment; namely, the transfer of substantial payments by minority undertakings, (including the applicants) to the dominant undertaking, with concomitant deterrent effects on market entry, the Scheme must constitute a measure incompatible with the obligations of the State under Article 86.1, because it strengthens the market position of the public undertaking at the expense of competing non-public undertakings.

130. It does not necessarily follow, however, that an entitlement to damages would thereby result. The infringement of Article 86.1 on the part of a Member State is the enactment or maintenance in force of an incompatible statutory or administrative measure. While it may well be correct in these circumstances to say that the 2003 Scheme was "enacted" in the sense that the two statutory instruments were signed and that the payment obligations were directed to commence on 1st January, 2006, notwithstanding the subsequent declaration that they were void *ab initio*; the measures were nevertheless quashed and rendered void, and could not therefore be said to have been "maintained in force" as measures which had actual binding effect in national law. Strictly speaking, as a matter of national law, they were never 'in force'. Furthermore, the benefit to the VHI which would have distorted competition never actually accrued. Accordingly, for the reasons already expressed above in respect of the alleged infringement of the Directive, the Court is satisfied that any technical infringement of Article 86.1 could not be characterised as such a manifest and grave disregard of the State's margin of regulatory intervention in the area as to constitute a serious act of infringement which would attract a liability in damages.

131. It is true that in Union law the *Bergaderm* criteria constitute minimum conditions for liability and do not preclude national rules which impose liability upon the State under less strict conditions. (See, for example, the judgments in *Brasserie du Pêcheur and Factortame* at para. 66 and in *Köbler v. Republik Österreich (Case C-224/01)* [2003] ECR 1-10239 at para. 57). Nevertheless, for the reasons already given above in relation to the alleged constitutional wrong (paras. 89-99) it is clear, in the judgment of the Court, that no liability on that basis on the part of the State could arise in the circumstances of this case.

132. It follows that, in the judgment of the Court, the questions posed in the preliminary issues at para. A(2) and B(1) must be answered to the effect that the applicants are not entitled to recover damages in respect of the infringements identified at para. (1) (a), (b) and (c) of those issues.

133. As a consequence it is unnecessary to rule on the issue as to the measure to be applied in assessing damages.

Summary Conclusion
In the light of the reasons given above, the conclusions reached by the Court on the issues directed to be tried can be summarised as follows:

(1) The effect of the Supreme Court judgment and order, in allowing the applicants' appeal and quashing the 2003 Scheme as *ultra vires* for mistake of law in construing the definition of "community rating" in the Health Insurance Act 1994 (as amended), has been to render the statutory instruments establishing that scheme void *ab initio*.

(2) Although the Supreme Court refrained from expressing any view on other findings contained in the High Court

judgment, this has had the result that the findings of McKechnie J., to the effect that the 2003 Scheme was in its objective and effects proportionate, reasonable and objectively justified as made in pursuit of the public interest in the common good, cannot be regarded as tenable.

(3) This is so because those findings as made in the High Court judgment were expressly predicated on the ruling as to the interpretation of the definition of "community rating" in the Act of 1994, as the s.12 definition "community rating across the market", an interpretation which has been adjudged mistaken by the Supreme Court.

(4) Because, in the view of the Court, the setting aside of the High Court's dismissal of the proceedings by the Supreme Court order has the result that there has been no final determination between the parties of the substantive issues raised as to the lawfulness of the 2003 Scheme, independently of the *ultra vires* ground, the principle of issue estoppel cannot apply.

(5) Furthermore, because (a) the findings made in the High Court judgment on the substantive issues as to the nature, extent and gravity of the impact of the 2003 Scheme on the applicants' commercial position and on competition in the market were based upon evidence and expert opinion heard by the High Court; and (b) those issues would now fall to be reassessed by a Court differently composed, it would be necessary, unless the parties otherwise agree, for this Court to hear such evidence *de novo* if those issues are required to be determined anew.

(6) Nevertheless, the Court is satisfied that even if on such a rehearing, the Court was to reach conclusions as to the detrimental impact of the 2003 Scheme at least equivalent to those reached by McKechnie J. and was also to decide that the 2003 Scheme was not saved from illegality as objectively justified, it would not result in the applicants establishing an entitlement to damages.

(7) This is because, as a matter of both national law and European Union law, the mere fact that the State has, as a result of a mistake of national law in adopting a legislative measure or administrative decision, infringed a right conferred by either law, does not give rise to an entitlement to compensation in addition to the remedy of annulment of the measure in question.

(8) So far as concerns the reliance placed upon the constitutional rights of property and the right to carry on a business, the principle in the cases of *Pine Valley Developments and Glencar Explorations* applies, and the Court is satisfied that in the particular circumstances of this case no "unjust attack" upon the rights of the applicants actually occurred, because the applicants were never in fact compelled to make the transfer payments which would have arisen under the 2003 Scheme, prior to their deciding to dispose of the Irish business.

(9) So far as concerns the claims based upon alleged infringement of the provisions of the Third Non-Life Directive and Articles 10, 86 and 82 EC, the Court is satisfied that the conditions applicable to liability of a Member State to make reparation for infringement are not met. First, having regard to the legislative and regulatory history of the 2003 Scheme and the consultation, research and deliberation that went into its preparation and implementation in the years prior to 2005, and to the technical complexity and legal uncertainty which surrounded the introduction of such a scheme, it could not be held that there has been a manifest and grave disregard on the part of the Minister or the State of the limitations on the State's margin of regulatory discretion in this particular area. Secondly, the condition as to the existence of a direct casual link between the infringement alleged and the loss said to have been sustained is not met in this instance. The loss relied upon is the diminished value at which the applicants claim to have disposed of the Irish business in March 2007, but this voluntary decision had the effect of breaking the causal link between the alleged breach and the loss claimed.

(10) Because, in the judgment of the Court, the claim for damages cannot be maintained, it is unnecessary to address the issue as to how damages might fall to be quantified.