THE COURT OF APPEAL

Record No. 2014/665

[Article 64 transfer]

Ryan P.
Peart J.
Hogan J.

BETWEEN/

STUDENT TRANSPORT SCHEME LIMITED

APPLICANT/APPELLANT

AND

THE MINISTER FOR EDUCATION AND SKILLS

RESPONDENT

AND

BUS ÉIREANN

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of May 2016

1. The applicant, School Transport Scheme Ltd. ("STS"), is a limited liability company which was incorporated in July 2011. STS commenced these proceedings in October 2011. The gravamen of its complaint is that there exists a concluded contract in writing between the Minister for Education and Skills and Bus Éireann for the supply of the school transport service and that it was entitled under EU procurement rules to tender for that contract. Its specific complaint is that there exists or existed a contract between the Minister and Bus Éireann for the school year 2011-2012 which ought to have been put out to tender under EU procurement rules, but which was not in fact made subject to the tender process.

2. The applicant then commenced the present Ord. 84A review proceedings on 27th October 2011. In these proceedings it sought essentially to challenge the failure to hold a tender which proceedings were then admitted to the Commercial Court. Following a lengthy exchange of affidavits, the matter was resolved adversely to the applicant by McGovern J. in a reserved judgment delivered on 23rd October 2012: see *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425.

3. The applicant then originally appealed this decision to the Supreme Court. This appeal was, however, remitted to this Court in accordance with Article 64 of the Constitution following the establishment of this Court on 28th October 2014.

4. As I pointed in a judgment delivered on 18th December 2015, *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2015] IECA 303 (dealing with the admissibility of fresh evidence on this appeal), the school transport system is an essential feature of rural life, as it is by this mechanism that thousands of primary and post-primary children are brought to and from school every day during the course of the school year. The scheme is an administrative one and (so far as primary school children are concerned) may be regarded as an effectuation of the State's constitutional duty as provided in Article 42.4 of the Constitution to "provide for free primary education", since, but for the Scheme, many children – especially those residing in outlying rural areas – might have difficulty in attending school. The Scheme thus serves the important public policy goods of promoting universal primary and secondary education on the one hand, while ensuring equal access to educational opportunity on the other.

5. The present appeal raises a number of fundamental issues regarding the operation of the procurement rules in the context of the present scheme. First, was there a contract in writing between the Minister and Bus Éireann within the meaning of Article 1 of the Public Procurement Directive 2004/18/EC ("the 2004 Directive")? Second, if there was such a contract, was it for "pecuniary interest" in the manner in which this term is generally understood in the relevant case-law? Third, even if the first two questions are answered in the affirmative, the question then arises is to whether the contractual agreement is really a unilateral administrative measure solely creating obligations for Bus Éireann within the meaning of the case-law of the Court of Justice in cases such as Case C-295/05 *Asemfo* [2007] E.C.R. I-2999 and Case C-220/06 *Asociacion Profesional de Emoresas* ("Correos") [2007] E.C.R. I-12175. Fourth, in any event, even assuming that there was a contract in writing for pecuniary advantage, was any such contract one of the indefinite duration which ante-dated the operation of the EU's public procurement regime?

6. I propose to consider these questions in more detail presently. It is, however, necessary to observe that as these proceedings were commenced in October 2011, it is not really in dispute but that events which pre-dated April 2011 (*i.e.*, six months prior to the commencement of the proceedings) cannot be considered for present purposes in view of the six months limitation period which applies in procurement cases of this kind.

7. Before proceeding further, however, it is necessary to set out more detail regarding the establishment and operation of the scheme.

The establishment of the school transport scheme

8. The present scheme dates from 1967 and is operated by Bus Éireann as agents of the Minister for Education and Skills, albeit that some 90% of actual school transport services so provided are currently tendered by Bus Éireann to private contractors. The evidence in the High Court showed that some 110,000 pupils participate in the scheme each school day and that the scheme serves some 3,000 schools through the State across some 6,000 transport routes.

9. The Scheme was introduced following the establishment of the free secondary school system in 1966. The Scheme was entrusted to Coras Iompair Éireann ("CIE") because the Minister's Department did not have the capacity or expertise to administer such a

complex transport scheme. By letter dated 10th February 1967, the Minister entrusted the administration of the Scheme to CIE which accepted the appointment by letter dated 13th February, 1967. In a further letter of 28th May 1969, the Minister set out the administrative and financial arrangements of the Scheme:

> "1. CIE will administer the scheme as agents for the Minister for Education, and as such, will operate the scheme in accordance with his general directions and policy.
>
> 2. All school transport services will be provided in accordance with the rules for eligibility of pupils and the regulations as to the minimum number of pupils necessary before a service can be established or maintained."

10. The financial arrangements were supplemented by a 1975 Agreement which evidenced the price for the services, the nature of the vehicles to be used and the schools covered by the scheme.

11. The Scheme is operated on the basis of the eligibility criteria prescribed by the Minister and is generally organised by reference to educational policy on the one hand and the availability of State resources on the other.

12. As might be expected, there have been changes to the Scheme over the years. Thus, for example, special arrangements are made for the transport of children with special needs and Garda vetting for drivers has since been introduced. While the Scheme has evolved over the years, it remains fundamentally the same Scheme as was originally established in 1967. Following the enactment of the Transport (Re-Organisation of Coras Iompair Éireann) Act 1996 and the creation of three subsidiary companies to run the CIE transport network, Bus Éireann is now the subsidiary company which administers the Scheme within the CIE Group.

13. The evidence also established that the Minister reimburses Bus Éireann on a cost recovery basis. Specifically, Bus Éireann is reimbursed directly for a range of costs which are incurred by it. In addition the Minister pays an agreed 13% charge to cover all other direct and indirect costs for services and other work performed by Bus Éireann in respect of the scheme, albeit that some of these monies have been rebated in recent years in view of the acute pressures to which the State's finances have been subject since 2008.

The present proceedings and the judgment of the High Court

14. The applicant in these proceedings is a private company which maintains that there exists a contract between the Minister and Bus Éireann for the school year 2011-2012 which ought to have been put out to tender and was not. The applicant then commenced judicial review proceedings which were first admitted to the Commercial Court. As I have already noted, the matter was resolved adversely to the applicant by McGovern J. in a reserved judgment delivered on 23rd October 2012: see *Student Transport Scheme Ltd. v. Minister for Education and Skills* [2012] IEHC 425.

15. In his judgment McGovern J. concluded that the applicant had not established that there existed a contract for "pecuniary interest", which is one of the requirements to the existence of a contract within the meaning of Article 1(2)(a) of the Public Contracts Directive:

> "Undoubtedly, funding passes from the respondent to the notice party but this does not determine whether the Scheme is for pecuniary interest, or indeed whether it establishes the existence of a public contract. In *Commission v. Ireland* (Case C- 532/03)[2007] E.C.R. I-1153, the Commission alleged that Ireland had failed to fulfil its obligations under the Treaty by reason of the fact that Dublin City Council was permitted to provide emergency ambulance services without any tender procedure having been undertaken by the Eastern Regional Health Authority. The E.C.J. held that the Commission had failed to prove its case against Ireland and stated at para. 37, "... the mere fact that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract which would need to be assessed in the light of the fundamental rules of the Treaty."
>
> The Scheme is operated by the notice party on a cost recovery basis. It is of some significance that in each year since 2008, the 13% charge to cover all other direct and indirect costs attributable to the Scheme has been reduced at the instigation of the respondent, having regard to the financial difficulties currently facing the State. This indicates that there is no pecuniary interest in the administration of the Scheme such as to satisfy the requirements of Article 1(2)(a) of the Directive."

16. McGovern J. next went to observe that the arrangements between the Minister and Bus Éireann did not establish that there was an ordinary commercial contract between the parties, which, again, is one of the indicia stipulated by the Court of Justice:

> "In Case C-295/05 *Asemfo* [2007] E.C.R. I-2999, the E.C.J. considered whether four municipalities had violated the public procurement rules in ordering the performance of certain services from Tragsa, a publicly owned company, without complying with tendering procedures. Under its rules of establishment, Tragsa was a *"technical service"* of the public administration and it was held at para.51 that the relationship between Tragsa and the public authorities that instructed it was "not contractual, but in every respect, internal, dependent and subordinate. At para. 54, the court stated:
>
> > "It must be observed that, if. .. Tragsa has no choice, either as to the acceptance of a demand made by the competent authorities in question, or as to the tariff or its services, the requirement for the application of the directives concerned relating to the existence of a contract is not met."

17. McGovern J. observed that the Court noted that Tragsa was not free to negotiate the scope of its activities, the conditions of its employment or the amount of remuneration to be received when undertaking work for public authorities. He then went on to say that:

> "In this case, the basis of the operation of the Scheme is entirely administrative:
>
> (a) The Scheme is based on an administrative arrangement between the notice party and the respondent; and
>
> (b) (ii) the administration of the Scheme was entrusted to C.I.E. by letter dated 10th February, 1967, and, in turn, transferred to the notice party [*i.e.*, Bus Éireann];
>
> (c) (iii) C.I.E. and, in turn, the notice party, had no choice as to whether or not they would administer the Scheme."

18. McGovern J. then observed that the definition of a "contract" for the purpose of the Directive is itself a question of E.U. law (see *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v. Administración General del Estado* (Case C-220/06) [2007] E.C.R. I-12175 ("Correos"). The requirement that "the normal conditions of a commercial offer made by [the service provider]" must be present in order for a contract to be found emerges from this case. In *Correos*, the Court of Justice considered Spanish legislation that:

> "permitted public authorities to enter into so-called "cooperation agreements" with the state-owned postal service provider, Correos, in order to cover the requirements for postal services, without any requirement to comply with public procurement procedures. In paragraphs 22 and 49, Spain argued that the case involved instrumental, rather than contractual, cooperation because Correos was subject to a statutory requirement to provide such services as came within the scope of the company's objectives, meaning that it was not in a position to choose whether or not to perform a particular service."

19. McGovern J. then stated that the Court of Justice held that the fact that a service provider was obliged to provide a service and to do so for a fixed price was not sufficient of itself to exclude the possibility of a contract, but it stated at para. 54:

> "It is only if the agreement between Correos and the Ministerio were in actual fact a unilateral administrative measure solely creating obligations for Correos ... and as such, a measure departing significantly from the normal conditions of a commercial offer made by that company ... that it would have to be held that there is no contract and that consequently, Directive 92150 could not apply."

20. McGovern J. ultimately concluded that none of the normal features of a commercial relationship existed between the parties in the present case:

> "I am satisfied that the evidence establishes that the arrangements between the respondent and notice party do not contain any terms that might normally be associated with a commercial contract.
>
> Each year since 2008, the 13% charge to cover all other direct costs and indirect costs attributable to the Scheme has been reduced on the direction of the respondent in the light of the financial difficulties facing the State during that period. The charge for functions performed by the notice party are laid down under budgetary decisions made by the Oireachtas and not the notice party."

21. Article 1(2)(a) of the 2004 Directive defines the term "public contracts" as follows:

> "….contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of the Directive."

22. The Court of Justice has confirmed that a contract which does not fulfil all of the requirements stipulated by the Directive falls outside the scope of the public procurement regime: see Case C-159/11 *Azienda Sanitaria Locale di Lecce* EU:C:2012: 817 at para. 36. All elements of the requirements of Article 1(2)(a) of the 2004 Directive must therefore be satisfied.

23. Some of these requirements are unproblematic so far as this appeal is concerned. If there is a concluded contract in writing between the parties, then the Minister is undoubtedly a contracting authority and the applicant is obviously an economic operator.

24. Again, assuming, therefore, that there was such a contract in writing, it was for the supply of transport services. Article 1(2)(d) of the 2004 Directive provides that "public service contracts" as "public contracts….having as their object the provision of services referred to in Article II [of the Directive]." Land transport services are included in category 2 of Annex II. It follows, therefore, that any such contract was for the provision of services within the meaning of the Directive.

25. What is, however, in dispute are the requirements that the contract must be one for:-

> (i) pecuniary interest;
>
> (ii) that it was "concluded in writing" and
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> (iii) that it is a contract of indefinite duration.

26. While I will deal first with the pecuniary interest issue, I propose then to consider the two other issues in reverse order.

If there was a contract, was that contract one for "pecuniary interest"?

27. Assuming for the moment that there was a concluded contract in writing, the first question to be considered is whether such a contract was one for pecuniary interest. The evidence in the High Court was that the Minister reimbursed Bus Éireann on a cost recovery basis for a range of costs identifiable as having been directly incurred in the operation of and administration of the Scheme, together with an agreed 13% charge to cover all other direct and indirect costs attributable to the work carried out in relation to the Scheme. In recent years some element of the 13% charge has been rebated by Bus Éireann by mutual consent as part of a much wider endeavour to reduce the costs of services supplied by the State.

28. In the High Court McGovern J. concluded that if there were such a contract, it was not one for pecuniary interest precisely because these arrangements provided for payment simply on a cost recovery basis and did not provide for any element of profit. In the light of the decision of the Court of Justice in Case C-159/11 *Azienda Sanitaria Locale di Lecce* (which was delivered some months after the decision of the High Court), it is clear that this aspect of the decision of McGovern J. can no longer be supported. In her opinion in that case, Trstenjak A.G. stated (at para. 33) in her opinion that in view of the objectives of the 2004 Directive in realising the aims of the internal market, the term "pecuniary interest" should be interpreted broadly:

> "In accordance with that broad interpretation, the service provider may not be absolutely required to be profit-making. Rather, it should also be sufficient, for the pecuniary interest requirement to be satisfied, if the service provider merely receives cost-covering remuneration in the form of reimbursement of costs."

29. This view was expressly endorsed by the Court itself when it stated (at para. 29) that as was "clear from the usual and ordinary meaning" of the phrase "pecuniary interest":

> "…a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed services."

30. It follows, therefore, that a contract providing for remuneration on a cost recovery basis does not cease to be a contract for pecuniary interest on that account.

If there was a contract, was it a contract of indefinite duration?

31. The next question is whether, assuming that there was a concluded contract in writing, it was a contract of indefinite duration. It cannot be really disputed but that a contract of indefinite duration falls outside the scope of the public procurement regime. While contracts of this kind are not currently looked on with favour by EU law, neither can it be said that such contracts are unlawful . This is illustrated by the Court of Justice's judgment in Case C-454/06 *Pressetext Nachrichtenagentur GmbH* [2008] E.C.R. I-4401, a case with some striking similarities to the present one.

32. In the aftermath of the Second World War a co-operative entity, Austria Presse Agentur ("APA"), was established in Austria for the provision of news services. APA traditionally provided the Federal State ("Bund") with news agency services. Pressetext was a limited liability company which was established in 1999 and which sought to compete on the news agency services market. It had hitherto obtained some minor contracts with individual Federal agencies.

33. In 1994 (*i.e.*, immediately prior to the accession of Austria to the European Union), APA concluded a contract with the Bund to provide news agency services. This contract was concluded for an indefinite period, save that the parties agreed to waive the right to terminate the agreement prior to 31st December 1999. In the years following there had been a number of essentially minor changes to basic contractual agreement. This had involved the re-structuring of the APA in 2000 and the conclusion of two supplemental agreements in 2001 and 2005.

34. Pressetext commenced proceedings before the Bundesvergabeamt (Federal Procurement Office) claiming that these supplemental agreement amounted to what it described as "*de facto* awards" and that such awards were unlawful and contrary to the EU procurement rules. The Bundesvergabeamt stayed the proceedings and referred certain questions to the Court of Justice, one which concerned the question of indefinite contracts.

35. So far as the question of indefinite contracts were concerned, the Court of Justice ruled as follows:

> "73. First of all, as regards the conclusion of a new waiver of the right to terminate the contract during the period of validity of a contract concluded for an indefinite period, the Court observes that the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts. Such a practice might, over time, impede competition between potential service providers and hinder the application of the provisions of Community directives governing advertising of procedures for the award of public contracts.
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> 74. Nevertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period.
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> 75. Likewise, a clause by which the parties undertake not to terminate for a given period a contract concluded for an indefinite period is not automatically considered to be unlawful under Community law governing public procurement.
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> 76. As is apparent from paragraph 34 of this judgment, in determining whether the conclusion of such a clause constitutes a new award of contract, the relevant criterion is whether that clause must be regarded as being a material amendment to the initial contract…."

36. Following an examination of the various contractual amendments the Court of Justice concluded that none of them were material. There was nothing to suggest that the parties would have terminated the contract even if the waiver of termination clause had not been present. Provided that such a waiver of termination clause had not been "systematically re-inserted in the contract", it had not been demonstrated that such clause "entails a risk of distorting competition, to the detriment of potential new tenderers". It followed that the clause "cannot be held to be a material amendment to the initial agreement."

37. The other change related to changes in price and a new rebate scheme. The Court found that the effect of these changes was to reduce the "remuneration received by the contractor as compared to what was originally provided for", so that "this does not shift the economic balance of the contract in favour of the contractor." These amendments were accordingly not held to be material. The critical point here, of course, is that a contract of indefinite duration which ante-dates the coming into force of the procurement regime and in respect of which there have been no material changes is not itself a contract which comes within the scope of the 2004 Directive.

38. If one applies the *Pressetext* analysis to the present case, it may be said that the original contract (on the assumption, of course, for present purposes, that there was in fact such a contract) was one of indefinite duration which, at least so far as any changes made in the six months prior to the commencement of the present proceedings in October 2011 is concerned, has not been the subject of any material amendments. (As I have already mentioned, it is not really disputed that in view of the applicable time limits that the appellants can only complain for this purpose of any material changes effected after April 2011).

39. It is, of course, true that the price payable to the operator, Bus Éireann, was reduced during this period, but as *Pressetext* itself shows, such a change does not shift the economic balance in favour of the contractor. It follows that this change cannot be regarded as material.

40. Accordingly, therefore, even if there was a contract which had otherwise been concluded in writing, it was nonetheless a contract of indefinite duration which came within the *Pressetext* exception. There was, accordingly, no necessity to have the contract advertised or otherwise submitted to the public procurement regime as such a contract falls outside the scope of the 2004 Directive.

41. It is clear, therefore, that the applicant's claim must fail on this basis alone. It may nonetheless be convenient to consider separately the question of whether there was in fact a contract which was "concluded in writing" within the meaning of Article 1(2)(a) of the 2004 Directive.

Was there a contract which was "concluded in writing" within the meaning of Article 1(2)(a) of the 2004 Directive?

42. There is no doubt but that one of the unusual features of this case is whether there exists a contract in writing within the meaning of Article 1(2)(a) of the 2004 Directive. This is unusual because in the overwhelming majority of procurement cases the existence of a formal written contract will *not* be at issue as the dispute will, as often as not, concern the circumstances in which the formal contract award came to be made in the first place.

43. Some guidance regarding the meaning of the contract in writing requirement is given by the language of Article 1(12) of the 2004 Directive which provides that the words "written" or "in writing" means:

> "any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means."

44. One of the objectives of this provision of the Directive appears to have been that there should be a formal record of the contract, presumably with a view to bringing clarity as to what the nature of the contract actually entailed. While it must be accepted that there is no one formal contractual document governing the Scheme, the terms of the 1967 and 1969 letters and the 1975 Agreement can nonetheless be "read, reproduced and subsequently communicated." This in itself suggests that the writing requirement of Article 1(2)(a) of the 2004 Directive has been satisfied.

45. It should also, however, be observed that Article 1(2)(a) of the 2004 Directive further requires that any such contract must be "concluded in writing." The juxtaposition of the word "concluded" beside the requirement that the contract be "in writing" provides clear evidence that the Union legislator sought to ensure that the contracting parties intended to create mutually binding legal relations in a formal and enforceable fashion.

46. As I have just noted, the agreement of 1967 was unusual in that it did not recite in writing the key terms such as the nature of the contractual obligations assumed by the parties, the duration of the contract or the remuneration payable under the contract such as would have been normal features of any contractual agreement. In many ways, the agreement consisted simply of an administrative instruction from the Minister for Education to CIÉ in 1967 to perform the service with which CIÉ duly complied. This was supplemented by the 1975 Agreement which evidenced the price for the services, the nature of the vehicles to be used and the schools covered by the scheme. Further details were supplied from time to time by Departmental circulars clarifying important matters such as pupil eligibility requirements.

47. There is certainly force in the argument advanced by the Minister to the effect that what is in issue is really an administrative scheme which lacks the indicia of a normal contract. This underscored by the fact there is no one single document which describes the scheme or which re-states in a comprehensive fashion the nature of the obligations thereunder.

48. In this respect, I have not overlooked the fact that in other contexts the State (or, for that matter, Bus Éireann) has described the arrangements as a contract. Thus, for example, in the context of a State aid investigation in 2007 which was conducted by the European Commission, the State described the school transport scheme as one which was operated by Bus Éireann "under contract on a cost recovery basis." The 2011 Annual Report of Bus Éireann further stated that the scheme "is operated under contract" with the Minister. In my view, however, these descriptions are of limited value: what counts, rather, is whether the arrangement is in substance in the nature of a concluded written contract, since this is a pre-condition stipulated by Article 1(2)(a) of the 2004 Directive to its very application

49. As McGovern J. noted in his judgment, the case with perhaps the closest similarity to the present one so far as the issue of whether there was a concluded contract is concerned is that of Case C-523/03 *Commission v. Ireland* [2007] E.C.R. I-11353. This was a case where Dublin City Council ("DCC") had agreed to provide emergency ambulance services on behalf of the (former) East Coast Area Health Board (now part of the Health Service Executive). The Health Board agreed to make annual payments to DCC in respect of this service.

50. The original agreement was negotiated in June 1998 for a five year period. The agreement was then renewed in 2003 and a complaint was made to the Commission that this constituted a contract which ought to have been put out to public tender. The Commission subsequently took enforcement proceedings against Ireland in respect of this failure.

51. The Court of Justice ultimately dismissed the enforcement proceedings, saying that it was quite possible that DCC provided this service pursuant to its own statutory powers and applying its own funds for this purpose, "although it is paid a contribution by the Authority for that purpose, covering part of the costs of those services." The Court further stressed that it was incumbent on the Commission to establish that a "public contract has been so awarded" and there was no evidence to this effect.

52. The Court concluded (at para. 37) by saying:

> "However, neither the Commission's arguments nor the documents produced demonstrate that there has been an award of a public service contract, since it is conceivable that DCC provides emergency ambulance services in the exercise of its own powers derived directly from statute. Moreover, the mere fact *that, as between two public bodies, funding arrangements exist in respect of such services does not imply that the provision of the services concerned constitutes an award of a public contract* which would need to be assessed in the light of the fundamental rules of the Treaty." (emphasis supplied)

53. The present case has much in common with that decision. There was no formal contract between the Minister on the one hand and CIE or, more latterly, Bus Éireann, on the other. It is true that the service was not supplied pursuant to statutory powers, although as this Court has already noted in *Student Transport Scheme (No.1)*, the provision of school transport for primary school students may be regarded as an effectuation of the State's constitutional duty under Article 42.4 of the Constitution to provide for free primary education.

54. Yet the fact that these services were not supplied pursuant to statute is really incidental to the point at issue here. What matters is that the Court of Justice clearly considered that an arrangement between two statutory bodies for the provision of public services was not a "public contract" for the purposes of the public procurement regime, even though one of those bodies made a substantial financial contribution to the other body in respect of those services.

55. This must, I think, be dispositive on the question of whether there was a public contract. There was here at most an administrative arrangement between two statutory bodies providing for some of form of financial contribution. It is clear, however, from the decision in *Commission v. Ireland* that this in itself is insufficient to constitute such an arrangement as a concluded contract in writing for the purposes of the procurement regimes.

56. Since, however, the entire claim of the appellant was contingent on showing that there had been a concluded contract in writing within the meaning of Article 1(2)(a) of the 2004 Directive, it follows that in the light of the conclusion that there was no such contract, this constitutes another independent reason as to why the appeal brought by STS must fail.

57. In deference, however, to the comprehensive nature of the arguments advanced on this appeal, I propose briefly to examine some of the other arguments advanced on its behalf, although it is not necessary to express any concluded view on this issue. I will assume *purely for this purpose* – and contrary to what I have just determined – that there was indeed a concluded contract in writing in existence between the parties.

Whether any such contract would have come within the Asemfo/Correos exception?
58. So far as the *Asemfo/Correos* exceptions are concerned, it is clear that arrangements between public service bodies do not fall within the public procurement regime where the State body in question had no option but to accept the demand of the competent authorities or where the tariff for its services was essentially imposed by the body in question.

59. In *Asemfo* the complaint was that various Spanish regional authorities had entered into contracts with Tragsa, a state body which performed certain technical other services in connection with forestry and the environment, without complying with the public procurement process. The Court of Justice held, essentially, that contracts of this kind fell outside the procurement process, saying (at paras. 55 et seq. of its judgment):

> "In any event, it is important to recall that, according to the Court's settled case-law, a call for tenders, under the directives relating to public procurement, is not compulsory, even if the contracting party is an entity legally distinct from the contracting authority, where two conditions are met. First, the public authority which is a contracting authority must exercise over the distinct entity in question a control which is similar to that which it exercises over its own departments and, second, that entity must carry out the essential part of its activities with the local authority or authorities which control it….
>
> Accordingly, it is appropriate to examine whether the two conditions required by the case-law cited in the preceding paragraph are met in Tragsa's case.
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> As regards the first condition, relating to the public authority's control, it follows from the Court's case-law that the fact that the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer tends to indicate, generally, that that contracting authority exercises over that company a control similar to that which it exercises over its own departments
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> In the case in the main proceedings, it is clear from the case file, but subject to confirmation by the referring court, that 99% of Tragsa's share capital is held by the Spanish State itself and through a holding company and a guarantee fund, and that four Autonomous Communities, each with one share, hold 1% of such capital.
>
> In that regard, the argument cannot be accepted that that condition is met only for contracts performed at the demand of the Spanish State, excluding those which are the subject of a demand from the Autonomous Communities as regards which Tragsa must be regarded as a third party.
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> It appears to follow from [the terms of the Spanish legislation] that Tragsa is required to carry out the orders given it by the public authorities, including the Autonomous Communities. It also seems to follow from that national legislation that, as with the Spanish State, in the context of its activities with those Communities, as an instrument and technical service, Tragsa is not free to fix the tariff for its actions and that its relationships with them are not contractual.
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> It seems therefore that Tragsa cannot be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital.
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> As regards the second condition, relating to the fact that the essential part of Tragsa's activities must be carried out with the authority or authorities which own it, it follows from the case-law that, where several authorities control an undertaking, that condition may be met if that undertaking carries out the essential part of its activities, not necessarily with any one of those authorities, but with all of those authorities together (CarbotermoandConsorzio Alisei, paragraph 70).
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> In the case in the main proceedings, as is clear from the case-file, Tragsa carries out more than 55% of its activities with the Autonomous Communities and nearly 35% with the State. It thus appears that the essential part of its activities is carried out with the public authorities and bodies which control it.
>
> In those circumstances, but subject to confirmation by the referring court, it must be held that the two conditions required by the case-law cited in paragraph 55 of the present judgment are met in this case."

60. This was matter was subsequently considered by the Court of Justice in *Correos* which concerned the validity of Spanish legislation which allowed the public authorities to conclude agreements for the provision of postal services with the publicly owned provider of the Spanish universal post service without regard to the public procurement regime. The Court of Justice stressed (at paras. 51 *et seq.*) that the reasoning in *Asemfo* would have to be read in its own context

> "Admittedly, in paragraph 54 of its judgment in Case C-295/05 *Asemfo* [2007] ECR I-2999, the Court held that the requirement for the application of the directives governing the award of public service contracts relating to the existence of a contract was not met where the State company in issue in the case that gave rise to the judgment had no choice as to the acceptance of a demand made by the competent authorities in question or as to the tariff for its services, a matter which was for the referring court to establish.
>
> However, that reasoning must be read in its specific context. It follows on from the finding that, under Spanish legislation, that State company is an instrument and a technical service of the General State Administration and of the administration of each of the Autonomous Communities concerned, the Court having already held, in a context different from that in the case that gave rise to the judgment in *Asemfo*, that being an instrument and technical service of the Spanish Administration, the company in issue is required to implement only work entrusted to it by the General Administration of that State, the Autonomous Communities or the public bodies subject to them (*Asemfo*, paragraphs 49 and 53).

> Correos, as the provider of the universal postal service, carries out an entirely different task, which means in particular that its customers consist of any person wishing to use the universal postal service. The mere fact that that company has no choice as to the acceptance of a demand made by the Ministerio or as to the tariff for its services cannot automatically entail that no contract was concluded between the two entities.
>
> In fact, such a situation is not necessarily different from that which arises where a private customer wishes to use services provided by Correos coming within the scope of the universal postal service, since it is in the very nature of the task of a provider of that service that, in such a situation, he is also required to provide the services requested and must do so, if necessary, for a fixed tariff or, in any event, for a price that is transparent and non-discriminatory. There is no question that such a relationship must be called contractual. It is only if the agreement between Correos and the Ministerio were in actual fact a unilateral administrative measure solely creating obligations for Correos and, as such, a measure departing significantly from the normal conditions of a commercial offer made by that company, a matter which is for the Audiencia Nacional to establish that it would have to be held that there is no contract and that, consequently, Directive 92/50 could not apply.
>
> In the course of that examination, the Audiencia Nacional will have to consider, in particular, whether Correos is able to negotiate with the Ministerio the actual content of the services it has to provide and the tariffs to be applied to those services and whether, as regards non-reserved services, the company can free itself from obligations arising under the Cooperation Agreement, by giving notice as provided for in that agreement."

61. It follows, therefore, from a consideration of this case-law that contractual arrangements between State bodies which involve the entrusting of functions to a State body in circumstances where the latter is in no position to refuse and which arrangements do not provide for normal or ordinary commercial arrangements between the parties generally fall outside of the public procurement regime. In the present case McGovern J. has already found:-

> (i) that the school transport scheme had been entrusted to CIÉ (and, more latterly, to Bus Éireann) and that these bodies had no choice in relation to this matter and
>
> (ii) that the administrative arrangements between the parties do not contain the ordinary elements associated with a commercial contract.

62. So far as (i) is concerned, there was clearly evidence to support McGovern J.'s finding that the scheme had been entrusted from its inception to CIÉ (and, more recently, to Bus Éireann) and that neither of the undertakings had any choice in the matter. This is a finding of fact supported by the evidence and, as such, this Court is bound by that finding in accordance with ordinary *Hay v. O'Grady* principles.

63. The terms of Minister for Education's letter of 28th May 1969 ("…CIE will administer the scheme as agents of the Minister and as such will operate the scheme in accordance with his general directions and policy") also tend to support this conclusion. All the available evidence furthermore pointed to the fact that the policy parameters of the scheme (such as pupil eligibility, the minimum number of pupils required to warrant a bus service, special provision for minority religions and arrangements for pupils with special needs) are set by the Minister and are then implemented by Bus Éireann.

64. So far as (ii) is concerned, there was no evidence (either in the High Court or before this Court) to support the contention that either CIE or Bus Éireann enjoyed the normal commercial freedoms either to negotiate a tariff for the provision of the service or to terminate the contract for its own commercial reasons. Over and above the fact that none of the documents recording the arrangements for the scheme provide for the termination (or even the variation) of the arrangements between the parties (which in itself would be highly unusual in any commercial contract), the evidence further shows that the relevant tariffs often were set either unilaterally or, in some cases, following a consultation process between the Minister and Bus Éireann where the company can at most seek to influence the Minister.

65. Thus, for example, the evidence shows that in January 1988 the Government cut the funding for the scheme unilaterally in the middle of the academic year for the period 1988-1991. It is true, of course, that Bus Éireann received payment on a costs recovery basis since certain financial arrangements were put in place in 1975. But quite apart from the fact that a cost recovery model differs significantly from the normal conditions of a commercial offer, the evidence also showed that even these payments had been rebated at the direction of the Minister in the period from 2008 to 2012 during the course of a severe economic recession and that while Bus Éireann was consulted in relation to this matter, it was essentially powerless to object.

66. A strong argument to the effect that the arrangements between the parties accordingly do not accord with the parameters of a normal commercial contract can therefore be advanced. One might also observe in support of this contention that the scheme contains no provision for review, amendment or termination. It might also be suggested that Bus Éireann does not enjoy the normal commercial freedom with regard to pricing structures: quite apart from the fact that a cost recovery model is not a normal commercial arrangement, the evidence suggests that the Minister can effectively unilaterally alter or vary this pricing structure and that he has, indeed, done so in recent times.

Conclusions on the *Asemfo/Correos* exception

67. In the light of my earlier conclusions it is thus unnecessary to express any views as to the correctness of McGovern J.'s findings that CIÉ was simply assigned the function of implementing and administering the scheme. While the argument can certainly be advanced that these arrangements lack the normal indicia of commercial arrangements in relation to matters such as determination of eligibility, funding, method of payment, variation, amendment and termination, it is now unnecessary to reach a concluded view on these difficult questions.

Overall conclusions

68. In summary, therefore, I am of the view that:

69. First, in light of the decision of the Court of Justice in Case C-159/11 *Azienda Sanitaria Locale di Lecce* (which was delivered some months after the judgment of McGovern J. in the present case), it is clear that if there was a contract, the fact that the payment was based on a cost recovery basis did not mean that it was not a contract for pecuniary interest within the meaning of Article 1(2)(a) of the 2004 Directive.

70. Second, even if there was a contract, it was a contract of indefinite duration coming within the scope of the *Pressetext* exemption. While it is true that the Scheme has evolved and changed in the last fifty years or so since its initial inception, STS have

not identified any material change within the six month period immediately prior to the commencement of the present proceedings in October 2011. This is in itself a reason why the present appeal must fail as such contracts of indefinite duration fall outside the scope of the 2004 Directive.

71. Third, quite independently of this conclusion, in the light of the reasoning of the Court of Justice in *Commission v. Ireland*, it is clear that the scheme is an administrative arrangement between the Minister and CIÉ/Bus Éireann. Specifically, there is no concluded contract in writing between the parties for the purposes of Article 1(2)(a) of the 2004 Directive. This finding is in itself also fatal to the STS's claim that there was such a contract and that it should have been put out to public tender.

72. It follows, therefore, that for the reasons just given I believe that McGovern J. was correct in the ultimate conclusion which he reached. I would accordingly dismiss this appeal.