Neutral Citation Number: [2011] IEHC 76

THE HIGH COURT

COMPETITION

2010 200 JR

BETWEEN

MEDICALL AMBULANCE LIMITED

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 8th day of March 2011

1. The plaintiff company is the owner of a fleet of ambulances and carries on the business of providing the service of transfer of patients by ambulance to members of the public and their insurers and to hospitals and other healthcare facilities, including hospitals and facilities operated by the defendant.

2. The defendant is a statutory body established under the Health Act 2004, to discharge a wide range of functions in relation to the provision of health-care and personal and social services in the State. (In a replying affidavit, Brian Gilroy, the defendant's National Director of Commercial and Support Services refers to the HSE as established under the Health (Corporate Bodies) Act 1961. While it may be historically correct that it was established on an interim basis by the Interim Health Service Executive (Establishment) Order 2004 (S.I No 90 of 2004,) it now stands established under s. 3 of the 2004 Act, the interim order having been repealed by the 4th Schedule to that Act.) In addition to its responsibilities for managing and operating hospitals and other facilities and providing medical care, the defendant has roles of a general social and public character in promoting the improvement and protection of health, safety and welfare, and functions of an advisory, educational and regulatory nature. (See in particular ss 7, 56 to 59 and Schedule 3 to the above Act of 2004.)

3. Amongst its functions in the area of providing hospital and health-care services the defendant provides ambulance services through its National Ambulance Service. In a total national fleet of approximately 460 ambulances, 400 or thereabouts are operated by the National Ambulance Service and approximately 60 by private operators. Of the fleet of private ambulances, 22 are operated by the plaintiff.

4. In conjunction with the operation of the National Ambulance Service, the defendant maintains a network of eight regional "call centres" or "ambulance control centres". Each of these call centres processes requests received from hospitals and other facilities for the provision of an ambulance to transport a patient to or from a hospital or between hospitals and allocates the job to an operator. Where the job involves the transfer of a public patient, it is allocated to a vehicle in the National Ambulance Service and only when none is available is recourse had to a private operator. The services of private operators for public patient transfers are currently provided under a "Framework Agreement" concluded by the HSE with three provided operators following a public procurement procedure. The agreement was concluded for the period 1 January 2008 to 31 January 2011. The plaintiff is one of the three operators in question.

5. Where the requirement is for the transfer of a private patient the job will be allocated to a private operator or one of a number of private operators nominated by the patient's health insurer. Only where no such operator is available will the job be allocated to a vehicle in the National Ambulance Service. Where an NAS ambulance is used, the defendant invoices its charge directly to the responsible health insurer. It insists that the charge is a "cost only" amount. The plaintiff estimates that the annual value of the market for private patient transfers is approximately €8 to 10 million.

6. In this action the plaintiff challenges the legality of an arrangement described as the "Booking Protocol" which it alleges was unilaterally introduced and imposed by the defendant in November 2008, and operated by it until December 2010.

7. In the Booking Protocol the defendant purported to introduce a changed regime for the allocation of calls for transfers of private patients and to define standards of performance for the private ambulance service. It sought to lay down standards for trained personnel assigned to ambulance vehicles, for the equipment to be carried on ambulances and levels of insurance cover to be maintained by operators. It also defined the manner in which reports would be compiled on the quality of performance by operators by reference to criteria such as response times, adverse incidents, cancellations etc.

8. In the part of the Booking Protocol material to the claim raised in this action, the document provided as follows:-

> "Protocols for Private Patients who are covered by Current Private Health Insurance:
>
> • All private patients being transported by private ambulance providers under contract to a private health insurance company must be transported in accordance with HSE policies and standards.
>
> • As per Health Service Executive Policy, all requests for an Ambulance must be processed through Ambulance Control.
>
> • A Private Ambulance Service booking form with a unique booking reference number must be received for all patients, prior to transport being arranged.

> • If the Private Ambulance Service provider is unable to facilitate the call within the relevant time frame specified by the Consultant booking transport, the HSE shall ***operate a strict rotational policy*** and the next Approved Private Ambulance Service provider for the relevant Insurance Company will be allocated the call.
>
> • In the event that none of the Private Ambulance Service Providers approved by the relevant Insurance Company can meet the prescribed requirement this information must be fed back to the Consultant booking the call and the HSE as the provider of last resort will step in to facilitate the requirement."

9. The remaining sections of the Protocol then set out the order in which calls would be allocated amongst the operators nominated by the different insurers. Thus, by way of example, for transfers supported by VHI insurance, the Protocol provided:-

> "***For patients with current VHI insurance***: calls are to be allocated on a ***Strict Rotational*** basis:
>
> Lifeline Ambulance Service
>
> Medicall Ambulance Service
>
> Medilink Ambulance service
>
> Needford Limited
>
> Beaumont Private Ambulance Service
>
> Heart ER Private Ambulance Service
>
> Murray Ambulance Service"

10. In the action the plaintiff seeks to obtain an order quashing the decision to introduce the Booking Protocol upon two main grounds; first, that its introduction was *ultra vires* the statutory powers of the defendant; and secondly that the action of the defendant in imposing the Protocol infringed s. 5 of the Competition Act 2002, (as amended) and was an abuse by the defendant of its dominant position in the market for the provision of ambulance services for the transfer of private patients in the State.

11. The rule prohibiting abuse of a dominant position is stated in s. 5(1) of the Act of 2002 as follows:

> "Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited."

12. The term "undertaking" is defined in s. 3 of that Act as meaning "a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service".

13. It follows therefore that the claim made by the plaintiff of the infringement of s. 5 cannot succeed unless the Court is first satisfied that the defendant is to be treated in these circumstances as an "undertaking" in that sense.

14. By notice of motion the plaintiff applied to the Court on the 11th January, 2011, for an order declaring that the defendant is such an undertaking "when engaged in arranging or providing ambulance and other means of transport for patients to and from hospitals and other health facilities in the State". The Court granted that motion and this is the judgment of the Court upon the preliminary issue thus raised.

15. The definition of "undertaking" in s. 3 of the Act of 2002, has been considered on a number of occasions by both the Supreme Court and the High Court and the concept of "undertaking" in European Union law (Articles 101 and 102 TFEU) has received extensive consideration in the jurisprudence of the Court of Justice of the European Union since the term was first employed in what were then Articles 85 and 86 of the Treaty of Rome.

16. In *Deane and Others v. Voluntary Health Insurance Board* [1992] 2 I.R. 319 the Supreme Court considered the definition in the context of services provided by the defendant as a statutory body incorporated under the Voluntary Health Insurance Act 1957. The issue turned upon the use of the expression "for gain" in the definition and the Supreme Court came to the opposite conclusion from that of Costello P. in the High Court who had considered that the expression connoted "for profit" and that the VHI did not have the making of profit as an objective but was providing a public service. Finlay C.J. said:

> "I am, therefore, driven to the conclusion that the true construction of this section is that the words 'for gain' connote merely an activity carried on or a service supplied, as it is in this case, which is done in return for a charge or payment, and that, accordingly, the defendant does come within the definition of an undertaking in the Act of 1991. What would be saved from application of the Act, by reason of the insertion of the words 'engaged for gain' is, in my view, what is referred to in the judgment of Jessel M.R. in *In re Arthur Average Association for British, Foreign & Colonial Ships* (1875) L.R. 10 Ch. App. 542 namely, a charitable association providing the spending of money and the supply of goods or services free of any charge or payment."

17. In the case law relating to Articles 101 and 102 TFEU where there is no definition of "undertaking" and therefore no element of being "engaged for gain", an entity will be considered to act as an undertaking where it is engaged in an economic activity. Thus in *SAT Fluggesellschalt mbH v. Eurocontrol* [1994] E.C.R. 1-43, the European Court held:-

> "The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed."

18. In many cases such as *Pavel Pavlov and Others v. SPMS* [2000] E.C.R.1-6451, the Court has held:-

> "Any activity consisting in offering goods and services on a given market is an economic activity . . ."

19. Thus, in Union Law the obtaining of a charge or payment in return for the goods or services offered is not an essential ingredient. In principle therefore an entity of the kind identified by Finlay CJ above might well be excluded from the definition of "undertaking" in s.3 of the Act but come within the scope of the concept in Union law.

20. It is equally clear, however, that the taking of a payment or the making of charge for a service does not of itself necessarily characterise the entity as an economic operator and therefore an undertaking. Where a public body (including a government minister) acts exclusively in a regulatory capacity or discharges a public interest function, its imposition of a fee or other charge does not convert the conduct or act into an economic activity as such. Thus, in *Carrigaline Company Limited v. Minister for Transport* [1997] 1 I.L.R.M. 241 at 290, Keane J. held that the Minister for Transport was not acting as an undertaking within the meaning of the definition when issuing television retransmission licences under the Wireless Telegraphy Acts notwithstanding the fact that a substantial initial levy together with an annual fee based on turnover was the price of the licence. Similarly, in the *Eurocontrol* case, although the *Eurocontrol* authority was established with competence to collect route charges levied on users of the airspace which it supervised, the European Court held that it was not an "undertaking". It held: "Eurocontrol's collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organisation's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services. . . . Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers . . . Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition." (paragraphs 28, 30.)

21. It is also clear as a matter of law that a public authority (including a government minister) while primarily established and principally engaged in activities of a public interest and non economic character, may nevertheless fall to be treated as an undertaking if and when economic activities are engaged in and goods and services are offered by it in a market. Public museums and galleries maintained by a department of education or science may be primarily engaged in the cultural activities in the public interest of displaying historic artefacts and works of art, but, nevertheless become subject to the competition rules as undertakings when offering for sale the wide range of goods and materials in the shops through which the members of the public must inevitably exit the building. Thus, the activities carried on by such an entity may require to be analysed separately. In its judgment of 1st July, 2008, in case C-49/07 *MOTOE*, [2008] E.C.R. 1-4816, the European Court pointed out that:

> "…the fact that, for the exercise of part of its activities, an entity is vested with public power does not, in itself, prevent it from being classified as an undertaking for the purpose of Community competition law in respect of the remainder of its economic activities. . . . The classification as an activity falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by a given entity". (paragraph 25.)

22. It is therefore clear that neither the objectives for which a body or organisation has been established nor the basis of its financing, nor the fact that it carries on predominantly public interest and non-economic activities prevents the entity being classified as an undertaking for other activities even when those activities may be merely incidental to its main area of operation.

23. Finally, in assessing whether particular activities of an otherwise public body may be economic activities which attract the categorisation of undertaking, it may be a relevant but not a determining consideration, that the particular activities are typical of and capable of being provided by private operators especially when the services are offered on a market where such private operators are already active. Accordingly, when it is necessary to examine particular conduct in the provision of goods or services in the context of an allegation of infringement of either s. 4 or s. 5 of the Act of 2002, what is of essential importance is the nature of the activity that is being performed which is the subject matter of the allegation. What is the entity in question actually doing when it engages in the conduct sought to be impugned?

24. It is immediately apparent, of course, from a perusal of the vast range of services which are entrusted to the responsibility of the defendant under the Health Acts that it is predominantly engaged in the discharge of public interest functions concerned with the provision by the State of health and social welfare services to the general public. However, the particular activity which is challenged by the plaintiff in this action is the conduct of the defendant in imposing the Booking Protocol and particularly in introducing for its ambulance call centres the "strictly rotational" system of allocating calls between private operators and as between those and the National Ambulance Service itself. The plaintiff proposes to demonstrate in evidence how this change of regime distorted competition between private operators and the National Ambulance Service and was wasteful and inefficient. It will be alleged for example, that this strict rotational allocation resulted in a private operator being required to travel (and charge for,) long distances outside its normal area of operation to answer a call which might well have been answered by a private operator closer to the facilities involved as the result only of the fact that the operator in question was next on the rotation list at the time. These allegations are, understandably, rejected by the defendant and will be vigorously contested at the trial.

25. In the judgment of the Court, the conduct of the defendant in introducing and effectively imposing upon private operators including the plaintiff such a regime for the allocation of ambulance service requests, has in these circumstances, the necessary indices of an economic activity which bring the conduct within the scope of the definition of "undertaking" in s. 3 of the Act of 2002.

26. In the first place, it is clear that there is a market in the State for the provision of ambulance services of this kind and that it is now and has been provided to an important degree by various private operators for many years. Those operators are in competition with one another and, to a degree, with the National Ambulance Service.

27. Secondly, it is clear that the services in question are provided "for gain". On the side of the private operators the services are commercial services provided by operators established to carry on a profitable business by arrangement with insurance companies. On the side of the HSE it is also the case that a charge is made by the defendant when by rotation, as the provider of last resort, a vehicle from the National Ambulance Service is supplied for the transfer of a private patient. The defendant places great emphasis upon the fact that its charges are calculated exclusively by reference to the cost incurred by the HSE and that no element of profit is included. However, as indicated above, profit is not a necessary ingredient of being "engaged for gain". This factor in the assessment of the activity as an economic activity is further borne out by the fact that when a private operator is engaged as a provider of last resort to transfer a public patient because no vehicle from the National Ambulance Service is available when the need arises, the HSE also makes a payment to the operator in question.

28. Furthermore, and perhaps significantly, the defendant chooses to provide ambulance services in a distinct but possibly related market when it would appear to have no specific statutory obligation (as opposed to having an entitlement,) to do so. This is the market referred to as "the events market" which involves the provision of ambulances on a "standby" basis for large public sporting events, concerts, exhibitions and similar occasions. The plaintiff had, according to the Statement of Claim, for a number of years provided ambulances on a commercial basis to the Royal Dublin Society for occasions such as the Dublin Horse Show. In 2004 the National Ambulance Service took over the provision of that service. The National Ambulance Service is also said provide such services to the GAA and although it was emphasised in argument by the defendant that it had not entered into any "contract" for this purpose it was not denied that the ambulances and crew are made available by the defendant in return for at least a "cost only" payment. Although it was strongly emphasised that these arrangements were entered into by the defendant as part of its public interest

functions in providing for health and safety at such events and because it had previous experience of difficulties for its vehicles in gaining access to grounds and arenas when called in an emergency, this possible motivation on the part of the defendant does not, in the Court's view, take from the fact that it chooses to take on an economic activity for which it makes a charge and which involves the placing of vehicles from its fleet on a standby basis when the vehicles would, presumably, be otherwise engaged in work related to the direct statutory functions of the defendant. It is true that the Booking Protocol has no application to this particular activity and that the services thus provided may fall into a distinct market for competition rule purposes. Nevertheless, the fact that the defendant can make use of its fleet in this way is, in the view of the Court, a relevant consideration or indicator when assessing whether the defendant is an "undertaking" because in so using its fleet, it engages for gain in providing a service to entities which appear to otherwise have the choice of having their requirements met by private ambulance providers.

29. This appraisal of the activities of the defendant in its involvement in the operation of ambulance services and of the distinction between its statutory responsibilities to public patients and its dealings with private patients is consistent, the Court believes, with the approach of the Court of Justice towards the analogous circumstances of Case C-475/99, *Ambulanz Glockner v. Landkreis* [2001] ECR I-8089. There the Court was concerned with an allegation of abuse of a dominant position by a number of voluntary, non-profit organisations endowed with public functions under German law for the provision of ambulance services, both public emergency services and services licensed for general patient transport. The State authority defendant had entrusted the public services to four non-profit medical aid organisations – the local equivalents of the familiar Red Cross, St. John's Ambulance or Order of Malta Ambulance organisations. When the plaintiff, a licensed private ambulance service provider, applied to renew its licence it met with objections by the voluntary organisations on the basis that their emergency services were underused and operating at a loss and that (under a recent change in the law,) a private operator ought not to be licensed if it would be likely to have an adverse effect on the general interest in the operation of an effective public ambulance service. Although the questions referred to the Luxembourg Court for preliminary ruling were concerned primarily with the scope of application of the abuse of dominance prohibition to a public undertaking endowed with special or exclusive rights in the context of what was then Article 90 EC (now Article 106 TFEU,) the Court had to consider the concept of "undertaking" when applied to the non-profit medical aid organisations concerned. It held at paragraph 20 *et seq* of its judgment as follows:

> *"20. In the present case, the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been and are not necessarily, carried on by such organisations or by public authorities. According to the documents before the Court, in the past Ambulanz Glockner has itself provided both types of service. The provision of such services therefore constitutes an economic activity for the purposes of the application of the competition rules laid down by the Treaty.*
>
> *21. Public service obligations may, of course, render the services provided by a given medical aid organisation less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities."*

30. It is also notable that in the opinion of Advocate General Jacobs in that case (paragraph 69,) the point was made that, for the purpose of Article 86 EC (now Article 102 TFEU) "public service obligations, special or exclusive rights, or State financing cannot prevent an operator's activities from being regarded as economic activities". Thus, it is the essential nature of the service and the circumstance in which it is offered or provided which determine whether it is an economic activity. The fact that it is provided because the organisation in question has taken on a public duty to do so does not prevent it being characterised as an economic activity. Sections 4 and 5 of the Competition Act 2002 are not, of course, qualified in their application to undertakings by any provision equivalent to Article 102 TFEU designed to recognise or safeguard the roles or obligations of public undertakings with special or exclusive rights. For the purpose of the definition of "undertaking" in the Act of 2002, therefore, the fact that an ambulance service is provided on foot of a duty or power under the Health Acts is not material to the analysis of the activity involved as an economic activity even if a statutory responsibility may have a bearing on the distinct issue as to whether the terms upon which the service is operated can, if necessary, be defended against complaints under s. 4 or s. 5 as being objectively justified. (It may also be worth noting for possible future reference in the present case that at paragraph 33 of its judgment the Court upheld as correct a Commission analysis to the effect that the emergency services and patient transport services in question, while related, were not interchangeable or substitutable by reason of their distinct characteristics and therefore fell into two different service markets.)

31. It was nevertheless submitted on behalf of the defendant that the conduct which should be the subject of examination from the point of the view of the definition of "undertaking" is that of the introduction of the Booking Protocol as such and that this was exclusively the act of the defendant in its regulatory capacity in laying down standards for the performance of services within the health sector. It was argued, in effect, that the rotational allocation of individual calls for ambulance services was purely incidental or ancillary to the purpose of the Protocol in prescribing the standards to be met in the competence of ambulance crews, the types or levels of equipment to be carried and the quality of service to be achieved by private operators wishing to provide transfer services for patients using the defendant's hospitals.

32. The Court does not consider this argument an adequate answer to the question raised by this preliminary issue. In the first place, it does not appear to have been a statutory function or responsibility of the defendant to prescribe such standards in relation to the operation of ambulances by private operators. The prescribing of such standards would appear to be the responsibility of the Pre Hospital Emergency Care Council (PHECC) and/or the Health Information and Quality Authority (HIQA). The plaintiff has exhibited a letter sent on the 15th October, 2009 (by e-mail) by the Assistant National Director of the National Hospital Office of the defendant to one of the insurers, Hibernian Aviva Health, in connection with the introduction of the Protocol. This explained the basis upon which the Protocol was being introduced and claimed that: "*This Policy and Standard has been developed in consultation with all Health Insurance Companies, HSE Senior Ambulance Service Personnel and other Senior Management Personnel, HIQA, PHECC, Private Ambulance Service Providers and the Competition Authority. . . . It is incumbent on each Health Insurance Company to satisfy itself and to verify to the HSE, that any Private Ambulance Service Provider identified by them for inclusion in their Directory of approved Ambulance Service Providers, meets equivalent standards to those on this Schedule. . . . As you are aware the HSE does not have a regulatory role and is not a competent authority in respect of establishing or policing standards for requirements in respect of the inter facility transfer of private patients, however, HSE has implemented an appropriate standard for public patients and would seek Health Insurance Companies to implement the equivalent standards in respect of their insured customers*".

33. Accordingly, while the defendant may admit that it has no direct regulatory role in this particular area but may feel entitled to insist upon the quality and performance standards for private operators equivalent to those it maintains for its public services, this motivation does not serve to prevent it being considered as acting as an operator in an area of economic activity when it intervenes to prescribe the manner in which the services will be performed by economic operators and by its own National Ambulance Service when providing services to private patients for which a charge, albeit a "cost only", charge is made. In the judgment of the Court this is sufficient to classify the activity of the defendant in providing ambulance services and prescribing the manner in which services by private ambulances will be performed and particular transfer jobs will be allocated as that of an undertaking.

34. As pointed out in the case law referred to above, where a public body has a variety of roles and functions, the different activities which these involve will fall to be analysed separately for the purpose of applying competition rules and the notion of "undertaking". If it was shown to be the case that the defendant had some responsibility, even on an interim basis, for prescribing quality standards for ambulances, their equipment, personnel and performance, that is a function which is clearly capable of being discharged independently of the day-to-day management of call centres and the allocation to particular operators of inter-facility transfer requests. While this matter may be the subject of evidence and further explanation at the trial of the action, the information before the Court at this point would suggest that the defendant's activities in the operation of its ambulance fleet are organised within its structures as a distinct service or unit. It is called the "National Ambulance Service" and seems to have its own management and staffing structure under a National Director (Mr.Gilroy) whose remit is described as that of "Commercial and Support Services." These features would suggest that even within the HSE the ambulance service is regarded as a distinguishable function.

35. Finally, the Court does not consider that the issue as to whether the defendant is "engaged for gain" in its activity of operating its fleet of ambulances is affected by the fact that, from the point of view of quantity, the bulk of the activity comprises the transfer of public patients for which no charge is made to the users concerned. As mentioned already, a distinction must be made between on the one hand, the characterisation of the activity for the purpose of the definition of "undertaking", and, on the other, the identification or delineation of the relevant market for the purpose of determining whether and where, amongst a number of related but separate markets, the alleged distortion of competition may be taking place. It may be instructive in this regard to note the analysis made of the conditions in the *Ambulanz Glockner* case. The relevant German law distinguished between public emergency services which the designated aid organisations were required to provide on a 24 hour basis and non-emergency patient transport services which they also were engaged in but which were otherwise provided by private operators who were required to be licensed but who were not obliged to operate on a 24 hour basis or to the same standards. The infrastructure costs of the public service were reimbursed to the medical aid organisations by the state authority responsible for the region and their operating costs were recouped mainly from charges to users. Both the Court in its judgment (paragraph 22,) and the Advocate General in his opinion (paragraphs 67 and 68,) regarded the medical aid organisations as "under takings" in both of those areas as each involved an economic activity. The Advocate General said in the first of those paragraphs: "The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could at least in principle, be carried out by a private actor in order to make profits." The Court also noted at paragraph 20 of the judgment that: "… in the past Ambulanz Glockner has itself provided both types of service". Even if they do so as "providers of last resort", both the National Ambulance Service and the plaintiff offer services on the private patient and public patient sectors.

36. In conclusion the Court would emphasise that this preliminary ruling is concerned only with the application of the definition of "undertaking" in these particular circumstances. As pointed out above, that issue must be distinguished from other issues which will no doubt arise at the trial of this action including, particularly, the issues as to whether the defendant can be considered to occupy a dominant position in the relevant market; whether what was done in the implementation of the Booking Protocol amounted to an abuse or whether the arrangements can be objectively justified by reference to the statutory responsibilities of the defendant.