Neutral Citation Number: [2009] IEHC 588

THE HIGH COURT

JUDICIAL REVIEW

2008 420 JR

Between:

NURENDALE LIMITED

TRADING AS PANDA WASTE SERVICES

Applicant

-and-

DUBLIN CITY COUNCIL,

DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL, FINGAL COUNTY COUNCIL,

AND SOUTH DUBLIN COUNTY COUNCIL

Respondents

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 21st day of December 2009

Summary of Issues:
1. These judicial review proceedings arise out of a Variation to the Waste Management Plan for the Dublin Region 2005 – 2010 made by the respondents on 3rd March 2008. The Variation would have the effect of excluding private operators from the domestic waste collection market, not including purpose built apartment blocks, and would vest all rights to collect waste in a single operator who, at their choice, shall be either a Dublin Local Authority, or following a public tender process their nominee. The applicants are contesting the Variation on the grounds that:

i) the Variation amounts to an abuse of a dominant position;

ii) the Variation amounts to an agreement between undertakings which has as its object or effect the restriction of competition;

iii) the Variation is *ultra vires* the respondents and/or is vitiated by an error of law, in that:

a) it impermissibly seeks to remove competition from the domestic waste collection market in the Dublin region,

b) it impermissibly seeks to stop private operators collecting domestic waste in the Dublin region,

c) its purpose is wholly or primarily to impermissibly grant the respondents total control over domestic waste in the Dublin region for the purpose of economic benefit to the detriment of competition,

d) it is neither reasonable nor necessary, in contravention of the requirements of, *inter alia*, s. 22 of the Waste Management Act 1996 ("WMA 1996") as amended, ("WMAs 1996 – 2007").

e) it was made without first conducting a Strategic Environmental Assessment;

iv) the Variation is vitiated by pre-judgment and objective bias, which rendered any consultation process preceding it meaningless;

v) the Variation amounts to a breach of the applicant's legitimate expectations;

vi) the Variation was grounded upon an incorrect Motion which was premised on the ground that it would ensure protection to customers in receipt of waivers;

vii) the Variation was an irrational exercise of the respondents' powers; and,

viii) The Variation amounts to a disproportionate breach of the applicant's property rights and its rights to earn a livelihood under Constitution, in particular Articles 40.3.1°, 40.3.2°, 43, 45.2.i and 45.3.i, or under the European Convention of Human Rights.

Not all of the above grounds however were dealt with in detail at the hearing. The essence of the applicant's argument on the competition side is that the Variation was contrary to s. 4 of the Competition Act 2002 ("CA 2002") and that it amounted to an abuse of a dominant position in the market for the provision of household waste collection, in breach of s. 5 of the CA 2002. It also relies on Articles 81 and 82 of the EC Treaty. On the administrative law side, it claims that the Variation was *ultra vires*, by virtue of being irrational, pre-judged or otherwise impermissible.

2. The respondents, in reply, firstly contend that the Variation is not an agreement between undertakings within the

meaning of s. 4 CA 2002, but even if it is so, they deny that it has the object or effect of removing competition from the market or of unlawfully establishing or restoring them as monopolists in their respective geographic markets; secondly that they are not undertakings within the meaning of the CA 2002, and even were they found to be, they have not acted in an abusive, anticompetitive way contrary to s. 5 CA 2002. The respondents further contend that the market for the provision of domestic waste collection in their region constitutes a "natural (local) monopoly" – a term in relation to which there was much discussion during the course of the hearing. Finally they claim that by providing in the Variation for competitive tendering, it is in fact pro-competitive, as it operates to increase efficiency and to address the objectives of the WMA1996.

3. In the alternative, the respondents argue that they are entitled to rely on the provisions of Article 86(2) of the EC Treaty, being an undertaking or undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly. As such, they are subject to the provisions of EC competition rules only insofar as the application of such rules does not obstruct the performance of the tasks assigned to them.

4. Further, in enacting the Variation they were legitimately exercising the discretionary powers conferred upon them by s. 22(4) of the WMA1996. It cannot, therefore, be said to be *ultra vires* either under that Act or at all. Nor was there prejudgment or objective bias in the formulation of the Variation, and it was not irrational or unreasonable for this reason, or any other so advanced.

5. With regards to allegations relating to the obligations imposed upon them by the European Communities (Environmental Assessment of Certain Plan and Programmes) Regulation 2004 (S.I. No. 435/2004) the respondents state that they complied with such.

6. Finally, the applicant was not entitled to any legitimate expectation that it would be permitted to collect household waste. If such expectation was held it was done so unreasonably and therefore may not be relied upon. Nor does the variation infringe any constitutional or Convention rights of the applicant. In any event the applicant has not sought any relief pursuant to the European Convention on Human Rights Act 2003.

Background:

7. Under the WMAs 1996 – 2007 a number of local authorities may jointly adopt a co-ordinated approach to waste management. This has occurred with the four Dublin authorities, who have nominated Dublin City Council to act as regulator and lead authority on their behalf. As well as making provision for the adoption of joint plans, this legislation controls waste collection by way of a permit system, which in detail is now regulated by the Waste Management (Collection Permit) Regulations 2001 – 2007. These regulations are augmented by bye-laws in individual regions. In its capacity as regulator, Dublin City Council, by enforcing the conditions of the permits, controls how domestic waste is collected, transported, recovered, recycled and disposed of. This system applies to operators, other than the local authorities; such authorities however are also involved in the collection of household waste, and charge a fee for such collection.

8. On or about 1st November 2001, the applicant applied to the first respondent for a Waste Collection Permit ("WCP"), and on 13th December 2002, and was granted such. The WCP authorises the applicant, *inter alia*, to collect household wastes in the local authority areas of the four respondents. Subsequent to this, a number of successful applications were made to vary the terms of the Permit, such as the addition or removal of vehicles, or other matters largely of an operational nature.

9. Being the lead authority, it is no surprise to find that one of the Dublin City Council's Assistant Managers plays a key role in this case; namely Mr. Matt Twomey, who has delegated responsibility for Environmental and Engineering Services. He was also the official in charge of Waste Management Services and has the delegated power under s. 22 of the WMA1996 to make, vary or replace the WMP. He was the Chairman of the Dublin Regional Waste Steering Group which was appointed to provide guidance on the preparation of the WMP and which recommended the final draft to the four Dublin City and County Managers; the final Plan itself being made by Order of the four Dublin Managers. He was involved in the proposal process regarding the Variation and in considering and evaluating the submissions received in respect thereof. He was also directly involved in the permit regime and its intended review. Despite the extent of the powers conferred on him and his undoubted influence in the area under consideration, it is still claimed that his involvement was purely administrative, and that the actual decisions made by the City and County Managers are immunised from his power and authority.

10. In or around 2004, the respondents began considering a replacement for the Waste Management Plan previously made in 1998/1999. To this end they engaged in a process of consultation and obtained advice from a "*consortium of international experts*". They received over 70 written submissions and 90 public feedback forms, and consulted with a number of prescribed bodies, as well as the Department for the Environment, Heritage and Local Government.

11. On 11th November 2005, following the conclusion of this process, the respondents, by Order of each City or County Manager, published their Waste Management Plan for the Dublin Region 2005-2010 ("WMP"). The Plan contained a general nine point Policy Statement (s. 17.6) and also specified more detailed objectives (ss. 18 and 19), including, *inter alia*, s. 18(15) that states:

> *"The Waste Management Plan follows the principle of the EU waste hierarchy… The Dublin Local Authorities will if necessary and as appropriate for environmental reasons direct that certain waste streams must be delivered to a certain tier in the waste hierarchy (example re-use, recycling, biological treatment and energy recovery). This will be achieved by means of the waste collection permit system or other appropriate regulatory or enforcement measures."*

The respondents note that no aspect of the WMP was challenged by the applicant herein or others (in particular Greenstar who are involved in parallel proceedings against the authorities relating to similar areas of contention) at the time it was made in 2005.

12. In the same year, the applicant, which was established in 1996, took steps to implement a business plan to focus on

domestic waste collection in the Dublin area. Following investment in infrastructure and facilities, it entered the Dublin household waste collection market in November 2006. The aim of the Company was firstly to win customers from the second respondent, and later from the third and fourth respondents, *"by providing a superior service at a lower price"*. The applicant (trading as Panda Waste Services) commenced operating within the areas of:

i) Dun Laoghaire / Rathdown County Council in November 2006

ii) South Dublin County Council in September 2007

iii) Fingal County Council in February 2008.

13. To prove its intent to seriously operate in these markets, the applicant applied for planning permission in relation to an 8 acre site in Cappagh, for the purposes of processing dry recycling waste, with a portion of the site to be used for skip waste. Permission was refused due to a lack of infrastructure, but was granted in relation to the skip business. Planning permission was re-applied for, and in July 2007 permission was granted for dry recyclables, but was refused in relation to mixed municipal waste. This has been appealed to An Bord Pleanála. In addition, during the planning process in June 2007, it purchased an existing waste treatment company, Smurfit Recycling in Ballyfermot, Dublin, which it modified so as to enable it to process a greater range of products from household recycling bins.

14. From being a new market entrant in November 2006, the applicant obtained approximately 28,000 customers in the Dublin area in the space of just under a year and a half. It suggests that it did so by:

"(a) In some areas, change prices and in all cases a price freeze to 2010;

(b) Introducing fortnightly green recycling bin collections;

(c) permitting all plastics into the green bin, where the Respondents initially did not allow any plastics and then reluctantly allowed plastic bottles only;

(d) allowing glass to be put into the green bin;

(e) allowing waste electrical goods to be put in the green bin;

(f) providing mechanical and biological treatment of the waste in the black bin, diverting 30% by weight of this material away from landfill."

Its overall investment to date in the enterprise has been €14,790,000 (*circa*), made up of infrastructural and other start up costs, and accumulated losses to February 2008 of €1,272,000. It has about 250 employees of which 100 operate the Dublin business, and has a turnover of €50 million.

15. The above steps are drawn attention to, so as to highlight the fact that after it had introduced a number of these services, in particular fortnightly green bin collections and the placement of plastics in those bins, the respondents reacted by providing these services as well. Previously the respondents had not permitted any plastics in the green bin, and it was collected only once a month. The applicant, despite the success of its improved services, was prevented by South Dublin County Council from collecting glass in green bins used in that area. The County Council justifies this on the basis that the recovery of glass from a co-mingled collection of different colours leads to a significant degradation in the quality of the recycled product; such often only being fit for use as infill for roads. This is disputed and the applicant notes that it had been successfully recovering glass from co-mingled green bins for over seven months, before Bye-laws were introduced by the respondents banning such collection. These facts, the applicant contends, show that its entry into the market has brought tangible benefits for consumers through competition.

16. On 12th December 2006, less than 1 month after first entering the market, Dublin City Council wrote to applicant informing it, that its WCP, despite its obvious and clear cut provisions, did not permit the collection of domestic waste in the Dun Laoghaire / Rathdown area. The applicant replied on 5th January 2007. Correspondence was thereafter exchanged between the parties on this issue, but no enforcement action was taken in this regard.

17. In February 2007 the respondents commenced a formal review of WCPs in the region. On or about 22nd February 2007 Dublin City Council invited submissions on the proposed review and on 16th March 2007 the applicant sent in written submissions. There was no response and the review of the WCPs was never concluded.

18. Having embarked upon this process, the respondents however at an early stage determined that the only way to prevent "*uncontrolled fracturing*" of the household waste collection market was to vary the WMP. They therefore suspended the review of the WCPs and on 8th June 2007 a notice was published advertising their intention to vary the WMP and inviting submissions thereon. The public advertisement was informative; it said:

"The variation may include an objective in the Plan that the collection of household waste from single dwelling households (other than those in purpose built apartment blocks) will be carried out by the local authorities or that the local authorities will make arrangements by way of a public tendering process for the collection of such household waste (which may be on a geographical or area basis)."

19. In or around August 2007, the respondents submitted an environmental assessment of the Proposed Variation to the Environmental Protection Agency ("EPA"), who was invited, by letter dated 15th August 2007, to make any observations. No reply was received within four weeks and accordingly the respondents took it that no Strategic Environmental Assessment was required.

20. After consideration of the seven submissions received during the consultation period, including one from the applicant, and having commissioned an Environmental and Technical Report (RPS) and an Economics and Competition Policy Report (Dr. O'Toole), the respondents decided to propose a variation to the WMP. On 19th September 2007 a notice of the proposed Variation was published in accordance with s. 23 WMA 1996, and the proposed Variation was submitted to several prescribed bodies in accordance with the Waste Management Acts and the Waste Management (Planning) Regulations 1997 (S.I. No. 137 of 1997). It is unnecessary to list these bodies *in extenso*.

21. In addition to the notice published in accordance with s. 23, the respondents initiated a public consultation on *www.dublinwaste.ie*; they also provided a consultation paper in relation to the variation, the RPS Environmental and Technical Report, Dr. O'Toole's Economics and Competition Policy Report, and the submissions received from interested parties. The consultation paper on the proposed Variation asserted that the waste collection market was a "*natural (local) monopoly*" and that as such, a single operator only should operate within each local authority area, being either the local authority or their assignee. The consultation paper also identified a number of environmental concerns with multiple private operators. Dr. Francis O'Toole's Report also concluded that the respondents enjoy "*a natural (local) monopoly*". RPS also prepared a response report, but this was not published until after the final decision to make the Variation.

22. By letter dated 7th November 2007 the applicant made a request under the Freedom of Information Act 1997, as amended, seeking the "*documentary instructions / terms of reference / brief provided"* to Dr. O'Toole and RPS in relation to their respective reports, and sought copies of the documents used by RPS to ascertain the income generated and expenditure incurred from household waste collection in the Dublin region, as contained at Table 4.4 of its September 2007 report. This request was refused and was appealed to the Information Commissioner in February 2008. The information sought, according to the applicant, was of importance in that in its view the first respondent was operating at a loss, and therefore waste collection charges could not contribute to other local authority services.

23. On 16th November 2007, the applicant submitted its response to the proposed Variation and: (i) took issue with both the environmental and economic concerns expressed by the respondents; (ii) asserted that the Variation's true purpose was to ensure control of the household waste collection market by the respondents, and (iii) alleged that the decision had been "*predetermined and is fundamentally flawed*". Another private operator in the domestic waste collection market, Greenstar, also made written representations on this date.

24. Nothing further was heard, until orders approving the Variation to the WMP were signed by the four Dublin Managers on 3rd March 2008. The Variation was published on 10th March 2008, together with the RPS response report of February 2008. The Variation, which was in identical terms to the proposal, inserted the following specific objectives into the WMP:-

> *"New Section 18.4A:*
>
> *1. (i) …*
>
> *(ii) …*
>
> *(iii) Specific Objectives*
>
> *Specific objectives with respect to the collection of household waste from single dwelling households are:*
>
> > • *Each Dublin Local Authority shall either collect specific streams of source separated household waste from single dwelling households within its functional area or arrange for the collection of such household waste by means of competitive tendering process(es).*
> >
> > • *Such collection of this source-separated household waste shall be by a single operator in designated areas, which may comprise all or part(s) of a functional area or a number of functional areas within the Dublin Region. The single operator shall either be a Dublin Local Authority or the successful tenderer under a competitive tendering process."*

25. On 10th March 2008, the date of publication of the Variation, Mr. Twomey, appeared on RTÉ Radio's Morning Ireland for a debate with the Chief Executive of Greenstar. The applicant cites a passage from the transcript of this interview where, it contends, Mr. Twomey admitted that under the Variation prices could increase.

26. During and as part of the above process, there was some direct engagement between Mr. Twomey and representatives of Panda. One such meeting occurred on 13th March 2007. It is alleged, and in fact not now denied, that Mr. Twomey informed the applicant that: (i) it was his intention to stop private operators collecting domestic waste in the Dublin region; (ii) that he would do everything in his power to ensure that this took place; (iii) that he had never intended private operators should be able to collect such waste; (iv) that its existing permit did not allow Panda to collect that type of waste; and (v) that the permit review process would be used to ensure that Panda and/or other private operators did not collect such waste from the Dublin region. Arising out of this, Dublin City Council, on 26th March 2007, was asked in writing if its intention all along was to ensure that no private collector would collect domestic waste in the Dublin region. The reply asserted that this was an incorrect description of the above discussions and that no indication of the review outcome, then taking place, had been given. The Council was pressed to say what aspects of the above allegations were erroneous. In particular it was noted again that Mr. John Dunne of Panda Waste and Mr. Jim O'Callaghan of O'Callaghan Moran Environmental Consultants recollected that Mr. Twomey had informed them of the above matters at the aforesaid meeting which at his insistence was formally on record. The fact of this meeting and the representations thereat, as stated, were set out on affidavit by the said Messrs. Dunne and O'Callaghan in these proceedings. It is not now disputed that these statements were made by Mr. Twomey.

27. In addition to the allegations above-made, the applicant also relies upon a contract entered into by the respondents with a public private operator to operate the new incinerator at Poolbeg. This contract required 325,000 tonnes of waste *per annum* to be delivered for 25 years. There is a penalty clause contained in the contract which requires the respondents to compensate the operator in the event of a shortfall. Two arguments are advanced in relation to the Poolbeg contract. The first is that although the respondents have the power, by way of permit condition, to direct waste

to a particular level in the waste hierarchy, *e.g.* to waste-to-energy plants, such waste if received at the incinerator would not be included under the contract when calculating the total amount of waste delivered to Poolbeg; such calculation is for the purpose of determining whether the contractual waste targets had been met, because the contract only includes waste "*collected by the local authority", "delivered … by or on behalf of any other local authority", or "delivered by private collectors, but directed to the Facility through the exercise by a Local Authority of contractual rights*". It is therefore questionable if waste directed to the facility by way of permit condition would be covered. The respondents therefore have an interest in ensuring that the waste delivered to the facility is collected either by them or on their behalf. The second argument is that even if the terms of the contract are wide enough to cover waste delivered under permit condition by private collectors, the local authorities may only direct waste to a particular level in the waste hierarchy, not to a particular facility. It would thus not be possible for the respondents to direct private collectors specifically to Poolbeg. In circumstances where there are other incinerators in the pipe line (even if eventually they do not materialise), the respondents would clearly have some apprehension that they will not be able to meet their tonnage requirements under the Poolbeg contract, especially given that the obligations imposed thereunder continue for 25 years; once other incinerators are operational, private collectors would be free to deliver their waste to any one of those facilities. There is therefore a significant financial incentive on the respondents to control the waste collection market in Dublin, so as to ensure that they are able to meet their requirements under the Poolbeg contract.

Statutory Background – Waste Management Legislation:

28. The waste management functions of the respondents are regulated by the Waste Management Acts 1996-2007, the Waste Managements Regulations 2001-2007, and their preceding enactments and Regulations. The Waste Management legislation implements 20 European Directives, including, *inter alia*, the Waste Framework Directive 1975 (as amended), the Waste Packaging Directive 1994, the Landfill Directive 1999, and the Waste Incineration Directive 2000. This legislation designates certain obligations, functions and abilities to local authorities, which include:

i) the making of a Waste Management Plan, or variation thereto, either singularly or jointly between local authorities; containing such objectives as are reasonable and necessary:-

> *"(a) to prevent or minimise the production or harmful nature of waste,*
>
> *(b) to encourage and support the recovery of waste,*
>
> *(c) to ensure that such waste as cannot be prevented or recovered is disposed of without causing environmental pollution, and*
>
> *(d) to ensure in the context of waste disposal that regard is had to the need to give effect to the polluter pays principle…"* (s. 22(6) WMA 1996);

ii) the supervising of compliance with the legislation in their functional areas, through monitoring *etc*., and by requiring those involved in waste collection to maintain certain records (s. 15);

iii) the abilities to:

> *"(a) engage or participate in the recovery of waste, and for that purpose may enter into one or more agreements with any other local authority or other person,*
>
> *(b) buy or otherwise acquire waste for the purpose of recovering it,*
>
> *(c) use, sell or otherwise dispose of any material or thing, including energy, recovered from waste." (s. 31(1))*

iv) the collection of household waste within their functional area unless:

> *"(a) an adequate waste collection service is available in the part concerned of the local authority's functional area,*
>
> *(b) the estimated costs of the collection of the waste concerned by the local authority would, in the opinion of the authority, be unreasonably high,*
>
> *(c) the local authority is satisfied that adequate arrangements for the disposal of the waste concerned can reasonably be made by the holder of the waste." (s. 33(3));*

v) provision and operation of facilities for the recovery and disposal of household waste within its functional area (s. 38(1)) and arrange for recovery or disposal in such a manner as is necessary (s. 38(7));

vi) administration of WCPs (s. 34), in particular the local authority may attach conditions to such permits, including, *inter alia*, specifying the place or places to which waste may or shall be delivered for recovery or disposal (s. 34(7)(b));

vii) administration of Waste Licences (s. 39);

viii) the making of bye-laws where necessary for the purpose of the proper management of waste or the prevention or control of environmental pollution, specifying:

> *"(a) that waste shall only be placed for collection in receptacles of a particular kind and that different waste shall be placed in different receptacles,*
>
> *(b) the quantity of waste which may or may not be placed in any receptacle,*
>
> *(c) the waste, or the mixtures of waste, which may or may not be placed in a receptacle,*

(d) the measures or precautions to be taken where particular waste, or mixtures thereof, is or are placed in a receptacle,

(e) the size, colour, construction or maintenance of receptacles,

(f) the location at which the waste is to be made available for collection,

(g) times during which the waste is to be made available for collection,

(h) any matters consequential on, or incidental to, the foregoing." (s. 35(3))

ix) *supervision and enforcement of the provisions of the legislation (s. 59).*

The Minister may also give directions to a local authority requiring it to take steps to ensure that certain materials are segregated for the purpose of and in the course of collection, and recovered or disposed of in a specified manner (s. 35(5)).

29. It is not generally disputed that the respondents have to the powers to create or vary a waste management plan ("WMP"), that they may collect domestic waste, or that they may impose conditions on WCPs. However, the applicant takes issue with the way in which these powers have been exercised, and alleges that in such circumstances the actions of the respondents are: (1) *ultra vires*, as not being necessary, or (ii) are so unreasonable as to render them illegal.

30. It is also not in dispute, that private waste collectors are required to obtain a WCP and that they must abide by its conditions. Section 34(1)(a), as inserted by s. 6 by the Waste Management (Amendment) Act 2001, states:

"… a person other than a local authority shall not, for the purposes of reward, with a view to profit or otherwise in the course of business, collect waste, on or after such date as may be prescribed, save under and in accordance with a permit (in this Act referred to as a 'waste collection permit') granted by –

(i) the local authority in whose functional area the waste in collected,

(ii) such other local authority as stands nominated for the purpose in accordance with paragraph (aa), or

(iii) such other body or bodies as may be prescribed."

31. It should also be noted, as the respondents made allegations against the applicant, although not to be decided here, that s. 34(5) of the WMA 1996 provides that a WCP may be revoked if a conviction for a breach of such permit or relevant waste regulations is recorded.

Economic Arguments / Expert Evidence:

32. Over the course of the hearing, several expert witnesses who were presented to the Court gave detailed economic evidence as to why the Variation was, or was not, supported by a rational basis and whether or not the Variation had as its object or effect the restriction of competition. These arguments and the evidence advanced, summarised below, will be set out in detail when considering s. 4(5) CA 2002.

33. According to the respondents, the Variation was intended to provide an appropriate policy basis to deal with concerns arising out of the entry of private operators into the Dublin household waste market. In particular these concerns were:

i) Uncontrolled fracturing of the household waste collection market;

ii) That such fracturing would make the respondents' areas indiscriminate and would make universal service unviable;

iii) That such fracturing would endanger the respondents' wider waste management objectives;

iv) "Cherry-picking" of more profitable routes by private operators;

v) Environmental and traffic hazards due to multiple vehicles on the same routes;

vi) Increased illegal waste disposal, "tipping" or backyard burning (or other forms of environmental pollution) by those customers left un-serviced.

Mr. Matt Twomey, in his affidavit, also set out several further reasons of concern relating to the entry of private operators into the household waste collection market; these, *inter alia*, are:

i) That the collection of household waste was not covered by the applicant's waste permit;

ii) That there would be a substantial increase in the costs of the provision of a universal household waste collection service to Dublin City Council, since private operators would cherry-pick, leaving the Council with the unpopular routes and those covered by the waiver scheme;

iii) That if costs went up substantially, the Councils would either have to:-

a) withdraw universal service,

b) subsidise the costs from the general waste budget, leaving less for education and enforcement (so-called "higher order environmental activities").

34. Several reports were opened before the Court in support of or resisting the grounds advanced. These included four environmental and technical reports: one for the applicant (OCM Report dated 11th April 2008) and three for the respondents (3 RPS reports, two dated September 2007 and one February 2008); and three economic reports: one for the applicant (report of Dr. Helen Jenkins dated 19th August 2008) and two for the respondents (report of Dr. Francis O'Toole dated September 2007 and RBB Report dated 3rd October 2008).

Competition Law Issues:-

Undertakings:

Arguments of the Parties:
35. The applicant argues that it is clear from European case law (*Höfner and Elsner v. Macrotron* [1991] ECR I-1979), that the respondents are undertakings, since they are engaged in an economic activity. The fact that they have a regulatory function will not preclude a finding that they are undertakings (*Kenny v. Dental Council* [2004] IEHC 29; *Wouters & Ors v. Algemene Raad van de Nederalnse Orde can Advocaten* [2002] ECR I-1577), nor will the fact that they are a public body (*VHI v. Deane* [1992] 2 I.R. 319; *ESB v. Donovan* [1997] 3 I.R. 573). This situation should be contrasted with bodies engaged in non-economic activities, or engaged in the performance of sovereign or administrative functions (*AOK v. Bundesverband & Ors*. [2004] ECR I-2493; *FFSA & Ors.* [1995] ECR I-4013). Further, even States will be subject to competition law where acting as economic operators (*FENIN v. Commission* [2003] ECR II-357; contrast with *Dutch Secretarial Pensions Funds cases, Albany* [1999] ECR I-5751).

36. The respondents argue that they are merely fulfilling the duties, and exercising the powers, conferred upon them by the WMAs 1996 – 2007 and therefore none of them constitutes an undertaking. Where a body is engaged in regulatory or administrative functions these will not render it an undertaking merely because it levies a charge (*Carrigaline Co. Ltd. v. Minister for Transport* [1997] 1 ILRM 241; *Diego Cali & Figli Srl*. [1997] ECR I-1547; *SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECR I-43). It is possible for a body to be both an undertaking, and not be so, depending on the activity in question (*Competition Enforcement Decision* (ED/01/008)). Nor will a body be an undertaking where the powers its exercises are exclusively those of a public authority or where its actions, due to its nature or purpose, are based on solidarity (*Sodemare* [1997] ECR I-3395). Further the introduction of charges for the collection of household waste must be seen in the context of the purposes for so doing; not for commercial gain, but on foot of European and national legislation requiring the enforcement of the "polluter pays" principle.

Conclusion:
37. The definition of an undertaking is given in s. 3 of the Competition Act 2002. It states:

> *"'undertaking' means 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."*

The words "*for gain"* have been interpreted as referring to *"an activity carried on or a service supplied … which is done in return for a charge or payment*"; the qualification "*engaged"* for gain, being inserted to save "*a charitable association providing the spending of money and the supply of goods or services free of any charge or payment*" (Finlay C.J. in the Supreme Court in *Deane v. VHI* [1992] 2 I.R. 319 at 322).

38. Although the EC Treaty neither describes nor defines the word "*undertaking"*, the breadth of that concept is now wholly established in European law, as can be seen from the decision of the European Court of Justice ("ECJ") in *SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECR I-43, when at para. 18 the Court said:

> *"[T]he 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."*

This view has been echoed in numerous other European cases including, *inter alia*: *Commission v. Italy* [1998] ECR I-3851, para. 36; *Aéroports de Paris v. Commission* [2000] ECR II-3929, para. 107; *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001] ECR I-8089, para. 19; *Wouters & Ors v. Algemene Raad van de Nederalnse Orde can Advocaten* [2002] ECR I-1577, para. 46; to name but a few. It is therefore settled that any entity engaged in an economic activity is an undertaking. This criterion, which is decisive, is applied by the use and application of a variety of tools, determined by reference to the presenting circumstances in any given case. As national and European competition law is compatible, these observations apply with equal force to our domestic provisions.

39. What amounts to, or what constitutes, an economic activity for these purposes has, likewise, been considered in numerous European and Irish cases. The ECJ has consistently held that the offering of goods or services on a market is a characteristic feature of commercial activity. For example, in *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 the Court stated at para. 75 that:

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

Whilst the receipt of payment for such goods or services and the assumption of financial risk relative to such activity, are supporting *indicia*, these requirements are not essential. The fact that goods or services are provided free of charge is likewise not determinative (*Bellamy & Childs* [2.005]), although where activity of the above kind takes place, the assumption of financial risk is presumed.

40. A body will not be prevented from being an undertaking merely because it was not set up for economic purposes or merely by virtue of being non-profit making; the latter, because the body may trade its goods or services against profit-making agents, but even if such agents were also non-profit-making, the same would apply (*MOTOE v. Elliniko Dimosio* [2008] ECR I-4863, para. 27 and Advocate General's Opinion, *MOTOE,* para. 41). However, where the body in question pursues exclusively social functions or solely public-interest activities, or where it exercises purely public powers it cannot be classified as an undertaking. Cases such as *Eurocontrol* [1994] ECR I-43 and *Cali and Figli* [1997] ECR I-1547, demonstrate how the Courts view the exercise of purely sovereign or administrative powers.

41. Care must be taken when differentiating between bodies which are economic entities and those which are not. The purpose of separating the independent power of a sovereign State, from the need to unshackle competitive restrictions, and the problems encountered in so doing were aptly captured by the Advocate General in *FENIN* (para. 26):

> *"In seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States. The power of the State which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases. It is therefore essential to establish a clear criterion for determining the point at which competition law becomes applicable. In principle, the rules of competition law apply only to economic operators who participate on a market and not to States, save where they pay aid to undertakings (Articles 88 EC to 92 EC). However, the need for consistency means that if a State ratifies decisions taken by undertakings or if it conducts itself in practice as an economic operator, Articles 81 EC to 86 EC may apply to it. It should be added that Article 86(2) EC would be rendered redundant if competition law were no longer to apply as soon as the State is present on a market."*

Consequently, the fact that a body exercises regulatory or public powers will not automatically exclude all of its activities from being considered economic in nature.

42. For this purpose therefore:

> *"[E]ach activity carried on by the entity falls to be analysed separately, it is [therefore] quite possible for an entity to be treated as an undertaking as regards some its activities, while others fall outside the sphere of competition law." (ibid.* para. 10)

The Advocate General in *MOTOE* similarly noted:

> *"[T]he distinction between public and economic activities must be drawn separately in relation to each activity carried on by an organisation. The organisation in question may therefore operate in part as a public body and in part as an economic agent."* (Opinion of the Advocate General, para. 49)

It is therefore the position that even bodies controlled by the State or those in semi-government ownership, or those correctly described as local authorities or municipalities, all of whom may exercise public powers, may also have the status of undertakings if the activities under scrutiny can be regarded as economic in nature.

43. It is thus clear that even though the respondents herein are public bodies, who exercise public powers, their actions may still be held to constitute economic activities which, if so, give them the status of undertakings and thus make their actions amenable to competition law. Likewise, the fact that a body is governed by private law will not necessarily make it accountable to competition rules (as in the case of *Cali and Figli*). It all depends on the body and the activity or function in question.

44. Gilligan J., in *Kenny v. The Dental Council* [2004] IEHC 29 stated:

> *"[T]he fact that a body has a regulatory function will not prevent a finding that it is also an association of undertakings."*

In that case the Dental Council had a purely regulatory role and thus was found not to be an undertaking for the purposes of ss. 4 or 5 CA 2002. The learned trial judge, in this regard, contrasted the Dental Council with the Bar of the Netherlands, which had been the subject of the ECJ decision in *Wouters* ([2002] ECR I-1577) and which had been found to be an undertaking, stating:

> *"when adopting measures … the Bar of the Netherlands was not required to do so by reference to specific public-interest criteria, the Advocatenwet did no more than require that they should be in the interest of the 'proper practice of the profession'. The composition of the Dental Council by contrast is specifically designed to ensure that the interests of the general public are represented. [Further] [i]t is clear that <u>the economic nature of the regulation</u> in question was of importance in the Court's finding that the bar was an association of undertakings. By contrast the making of a scheme for auxiliary dental workers does not fall within the sphere of economic activity but rather is the exercise of a power in the interests of public health."* (Emphasis added)

The underlined phrase (referable to para. 63 of the judgment) is important because it shows that in deciding whether an act is economic in nature one may examine the nature of the impugned regulation. Is it purely administrative, or is it designed to have an affect on the market in question; if so, despite being exercised as a regulatory function, can it more properly be said to be economic in nature?

45. The Advocate General in *MOTOE,* at para. 44, noted that even if an organisation operates for social or public interest:

> *"where the organisation concerned begins to market its services, it moves away from the sphere of exclusively social or public-interest activity; the mere fact that it continues at the same time to pursue an aim in the general interest … and does not seek to make a profit is no longer sufficient for it to be denied the status of undertaking…"*

46. By way of example, the Court in *Pavel Pavlov* ([2000] ECR I-6451 at para. 110), noted the case of *Fédération Française des Sociétés d'Assurance and Others* [1995] ECR I-4013 (*FFSA*) in which a non-profit-making body, established by law and operating according to the principle of capitalisation, which managed an old-age pension scheme intended to supplement a basic compulsory scheme was found to be an undertaking:

> *"Neither the social objective pursued, nor the fact that the body was non-profit making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which it was subject in making investments altered the fact that the managing body was carrying on an economic activity."*

Thus, although not preventing the body in question from being an undertaking for the purposes of Articles 81 or 82, these factors might be material in considering any justification of the granting of an exclusive right of such a body to manage a supplementary scheme.

47. Another factor which may indicate that an activity is within the economic sphere is the fact that the activity is capable of being carried out by a private undertaking (*Höfner and Elser v. Macrotron* [1991] ECR I-1979 at para. 22; *Aéroports de Paris v. Commission* [2000] ECR II-3929 at para. 124), or as the question is sometimes phrased "can the activity at least in principle be carried out by a private undertaking in order to make a profit?" (*Albany* [1999] ECR I-5751; *Pavlov* [2000] ECR I-6451). This of course could never of itself be decisive, as was noted by the Advocate General in *FENIN* at para. 13:

> *"It is not the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions."*

Despite this the Advocate General continued at para. 29:

> *"[W]here the State has reserved to itself a statutory monopoly for carrying on an activity, which means that no effective competition can arise, the possibility none the less remains that it is acting as an operator on the market, as the existence of such a monopoly will not change the nature of the activity in question."*

48. Of the many decisions on this subject, there are in particular three cases on the European side which deserve some detailed treatment, the first being the *Eurocontrol* case (*SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECR I-43). Eurocontrol, the European Organization for the Safety of Air Navigation, is an international body, established by Convention as amended. The Contracting States to the Convention (plus two others) were also parties to a multilateral agreement relating to the collection of navigational route charges. Eurocontrol's function on behalf of the State parties was to establish and collect the charges levied on users of air navigation services, in accordance with pre-set formulae, set out in the Agreement. It has some other functions, which include the strengthening of co-operation between the parties in the field of air navigation. The applicant airline, which had refused to pay the levied charges and on a number of grounds, alleged an abuse of a dominant position within the meaning of then Art. 86 (now Art. 82) of the EC Treaty. Eurocontrol brought proceedings to recover the unpaid charges in the Brussels Commercial Court. The claim was defended, *inter alia*, on the abuse of dominance ground and so the question arose as to whether Eurocontol was an undertaking for the purpose of Art. 82. A number of State parties, as well as the Commission, contended that the act of air traffic control was a supervisory safety role, and thus was not an economic activity. The charges levied merely constituted the consideration for the air navigation services provided by the contracting states.

49. In coming to its decision, the Court noted a number of facts relating to Eurocontrol, *inter alia*, that it was required to provide its services to all air users, even those who had not paid the required charges, that its activities were financed by contributions from the contracting states, and that it had no influence over the amount of the route charges which it collected; the responsibility for which lay with the Contracting States which established the pre-set formula which determined the amount of the rates per unit. The Court, which held that the activity of collecting charges could not be separated from its other activities, ultimately found that:

> *"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."* (para. 30)

50. This case can be contrasted with the recent decision of the CFI in *Ryanair v. Commission* (17th December 2008), which shows that even ostensibly public bodies can be acting as economic operators for the purpose of competition law. In that case, Ryanair had entered into two agreements, one with the Walloon Region, the owner of Charleroi Airport, and the other with Brussels South Charleroi Airport (BSCA), a public sector company controlled by the Walloon Region which managed and operated the airport as a concession holder. Under the first agreement, Walloon Region agreed, *inter alia*, to a reduction of some 50%, as compared with the regulatory level, of landing charges, and undertook to compensate Ryanair for any loss of profit arising directly or indirectly from any enforced change of airport charges or opening hours. Under the agreement with BSCA, Ryanair agreed to base between two and four aircraft at Charleroi Airport and to operate, over a 15 year period, at least three rotations a day per aircraft. It also undertook to pay back all or part of certain payments made to it by BSCA in the event of its substantial withdrawal from the airport. In return BSCA agreed to contribute substantially to various costs incurred by Ryanair in establishing and maintaining its base and also to pay the airline €160,000 for each new route opened up to a maximum of three routes per aircraft. Further, BSCA would invoice Ryanair €1 per passenger for the provision of ground handling services, rather than €10 which was the published tariff for other users. Lastly, BSCA and Ryanair formed a joint company, Promocy, which had as its aim the promotion of Ryanair's activities at Charleroi and of Charleroi Airport, funded by both parties equally. The Commission took issue with the

agreements on the ground that they amounted to state aid for Ryanair, under Art. 87 of the EC Treaty. A question arose as to whether the public bodies could avail of the private investor defence. It was in this context that the Court of First Instance considered whether Walloon Region and BSCA could be considered economic operators.

51. Ultimately the Court found that despite the undoubtedly public nature of the parties to the agreements with Ryanair, they were economic operators for the purposes of competition law. The Court held at paras. 88-92:

> *"[T]he actions of Walloon Region were economic activities. The fixing of the amount of landing charges and the accompanying indemnity is an activity directly connected with the management of the airport infrastructure, which is an economic activity … [T]he airport charges must be regarded as the consideration obtained for services rendered by the airport owner or concession holder. Accordingly, the provision of airport facilities by a public authority to airlines, and the management of those facilities, in return for payment of a fee the amount of which is freely fixed by that authority, can be described as economic activities; although such activities are carried out in the public sector, they cannot, for that reason alone, be categorised as the exercise of public authority powers. Those activities are not, by reason of their nature, their purpose or the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority (see, a contrario, Case C 364/92 SAT Fluggesellschaft [1994] ECR I 43, paragraph 30). The fact that the Walloon Region is a public authority and that it is the owner of airport facilities in public ownership does not therefore in itself mean that it cannot, in the present case, be regarded as an entity exercising an economic activity (see, to that effect, Aéroports de Paris v Commission, paragraph 66 supra, paragraph 109)."*

The Court further held that:

> *"The mere fact that … the Walloon Region has regulatory powers in relation to fixing airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the private investor principle, since such a scheme could have been put in place by a private operator." (ibid.* para. 101)

52. Thus from *Ryanair* it can be seen that even where a public body exercises regulatory power it will not necessarily prevent it from being an economic operator, where there is the provision of services for a charge. Unlike a situation where a public body issues a licence or permit for a fee, where no service apart from the provision of that licence or permit is provided and which is clearly a purely public act, where a public authority acts in such a way as to charge for a service this must be an economic activity, even: i) if the level of the charge is set by regulation; or, ii) if there is only a weak connection between the fee charged and the services rendered.

53. Lastly, the case *of MOTOE* [2008] ECR I-4863 should also be outlined. In that case MOTOE (the Greek Motorcycling Federation), a private non-profit-making association, whose object was to organise motorcycling competitions, sought consent for the holding of certain motorcycling events in Greece. Under s. 49 of the Greek Road Traffic Code ("GRTC") the required Ministerial consent could only be given following the consent of the national representative of the International Motorcycling Federation, which was the Automobile and Touring Club of Greece ("ELPA"). ELPA itself, assisted by ETHEAM, created by it for that purpose, both organised and marketed motorcycling events in that country. After due compliance with all requirements, MOTOE was informed by the Minister that he could not consent, as ELPA had failed to furnish its consent. MOTOE therefore complained that s. 49 of the Code infringed Articles 82 and 86(1) of the EC Treaty on the ground that it enabled ELPA to impose a monopoly in the given field and to abuse its position. A question thus arose as to whether ELPA could be classified as an undertaking for the purpose of Articles 82 and 86 given that as well as having the power to authorise such events, it also organised such events itself and marketed them by entering into sponsorship, advertising and insurance therefor. The second question asked whether a law such as s. 49 GRTC was precluded by the treaty as far as it conferred on an organisation, the power to give consent to organise events without that power being subject to restriction, obligation or review (*ibid.* para. 19).

54. Before referring to the Court's judgment, it is worth looking also at the Opinion of the Advocate General. In Madam Kokott's view, by asking the first question, the referring court wished to know:

> *"[W]hether the activity of a non-profit-making association falls within the scope of Articles 82 EC and 86 EC, where that association not only has an exclusive right of co-decision in the authorisation by a public body of motorcycling events, but also organises such events itself…"* (para. 29)

Having satisfied herself that ELPA's activities involved two markets, one the organisation of motorcycling events, and the second the marketing of such events, the Advocate General held that the absence of profit-making motive did not dislodge the presumption that ELPA was engaged in economic activity. Her conclusion on this point stated at paras. 48-50:

> *"48. … [T]he assumption that ELPA pursues an economic activity is not precluded by the fact that, in addition to organising and marketing motorcycling events, as mentioned above, it also participates in the authorisation by a public body of such events under Article 49 of the Road Traffic Code.*
>
> *49. It is true that the exercise of public powers does not fall within the scope of the competition rules in the EC Treaty, and an organisation which exercises public powers is not an undertaking within the meaning of competition law. However, the distinction between public and economic activities must be drawn separately in relation to each activity carried on by an organisation. The organisation in question may therefore operate in part as a public body and in part as an economic agent.*
>
> *50. This is precisely the case with an organisation such as ELPA, which, on the one hand, participates in the authorisation by a public body of motorcycling events while, on the other, itself organises and markets such events. Even though ELPA's participation in the public body's authorisation of motorcycling events may be classified, as such, within the sphere of public activity, this none the less in no way alters that association's status as an undertaking in other respects, that is to say in so far as it itself organises and markets motorcycling events."*

55. The ECJ when following this Opinion, answered both questions, which it considered together, in the affirmative; having held that because its activities consisted not only in taking part in administrative decisions, but also in organising and marketing motorcycling events, ELPA was an undertaking. The Court went on to say:

> *"A system of undistorted competition … can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount de facto to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors (see, by analogy, Case C-202/88 France v Commission [1991] ECR I-1223, paragraph 51, and Case C-18/88 GB Inno BM [1991] ECR I-5941, paragraph 25). Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact … that, when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation*." (para. 51, emphasis added)

In relation to s. 49 of the GRTC it stated:

> *"such a rule, which gives a legal person such as ELPA the power to give consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organises or those in whose organisation it participates."* (para. 52, emphasis added)

56. Thus it can be seen that the fact that a body has both an administrative and an economic operation will not mean that it cannot be classified as an undertaking for the purposes of Articles 81 and 82 (and therefore ss. 4 and 5 CA 2002) and Art. 86 of the EC Treaty. Further, a rule granting such administrative power to an undertaking will breach Art. 86(1) where that power is not subject to restrictions, obligations and review, since it could lead the legal person entrusted with that power to distort competition.

57. Such a situation is clearly distinguishable from circumstances where the body in question, although levying a charge, is acting solely in an administrative role. The Minister in *Carrigaline Co. Ltd v. Minister for Transport* [1997] 1 ILRM 241 was not operating in the market for television broadcast. That case and others of similar nature, including *Greally v. Minister for Education* [1995] 3 I.R. 481 , where the body in question was not providing goods or services for gain, are therefore of little persuasive effect in determining whether the respondents herein are undertakings.

58. As stated above, it may be possible to examine a regulation so as to determine whether it is economic in nature, so that despite its regulatory nature, the body in question may be an undertaking. In this context the approach adopted in *MOTOE* must be noted. Both the Advocate General and the Court considered both the consent required from ELPA and its actions on markets together, finding that its activities must be economic and therefore it must be an undertaking. Such a unified approach can be seen in the way in which they phrased, for the purposes of answer, the questions for reference. The Advocate General, in her Opinion phrased it in the following way, as for all intends and purposes the Court likewise did:

> *"[W]hether the activity of a non-profit-making association falls within the scope of Articles 82 EC and 86 EC, where that association not only has an exclusive right of co-decision in the authorisation by a public body of motorcycling events, but also organises such events itself and, in that connection, concludes sponsorship, advertising and insurance agreements."* (para. 29)

Having outlined the activities of ELPA, the Advocate General came to the conclusion that its activities, as described, could only be considered economic in nature. In those circumstances:

> *"All the foregoing points to the economic nature of the activity of an association such as ELPA and therefore its status as an undertaking. … ELPA's status as an undertaking is not precluded by the fact that the services provided by it relate to sport, that ELPA is a non-profit-making association and operates without seeking to make a profit, or that it participates in the public body's authorisation of motorcycling events."* (paras. 36 – 37*)*

She continued at paras. 49 – 50:

> *"49. It is true that the exercise of public powers does not fall within the scope of the competition rules in the EC Treaty, and an organisation which exercises public powers is not an undertaking within the meaning of competition law. However, the distinction between public and economic activities must be drawn separately in relation to each activity carried on by an organisation. The organisation in question may therefore operate in part as a public body and in part as an economic agent.*
>
> *50. This is precisely the case with an organisation such as ELPA, which, on the one hand, participates in the authorisation by a public body of motorcycling events while, on the other, itself organises and markets such events. Even though ELPA's participation in the public body's authorisation of motorcycling events may be classified, as such, within the sphere of public activity, this none the less in no way alters that association's status as an undertaking in other respects, that is to say in so far as it itself organises and markets motorcycling events."*

59. It is therefore clear from *MOTOE* that where a body, which has public powers, operates on the same or on a connected market, and where, if its actions on the market are sufficient to render it an undertaking, the fact that it exercises public powers, which could be described as non-economic, will not deprive it of the status of an undertaking.

60. From the foregoing the following can be surmised thus:

i) An undertaking is any body, regardless of how it is established or how it is funded, or of its legal status, which is engaged in an economic activity, or to have the same meaning, in a commercial activity.

ii) An economic activity consists of offering goods or services on a market, usually although not necessarily for a fee or charge.

iii) The actions of any given body are severable so that it may act as an undertaking on some occasions, and not so act on others.

iv) The fact that a body pursues purely social or public objectives indicates that its activities are non-economic. However, where there are other activities which are not so, the existence of such social and public objectives will not of themselves preclude a finding that the action is economic in nature. Similarly with the fact that the function or body is non-profit-making.

v) Whether a private operator would be capable of carrying out the activity for profit under market conditions, is an important, but not a decisive factor, in determining if the actions in question are economic; this applies whether or not such activity is in fact carried out by private operators.

vi) The fact that a body engages in administrative acts, as well as economic, will not by reason only of the former, relieve it of the status of an undertaking.

vii) Where the act complained of is regulatory, the nature of that regulation may be examined so as to determine whether it is economic in nature, or else is purely administrative.

viii) Where administrative power is granted to an undertaking this may, in certain circumstances, breach Articles 82 and 86(1) of the EC Treaty where such power is not the subject of restrictions, obligations, and review.

61. Applying the above principles to the present case, it is undoubtedly a fact that each respondent is the provider of a refuse collection service to single dwelling households in their respective local authority area. They each charge for that service. Not only could private operators carry on this business under market conditions, but as a matter of fact they are. Such operators are active in the market, with many private customers, for whatever reasons, choosing their services over those of the local authorities, and making payments to them for that service. In such circumstances, it would be absurd to suggest that the collection of household waste is not an economic activity (whatever the situation may have been historically). Therefore, in my view, the respondents are undertakings in this regard.

62. In addition, however, they also have statutory powers which they have exercised to make and thereafter to vary the WMP 2005 – 2010. The Variation of 3rd March 2008, now subject to legal challenge, is however part of the Plan. That Variation seeks to alter the competitive environment of the household waste collection market. In such circumstances where the regulatory acts affect the same activity, and impact on private operators on the same market where the respondents also commercially engage, the regulatory role performed will not preclude them from being found to be undertakings. This conclusion is consistent with *MOTOE* and *Ryanair*. Were this not the case, the State or other public bodies would be free to engage in all forms of regulatory abuses for commercial gain. The fact that their commercial actions are carried out under statutory powers or obligations, or done for some social or public benefit, and ostensibly at a loss, does not prevent them from being undertakings.

63. Whilst I accept that the Variation is a regulatory function, the nature of this regulation may be examined (see *Wouters*). As is evident, the decision is aimed to directly affect the market for domestic waste collection. In those circumstances it is clear that the Variation is of an economic, rather than of an administrative, nature. It seeks to substantially reorder the market as it currently exists. Were the respondents exclusively involved in the regulation of the waste market, *e.g.* merely imposing charges or conditions on licences and/or overseeing the market for compliance, they would not be undertakings. It is true that the waste charges themselves were introduced in the context of EU law and in order to ensure the "polluter pays" principle. Nonetheless, the fact that an action is prescribed by law will not prevent it being an economic activity.

64. In the above outlined circumstances, I therefore find that the respondents are undertakings for the purposes of ss. 4 and 5 of the Competition Act 2002, and likewise for the purposes of Articles 81 and 82 of the EC Treaty.

Association of Undertakings:

65. It is alleged that in the alternative to the Variation being an agreement between undertakings, it may be considered as a decision by an association of undertakings. The reason why associations are included in s. 4 CA 2002, and Art. 81 of the EC Treaty, is that such a body may be held liable for the anti-competitive behaviour of its members: individual undertakings cannot dis-apply these previsions by simply changing the form in which they co-ordinate their market conduct. Therefore Art. 81 covers not only direct co-ordination, but also where operators act through a collective structure or common body. As such bodies may not be economic operators in their own right, and thus not undertakings, so hence the inclusion of associations.

66. It is important however to bear in mind that, when considered under the CA 2002 or Art. 81 of the EC Treaty, such an association cannot be incorporeal or notional. It is not some hypothetical entity. Rather it should be a separate and distinct body from the undertakings which form it. In this regard it must therefore be noted that no such organisation exists in this case. An association of undertakings will generally be a body formed as an umbrella organisation for a collection of undertakings. For example, bodies such as trade unions, professional associations, cartels *etc*. which do not generally operate on the market, but instead regulate it, may be considered to be associations of undertakings. Where such an entity also operates on the market, it is in fact an undertaking, and so in any event is subject to statutory control.

67. Furthermore, in order for the Act to apply, it is necessary to find that there is a decision by an association of undertakings. I am satisfied that no such decision exists in this case. The Variation was not implemented by Dublin City

Council, acting as the delegated regulator on behalf of the other Councils; it was adopted by each individual Council in concert. This situation is more properly described as an agreement between undertakings, rather than a decision of an association.

68. I therefore find that there was no association of undertakings, and therefore no decision by any such organisation. The councils acted in concert as individual undertakings, rather than the regulation being applied or adopted by a *supra*-Council body, which, as I have stated, does not exist. The fact that in some respects Dublin City Council acts as overall regulator on behalf of the other local authorities is not to this point. It is not alleged that the Variation was enacted by Dublin City Council in that role. I therefore need not analyse this area any further.

The Competition Act 2002:
69. The relevant provisions of this Act are those contained in ss. 4 and 5, which read as follows. Section 4(1):

> *"[A]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which —*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions,*
>
> *(b) limit or control production, markets, technical development or investment,*
>
> *(c) share markets or sources of supply,*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."*

Section 4(5):

> *"The conditions mentioned in subsections (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not—*
>
> *(a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,*
>
> *(b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."*

Section 5:

> *"(1) 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.*
>
> *(2) Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in—*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers,*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
>
> *(d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.*
>
> *(3)…"*

Non-Applicability of ss. 4 and 5 CA 2002:
70. The respondents have advanced the argument that in principle since they are fulfilling statutory duties, the exercise of those duties may not be challenged *via* ss. 4 and 5 of the CA 2002. In particular they allege that in order for these sections to apply they would have not to be entitled *(sic.)* to fulfil the duty expressly imposed upon them by the WMA 1996, namely to provide waste collection services. Neither, they say, citing *Mr. Binman Ltd v. Limerick County Council* [2005] IEHC 192, do these statutory provisions confer any entitlement to challenge the exercise, by them, of their legislative powers or duties. Further the principle in EU law, referred to as the "state defence doctrine", means that state imposed behaviour cannot constitute an infringement of the normal competition rules, otherwise imposed on undertakings.

71. I would firstly say that I am not impressed by the respondents' argument that they would not be able to fulfil their statutory obligations merely because of the application of the Competition Act. As is patently clear from the WMA 1996 they do not have an obligation to collect waste from households in their functional area where it would be prohibitively costly for them to do so (s. 33(3)(b)) or, of even more importance in the present circumstances, where there is "*an*

adequate waste collection service … available" (s. 33(3)(a)) or where they are "satisfied that adequate arrangements for the disposal of the waste concerned can reasonably be made by the holder of the waste" (s. 33(3)(c)). Even were they to have residual obligations of a limited nature to collect waste, it could not be, and is not the case, that the legislation ever anticipated that local authorities only would be waste collectors. This is provided for nowhere in the legislation. To the contrary, large segments of the WMA 1996 deal with the issuing of permits (and related issues) and the control, by way of authorisation/conditions, of private operators. There is no suggestion in the Act that it would be improper for private collectors, who are permitted and compliant, to collect household waste; in fact legislatively I see no real distinction between a private householder disposing of waste by skip hire, for example, as opposed to paying a private collector to do so on a weekly basis; provided of course that the collector has the relevant permits. Indeed all three exemptions found in s. 33(3), noted above, and the provisions dealing with permits, would seem to contemplate that operators, other than local authorities, would be active in the collection of household waste. Such contemplation is also clear in the Waste Management (Planning) Regulations 1997 (S.I. 137/1997).

72. In relation to the state defence doctrine, this concept is succinctly outlined in "*the Annexes to the Communication from the Commission on Social services of general economic interest in the EU"* {COM (2006) 177 final}, where at p. 22 it was stated:

> "*[W]here the behaviour of the undertaking concerned is imposed by the State, <u>without the undertaking having a margin of manoeuvre</u>, the undertaking may avoid liability."* (Emphasis added)

As is quite evident from what is stated above I am entirely satisfied that the respondents at least have a "*margin of manoeuvre*" and therefore, without further analysis, I am satisfied to find that the state defence doctrine does not apply in this case.

73. Thus, given my conclusions with regards to the applicability of ss. 4 and 5, and my finding that the respondents are undertakings, the next issue for decision will now be considered.

Relevant Market:

74. In the process of applying ss. 4 and 5 CA 2002 it is necessary to determine the question of what market(s) is under consideration. "Market" in this context refers to both the product/service market and the geographic market. There is no dispute in this case as to the relevant product/service market; that is the market for the provision of household waste collection services, excluding apartment complexes.

75. With regards to geographic market it was stated by the Advocate General in *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz* [2001] ECR I-8089, at para. 113, that:

> *"The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas."*

76. Similar phrases have been used in subsequent cases, with the CFI in *Aéroports de Paris*, at para. 140, referring to "*territory in which all traders operate in similar conditions of competition with regard specifically to the relevant products (Case T-83/91 Tetra Pak v. Commission [1994] ECR II-755, paragraph 91)".* The ECJ in *MOTOE*, at para. 32, stated in more thorough terms the definition:

> *"The definition of the relevant geographical market calls, just like the definition of the product or service market, for an economic assessment. The geographical market can thus be defined as the territory in which all traders operate under the same conditions of competition in so far as concerns specifically the relevant products or services. From that point of view, it is not necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are similar or sufficiently homogeneous (see, to that effect, United Brands and United Brands Continentaal v Commission , cited above, paragraphs 44 and 53)."*

77. The question in this case therefore is, within what area are the terms of competition sufficiently homogeneous with regards to the provision of household waste collection services? This question is in fact easily answered. The WMP applies to the areas of all four respondents. The conditions of competition in these areas are therefore homogenous, or at least sufficiently homogenous within the above test. The Variation too applies to what one could call the greater Dublin area. This is therefore the geographic market for the purposes of applying ss. 4 and 5 CA 2002 and/or Articles 81 and 82 of the EC Treaty.

78. It is now necessary to consider the constituents which require to be established before s. 4 will apply. These are specific to the case that the Variation is an "*[agreement] between undertakings", "concerted practice"* or "*a decision by an association of undertakings*", and secondly that it has as its "*object or effect the prevention, restriction or distortion of competition"* in any goods or services. These will now be considered.

The First Requirement of s. 4 – Agreement or Concerted Practice:

79. The concept of what amounts to an agreement or concerted practice is relatively fluid. Less so with regard to a decision by an association of undertakings; however, because of the conclusion which I have above-reached (see paras. 67 and 68 *supra*.) it is unnecessary to further dwell on this point. An "agreement" need not be written or binding, and the term "concerted practice" is broad enough to encompass any form of collusion between undertakings which is anti-competitive. Although conceptually distinct, it has been noted that there is little point in rigidly distinguishing between the two, since either is sufficient. In particular, where the Commission is satisfied that the parties are guilty of a concerted practice it will not require it to be shown that there is also an express or tacit agreement between the undertakings (see

Polypropylene [1988] 4 CMLR 347, para. 87). Indeed in some cases the Commission has decided that certain co-operation between undertakings constituted an agreement, or at least a concerted practice, without holding which of the actions are specifically one or the other (see *Re Floral* [1980] 2 CMLR). Such an approach was upheld by the CFI in *NV Limburgse Vinyle Maatschappij* [1999] ECR II-931, and by the ECJ in *Commission v. ANIC* [1999] ECR I-4125 (see also *British Sugar* [1999] 4 CMLR 1316).

80. As already stated above, the statutory nature of the Variation and the WMP will not prevent their scrutiny under ss. 4 or 5 CA 2002. Given that, it must follow, I think that the Variation is, or are, agreements between undertakings for the purposes of s. 4. Any question as to justification, by reason of solidarity, public policy, or environmental concerns, is more properly left to be considered under s. 4(5). In any event, even if there was some impediment to the Variation being such an agreement(s), I am satisfied that the actions of the respondents and their collusion in attempting to exclude private operators from the market, amounts at least to a concerted practice. Therefore the first requirement is satisfied.

The Second Requirement of s.4 – Object or Effect:

81. The next question is whether the agreement or concerted practice had as its "*object or effect the prevention, restriction or distortion of competition*". In this regard it must be stated firstly, that any question of the Variation creating more favourable conditions for competition, albeit competition-for-the-market, as opposed to competition-in-the-market, is irrelevant. That is a justification argument which is more properly dealt with under s. 4(5) CA 2002 (see paras. 83 *et seq., infra*.). The real question is: does the Variation, by its object or effect, prevent, restrict or distort competition? The Variation seeks to remove private operators from a market in which there is currently competition, and instead replace it with a system whereby either the local authority, or a successful tenderer (as the former decides),will be the sole collector within the entire region or within any single or multiple sections, that the respondents should so designate. Its object is thus the removal of operators from the market and its effect will be likewise. That this prevents, restricts or distorts competition is patent. It would cause the market to move from many multiple competing undertakings to only a few, or even perhaps one, with no or only limited competition between them. It would foreclose competition and prevent entry. It is therefore clear that the Variation has as both its object and effect the restriction of competition, contrary to s. 4(1) CA 2002.

82. Thus given these findings that the Variation and/or the conduct surrounding it amounts to an agreement or concerted practice between undertakings which has as its object and/or effect the prevention, restriction or distortion of competition, I must then proceed to the question of whether there could be any objective justification which would prevent the respondents' actions from breaching s. 4 CA 2002.

Objective Justification (s. 4(5)):

83. By virtue of s. 4(2) CA 2002 an agreement or concerted practice will not be prohibited where it complies with the conditions laid down in s. 4(5). Those conditions are:

> *"[T]hat the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not—*
>
> > *(a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,*
> >
> > *(b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."*

84. Thus in order for the Variation to be saved by virtue of s. 4(5), it must contribute to the improving of the provision of the service, or promote its technical or economic progress, while allowing consumers a fair share of the resulting benefits, and, it must not impose terms which are not indispensable to those objectives, and must not eliminate competition in respect of a substantial part of the services in question.

85. As part of this justification argument, it is necessary to outline what it is claimed by the respondents their justifications will bring about. Firstly, however, their concerns must be outlined. These were:-

i) The uncontrolled fracturing of the market by the entry of private operators;

ii) Cherry-picking of economically preferable routes by private operators;

iii) That the fracturing and cherry-picking would render the respondents' areas indiscriminate and would affect their ability to provide universal service;

iv) That it would endanger the respondents' wider waste management objectives;

v) Environmental and traffic hazards due to multiple vehicles collecting on the same routes;

vi) Increased illegal waste disposal or "tipping" or backyard burning (or other forms of environmental pollution) by those left un-serviced;

vii) Substantially increased costs to the respondents' in their provision of a universal service, by virtue of the aforementioned cherry-picking, leaving the respondents' with the least profitable routes and those customers on the waiver scheme;

viii) Such increased costs would lead either to:

a) the respondents' withdrawal of universal service,

b) subsidisation of the cost of provision of a universal service from the general waste budget leaving less money for education and enforcement (so-called "higher order environmental activities").

The object of the Variation, put simply, was thus to prevent the fracturing of the market and the resultant increase in costs to the respondents, which would put at risk the provision of their universal service, together with some concerns in relation to the environment and traffic. It is claimed that under a system of competition-in-the-market these risks will materialise, leading to an increase in costs, and in some cases to the withdrawal of service, to the detriment of consumers. In those circumstances, the Variation, which favours competition-for-the-market, or provision by the local authority only, will remedy / prevent these ills.

86. Before drawing any conclusions in this regard, the arguments set out *via* the expert reports should be considered. The economic reports of Dr. O'Toole and Dr. Jenkins will be considered first, followed by the environmental and technical reports.

87. Considering the economic reports, the first was provided by Dr. Francis O'Toole, dated September 2007. His main argument is that the market for household waste collection in the Dublin region is a "*natural (local) [sic.] monopoly*" and he rejects as unnecessarily inefficient competition-in-the market. As he puts it:

> *"From an economics of competition policy perspective, if household waste collection is a natural (local) monopoly then the placing of certain pro-competitive restrictions by the relevant (local) authorities on the number of providers allowed to enter the market would be justified."* (p. 2)

So subject to that assumption, restrictions on entry can be justified. He further states that Ireland would seem unusual in having significant involvement of the private sector in the waste collection market, and in fact in at least 20 of the 34 local authority areas, the private sector is now dominant.

88. In order to address whether the market is a natural (local) monopoly it is necessary to distinguish between economies of scale and economies of density. Dr. O'Toole gives the following broad definitions:

> *"Economies of Scale*
>
> *Economies of scale exist for a firm to the extent that a firm's average cost of production decreases as its output of a specific product increases."*
>
> *"Economies of Density*
>
> *Within the context of a given (and hence fixed in size) network, route or asset, economies of density are decreases in average costs as usage, traffic or load on a given network, route or asset increases, i.e. economies of density are essentially economies of scale along a given network or route…"*

Thus, I think it is possible to put it succinctly as being that, economies of scale are efficiencies gained through an increase in customer numbers, whereas economies of density are the efficiencies gained through concentration of a service with the same number of customers in a given network or area. Another concept which is relied upon in the report is that of "*minimum efficient scale*" or "mes" – this is the minimum number of customers required in order for a given business to cover its costs. Above this level it can be presumed that the business will operate at a profit; below it at a loss. A natural monopoly (local or otherwise) will exist where the minimum efficient scale is so large that only one business could operate within the market at a profit – or as Dr. O'Toole puts it, "*if the mes is large relative to the size of the total market demand. In particular, if there is insufficient demand in a market for two (or more) firms to reach the mes, there is a natural monopoly in the market*."

89. Dr O'Toole states that Dublin City Council has done a comparative analysis between the costs per lift between two trucks collecting and one. He states:

> *"The average costs per household for household waste collection are between 41 per cent and 66 percent higher in the former case relative to the latter. This is due primarily to the fact that the cost-per-lift increases significantly as the number of lifts carried out by each firm decreases; equivalently, the cost-per-lift decreases significantly as the number of lifts carried out increases."*

Citing the RPS environmental and technical report, he notes that not only would economic costs increase with more vehicles, but so too would social costs, such as congestion and greenhouse gas emissions. With regards to the economies of density to be achieved he notes the proposition that it is clear that in the waste collection market the greatest efficiencies will be achieved where one operator collects from every house on a given road, or in an estate. The more operators, the less efficient, since all operators must pass by all of the houses even though not collecting from them. As to economies of scale he says that:

> *"In summary, the international literature suggests that significant economies of scale are available for areas with up to 20,000 inhabitants but economies of scale are no longer available for areas with more than 50,000 inhabitants."*

He gives the following figures as the number of households (rather than population) of each of the four local authority areas:

Dublin City Council: 163,000

Dun Laoghaire / Rathdown County Council: 64,000

Fingal County Council: 80,000

South Dublin County Council: 84,000

He does not wish to conclude how many potential markets would be available in the Dublin region, but notes that:

> *"The key determining factors would be the number, distribution and density of housing units…"*

In any event he feels it is unnecessary to define the exact number and locations of the geographic markets since the focus of the report is on *"whether or not there is a natural (local) monopoly in household waste collection, and not on the exact number of such in the Dublin (or any other) region."* (p.8)

90. He continues in his report to note that if you considered multiple local monopolists, there would always be an incentive for a neighbouring monopolist to enter the adjoining market. Such marginal customers could be serviced at a relatively low increase in costs to the encroaching operator. Once there is such encroachment, however, the costs to the incumbent operator would inevitably increase. Likewise, the incumbent provider would also have an incentive to encroach on his neighbour. As Dr. O'Toole puts it: *"[A] prisoners' dilemma exists in that all local monopolists (as well as society) would be better off with no 'incursions' but each individual local monopolist has an incentive to make incursions"* (p. 9). Further still, any second provider would have an incentive to cherry-pick the most profitable sub-regions within the natural local monopoly. Notwithstanding such incentives, the result would be an overall increase in average costs for all providers. He gives the examples of Finland and the United States where there is side by side competition in the market, and notes:

> *"It is clear that the duplication of fixed costs and effect … associated with competition-in-the-market gives rise to significant levels of inefficiencies."*

He further comments that:

> *"To the extent that the actual process of competition-in-the market might give rise to the eventual emergence of an actual monopolist, it may appear that the cost inefficiencies referred to above are eliminated. However, the cost inefficiencies are then almost certainly replaced by the standard inefficiencies associated with unconstrained monopoly behaviour, e.g. high prices and poor service."* (p. 10)

He thus favours *"pro-competitive restraints on excessive entry into the household waste collection market"*. As to who provides the service, public or private, he ultimately feels that no generalised statements can be made as to the relevant respective efficiencies, and therefore does not recommend either in preference.

91. In reply to this report, the applicant has submitted a report by Dr. Helen Jenkins. She does not generally take issue with the general definitions used by Dr. O'Toole in his report, rather she disputes his conclusions. Although she accepts that there will be some savings due to economies of scale, it does not follow that these would be significant. Instead the extent of cost saving will depend on whether the economies of scale are weak or strong. In this respect Dr. O'Toole's report fails to consider the fact that economies of scale may be so small as to be economically insignificant; similarly with economies of density. With regards to natural monopolies she notes that they may cease to be such where there is an increase in demand which calls for an increase in capacity: *"it is the ratio of minimum efficient scale to total demand that is important"* (p. 4). In this regard she notes that no primary evidence was provided in Dr. O'Toole's report as to the level of minimum efficient scale in his defined markets and: *"To do so would require appropriate and detailed analysis of the vehicles used for waste collection in Dublin, and the various depots, landfills and recycling facilities around the city"* (p. 5).

92. Turning to the empirical data relied upon in Dr. O'Toole's report, Dr. Jenkins gives the relative populations of the four Dublin local authorities as:

Dublin City Council: 506,211

Dun Laoghaire / Rathdown County Council: 194,038

Fingal County Council: 239,992

South Dublin County Council: 246,935

She notes that he stated that economies of scale would be exhausted at the 20,000 to 50,000 inhabitant level. If that is the case, she concludes:

> *"Hence, in each of the local authority areas the economies of scale are likely to be easily exhausted; indeed, even a share of 4% in Dublin City might be sufficient to exhaust economies of scale if the minimum efficient scale is indeed 20,000 inhabitants. On the basis of the O'Toole Report's own research, the minimum efficient scale estimate presented indicates that each local authority area would be able to sustain at least three firms and would not be found to be a natural monopoly on these grounds."* (p. 5)

Dr. Jenkins further outlines, using Panda's own economic data what, in her opinion, would be the minimum: 12,652 customers/households (approximately 35,000 inhabitants).

93. She takes issue with Dr. O'Toole's description of economies of density, namely that it is economies of scale along a given network, instead she says *"economies of density are connected with the frequency of customers along a route,*

and the extent to which cost savings can be made if customers are more frequent" (p. 6). She points out that Panda's data would suggest that the economies of density in the Dublin area are not prohibitive:

> *"[W]here Panda breaks even at 12,652 customers with five trucks, then if fuel costs were to halve, the minimum efficient scale would be 12,467 customers, which is just 1.5% lower. As fuel costs are an important constituent of the saving which would be expected to be made as a result of denser operations, this would seem to indicate that there would have to be large savings in maintenance or staffing costs for economies of density to be large."* (p. 7)

Similarly there would be no significant saving by doubling the density of operations of the trucks, since trucks have a limited capacity, and although there would a saving in time per lift (from 1.9 bins per minute to 2.8 bins per minute, by increasing from 50% to 100% of a route) this would not be a sufficient time saving to enable an extra run per day. There would thus, on the basis of Panda's assessment, be little or no cost savings from more efficient collection in this regard.

94. Dr. Jenkins, responding to the use of Finland as a comparator by Dr. O'Toole, notes that the 2000 OECD paper, which he considered, does not point to the conclusion he asserts. Instead the OECD points out that "*in municipalities with weak competition the market price is equal to the maximum price stipulated by the local authority, while in municipalities with effective competition, the price is lower*." This would therefore seem to recognise that where there is active competition between two or more firms, on sufficiently even grounds, this will drive down prices to the benefit of the consumer.

95. Dr. Jenkins also cites the "Stevenson report", relied upon by Dr. O'Toole, and takes issue with his conclusion that there is no difference in costs between a private and public monopolist. In fact, it is clear from the report that although in areas with a population of less than 50,000 inhabitants the cost to the consumer will be equivalent, where the population is higher the cost to the consumer from a public monopolist is in fact far greater than from a private one.

96. She further draws attention to the fact that if the market was a natural monopoly there would be almost no incentive for an entrant into the market. Using the examples of natural monopolies used by Dr. O'Toole (train lines between Dublin and Belfast, the UK water distribution network) she notes that there has been no attempt, nor would there be in absence of a subsidy, to enter into either of these markets. On the other hand there has been significant entry into the household waste collection market by private operators: this, in itself, can "*be considered prima facie evidence against the existence of a natural monopoly in waste collection in the area of the various Dublin local authorities"* (p. 10).

97. Following this, Dr. Jenkins sets out extensively the benefits of competition over monopoly, but it is not necessary to set out her considerations *in extenso*. She does note that monopolies would tend to cause a tension between "*productive efficiency (low costs)" and "allocative efficiency (low prices)"*. The entry of only one competitor into a market may significantly reduce prices for consumers even if the costs to the operator increase, because competition will force the former monopolist to cut profit margins to compete. As an example she compares the situation between Dun Laoghaire / Rathdown County Council charges and Dublin City Council charges; after the entry of Panda into the former, the Council was forced to freeze its prices, whereas in the latter the Council increased its charges over the same period. She also notes the improvements in the market since the entry of the private sector, *e.g.* increased green bin collection frequency. With regards to the problems with competition-for-the-market, apart from the fact that competition will only be focused periodically, *i.e.* during the tender process, it creates incumbent providers who will benefit from cost efficiencies which a non-incumbent would not. In that situation there would thus need to be some further incentive for operators other than the incumbent to even bid at renewal time. This may be a particular problem if the local authority subsidiaries were permitted to tender, although it is unclear if they would. Finally she gives her opinion on this case, in particular whether the respondents are in breach of ss. 4 and 5 CA 2002. I need not enter into her opinions in that regard, she is an expert in economics, not law, and her conclusions in this regard should not be considered.

98. The final economics report which should be mentioned is the RBB Economics report of 3rd October 2008, created in reply to the report of Dr. Jenkins. The report examines the efficiencies and inefficiencies of a monopoly provider and competition in the market. I need not detail the arguments in this report, since much of it merely reflects the information and arguments already presented. His conclusions were, however, that:

- It is not clear that provision of waste collection by local authorities implies less productive and allocative efficiency or less choice than arises with free entry.

- There is a danger that free entry could lead to the market tipping to one provider and this provider being able to exercise market power.

- Free entry may also give rise to negative externalities because the full costs of free entry are not borne by the private sector collectors, but borne by society generally (*e.g.* increased pollution and noise levels).

99. Evidence of the ills which the Variation sought to remedy were also sought to be highlighted through reports produced by RPS. An environmental and technical report was produced by RPS in September 2007. This was released to the public during the consultation period of the proposed Variation. The resulting issues with regards to the proposal and the September 2007 report were outlined and replied to in the environmental and technical report of February 2008. All points contained in the September 2007 report were ultimately supported by the 2008 report. RPS also prepared an environmental report, dated 16th January 2008, which outlines the general environmental issues with waste collection, and in particular focuses on issues relating to climate change. In those regards the report is of little significance to this case, although reliance is placed on it by the February 2008 report. However, at p. 13 of the environmental report it states:

> *"Recently a private waste collector has entered the single dwelling household market… This fracturing of the household waste collection service has implications from a climate change perspective with additional collection vehicles on the road and an increase in transport emissions as a result. The Dublin Local Authorities are considering a proposed variation to the Waste Plan to address this and other environmental concerns over long-term uncontrolled fracturing of this market."*

This point is echoed in the conclusions on p. 15 of the report.

100. The first major concern raised in both the September 2007 report and February 2008 report is the issue of coverage; that is the percentage of households within a region being serviced. The February 2008 report states at p. 10:

> *"From an environmental perspective the higher the waste collection coverage in the region the better."*

The Report goes on to argue that the entry by private operators into the market for household waste collection will inevitably, in the long term, reduce overall coverage. Such a reduction would inevitably lead to environmental problems, such as illegal dumping. Whilst accepting that the Dublin Region is different to all other regions in Ireland, as it contains the largest urban centre in the county, with the highest population density, the Report states that the region is not exclusively urban and contains rural communities which have similar characteristics to rural areas in other parts of the country. The Report enters into a detailed consideration of the effects of private waste collection in several other regions, namely the Midlands region, Galway City, County Waterford, and County Kildare. It is suggested that:

> *"[T]he experience from other regions suggest that collection coverage in lower density areas will be affected. As private sector operators cherry-pick more lucrative routes, local authorities may be forced to exit the collection market which could well impact collection coverage rates more generally and, in particular, collection coverage for those households that qualify for local authority waiver schemes."* (p. 11)

101. In particular, in relation to the Midlands region, where the majority of collection is carried out by private operators, whilst acknowledging that coverage rates have remained relatively constant within the area, the Report notes:

> *"Private operators in the Midland Region … have not shown any willingness to expand their service offerings to non-commercially viable areas and there is no incentive for them to do so. Waiver schemes are also not being operated in those areas controlled by the private sector while Westmeath County Council continues to be the only collector in the region to operate a household waiver scheme."*

102. With regards to Galway City, where a private operator services about 8,000 of 23,000 householders in the area, the Report states:

> *"Similar to the experience outlined above in the Midlands region, the rate of collection covering in the city itself has remained consistent following the fracturing of the market. However, the selective approach of the private operator in concentrating on dense economically viable routes has wider implications for household waste collection in Galway city. In addition there are parts of the city for which the private sector does not provide services, including lower income areas and estates, highlighting the selective approach taken by the private collectors… The fracturing of the market has changed the profile of the customer base remaining to be served by the Local Authority who also continue to serve the majority of the pensioners, students households and all waiver applicants." (p. 12)*

The Report continues, in relation to Galway, by noting that not only is there a risk to the local authority's ability to continue collecting, but that in circumstances where there is significant fracturing of the market, competitive tendering would fall into jeopardy due to the lack of security on the market; some collectors may not participate in the tendering process, some may instead prefer to compete with the authority, and even those involved in such a process may seek guarantees as to the level of customers which they would be servicing. Thus, the Report states, without "*exclusive control of the household collection market"*, competitive tendering would be problematic and unattractive to both the tenderers and local authority, otherwise, the local authority may be forced to exit the market.

103. The Report cites County Waterford as an example of where the loss of customers to private operators has result in a "*continued shortfall in revenue*" which undermines "*the ability of the Local Authority to provide future waste treatment facilities, local recycling centres, bring banks as well as awareness and education campaigns to all householders*" (p. 13).

104. The Report is therefore clear that the entry of private operators into the household waste collection market in an uncontrolled manner has lead to fracturing of that market and cherry-picking of routes, which has jeopardised the local authorities' ability to continue their service or to arrange for collection by way of competitive tendering. Further, this entry will endanger coverage rates since:

> *"the rate of collection coverage in an uncontrolled market is more a function of economic route optimisation than any objective to achieve universal service... The long-term aim for the Dublin Local Authorities is for exiting rates of collection coverage in the region to remain stable, regardless of population density and settlement patterns."*

The Report concludes in relation to coverage that the variation would be justified so that the local authorities:

> *"can bring certainty to the household market, ensure that all dwelling households will receive the same level of collection service and ensure that the high rates of coverage in the Dublin region are continued."* (p. 14)

105. The next main issue is unauthorised waste activities. The Report, drawing attention to both its Environmental Report and an EPA national report, notes that there is an undisputed connection between lower rates of waste collection, particularly from households, and an increase in unauthorised waste disposal, in particular fly-tipping and backyard burning. Drawing on its conclusions in relation to the reduction in coverage which would be caused by private operators, the Report concludes that illegal activities will inevitably increase. In this regard attention is drawn to the situation in the town of Tullamore, Co. Offaly, where two private collectors service the majority of the town who avail of collection. Both collectors operate similar waste charge systems and both charge the same monthly rate. In that area, it notes, "*the level of uncollected waste for an urban area is quite high. This is evidenced by the high number of householders disposing of their waste at the nearby Derryclure Landfill…"* (p. 16)

106. Another problem identified in the reports is greenhouse gas emissions caused by multiple operators collecting on the same routes, and therefore with decreased efficiency. The February 2008 Report states:

> *"[T]hat uncontrolled fracturing of the household market with the arrival of multiple collectors will contribute to an increase in greenhouse gas emissions is well founded and justifiable… Coming from a baseline scenario whereby one operator (Dun Laoghaire Rathdown County Council) previously collected all the household waste in a particular estate, it is now the case that several different collectors operate in the same area, overlapping routes as they collect household waste."*

107. In the context of rebutting submissions made by private operators that ultimately routes would stabilise, with only a few operators in any given area, the Report comments:

> *"If the market in Dublin remains open the arrival of multiple collectors will stimulate high competition in all areas and it is unlikely that one operator will be able to establish a dominant position…"*

108. The report also raises concerns as to the non-utility of pay-by-use payment methods by private operators. This is contrary to national waste management policy. The local authorities in January 2005 were instructed by the Department of Environment, Heritage and Local Government to apply the polluter pays principle. Private operators have shown that they will not always apply this principle in their charges to customers; many providing services on a flat rate basis. The principle operates as an incentive to householders to increase recycling and reduce landfill waste. The non-implementation of this principle by private operators is therefore harmful to the environment.

109. Ultimately, in relation to the environmental concerns*,"[t]he objectives of a waste management plan must be designed to <u>prevent</u> environmental pollution*." It is thus contended that even if the concerns expressed in the report are theoretical in nature, it is the duty of the Councils to prevent pollution, not merely remedy it *ex post facto*. It is in this context that the Variation is proposed. The evidence from other regions clearly shows that the entry of private operators may have the effects identified in the report (*i.e.* lower coverage and collection rates, increased backyard burning / fly tipping, pollution from an increase in collection vehicles, an adverse impact on universal service and quality and on the development of waste treatment infrastructure). The Council must therefore prevent such entry to prevent the evidenced potential environmental and service concerns.

110. In reply to the allegations of the alleged harms of competition-in-the-market, the applicants have noted in particular that: firstly, the burden is on the respondents to objectively justify the Variation in circumstances where prior to it there was full competition within the market; secondly, the respondents have focused on the increase in their costs, which they then contend will inevitably lead to an increase in consumer costs, a presumption seriously denied; thirdly, the local authorities, prior to the entry of private operators into the market, had been solely responsible for the collection of waste. Upon entry, private operators added significant service value, both in innovation and costs, for all consumers' benefit. This compelled the local authority to follow, at least in part. This fact mitigates strongly against any contention which argues that returning to a monopoly situation will improve services; in fact a *contrario* such a move can only worsen the situation of consumers.

111. The applicant notes that there is no evidence that the entry of private collectors will result in a reduction of coverage and collection rates, and in fact the evidence shows that such rates have remained stable; such was admitted in the February 2008 report. Apart from this, all of the comparators used by RPS are primarily rural in nature. The OCM report states:

> *"RPS avoids the fact that the excessive costs associated with collection in rural areas is not due to servicing relatively small population centres, but the isolated and once off houses outside of towns and villages."*

It notes that the rural areas referred to in the RPS report within the Dublin region have populations ranging from 625 to 1182. These figures would in fact be typical of the rural towns and villages throughout Ireland which are served by private operators. No examples of any population centres of similar size which do not have waste collection are provided. Also:

> *"The Dublin Region is different to all other regions in that there are no economic barriers to the collection of household wastes in the rural areas."* (p. 6)

Further, the RPS reports ignore the experience in Cork City and the adjoining parts of the County, "*which is probably the area of the country most directly comparable to the Dublin region in terms of population density and distribution*." The OCM report notes that private operators are competing with both Cork City and County Councils in the collection of household waste, in both city and rural areas. Instead of attempting to restrict competition, the Cork authorities have instead taken measures to improve the level of service they provide. The report posits that the only real distinction between Cork and Dublin, and the reason why the Dublin authorities are seeking to restrict competition, is that the latter has committed to the development of a Waste to Energy Facility (Poolbeg Incinerator), and therefore the Cork Councils "*do not need to 'ring fence' the household waste market.*" The report also denies that there is any evidence of cherry-picking by the private sector in the Dublin region, and had any assessment of the entry of the private sector into Dun Laoghaire / Rathdown been done it would have shown this. Ultimately the Dublin region is unique in Ireland as "*there are no economic barriers to the cost effective 100% collection of household waste in the Region*."

112. The OCM report similarly takes issue with the conclusions drawn by RPS in relation to illegal waste disposal. Although it accepts that such disposal has an adverse impact on the environment, there is no evidence that where the private sector enters a market fly-tipping or backyard burning increase. With regards to the example of Tullamore, cited by RPS, the OCM report notes that although there is a high proportion of "*uncollected waste*" this is not the same as "*unauthorised waste*":

> *"[T]he individual householders deliver the waste directly to the nearby landfill. This is a common sense approach by the householders, as it eliminates the collection costs, of the overall household waste collection and disposal*

charges." (p. 7)

113. As to the pay-by-use issue, the OCM report notes conclusively that, despite any prior potential problems, if such did indeed exist, with imposing pay-by-use on private operators:

> *"The Waste Management Collection Regulations, which came into force on 31st March 2008 allow the Dublin Local Authorities to set conditions requiring the implementation of PBU. Therefore there is no need to vary the Waste Management Plan to achieve this objective."* (p. 9)

114. In relation to concerns about an increase in greenhouse gases due to an increase in the number of waste collection vehicles on the road, the OCM report cites a recent European Environmental Agency Briefing document which concluded that collection and transport of waste accounts for less that 5% of the overall emissions from the waste sector; the vast majority come from landfill. This 5% includes commercial, industrial and household waste. Even if household waste accounted for approximately 58% of greenhouse gases, a figure based on the composition of "municipal waste" – being both commercial and household – this would only be 2.9% of the waste sector, and is in fact a significant overestimate since industrial waste is not included. This figure would also be national, therefore the Dublin figure would represent only 28% of this figure – the percentage of national household waste. Further, the overall contribution by the waste sector to all greenhouse gases is only 2.5%. Thus the figure, as part of the national total, taken at a great estimate, of all waste collection in the Dublin region amounts to only around 0.002% of the national greenhouse gases. Regardless of these figures, the OCM report points out that there are also other flaws in the assumption that the entry of private operators will increase greenhouse gases. In particular, it does not take into account that the amount of greenhouse gases emitted varies not merely by the number of trucks, but on their type and the distances they must cover. Further, if viewed from the point of view as a percentage of the number of HGVs in Dublin, waste collection vehicles would amount for only 1.1% of these movements in Dublin.

115. Apart from this it also fails to consider that if the market percentage of the local authorities decreases there will be a subsequent decrease in the number of local authority trucks. This decrease will be mirrored by a similar increase in the number of private trucks operating in respect of the market. For example *"while Panda and Greenstar were using 8 trucks in Dun Laoghaire Rathdown, Dun Laoghaire Rathdown County Council (DLRCC) had taken 7 of its trucks out of operation, resulting in an overall increase of 1 vehicle"* (p. 11).

116. With regards to waivers it is noted that this could easily be dealt with by way of public service obligation, so that any private operator requested to collect waste from a waiver household would have to do so. The OCM report, at p. 17 states:

> *"The Dublin Local Authorities now accept that the variation of the Plan is not required to allow it to maintain its waiver scheme. It has been the experience of other local authorities, who have stopped collecting household waste, that the loss of revenue has not undermined their ability to meet their obligations under the Waste Management Act 1996 & 2007."*

117. The OCM report notes that the RPS reports also contend that an increase in the number of trucks would also result in increased traffic incidents and accidents, congestion, noise and odour nuisance and air pollution, but no assessment has been carried out as to the extent of these emissions. It further notes that no similar concerns in this regard, or in relation to greenhouse gas emissions, have been raised in relation to private sector collection from apartment blocks, despite it accounting for a similar amount to individual households.

118. With regards to the future development of waste infrastructure the OCM report notes that the Dublin local authorities are pursuing a materials recovery facility, biological treatment facilities and a landfill, as well as the Poolbeg incinerator, but the waste flow models and capture and participation rates were based on the assumption that the local authorities would continue to control the household waste collection service and *"specifically excludes the potential for direct private sector involvement in the provision of these large scale facilities"*. It also notes that the restrictive nature of the contract with the operator of the facility, which requires that 325,000 tonnes of waste *per annum* be delivered to the site for 25 years, and if this volume is not delivered the local authorities will have to compensate the operator.

119. I would say firstly that I am satisfied that it is incumbent upon the respondents to prove on the balance of probabilities that the Variation, firstly, will improve the provision of the service to the benefit of consumers. Having considered the economic evidence presented before this Court I am not so satisfied. I do not believe that the Dublin market for the collection of household waste is a natural (local) monopoly either taken as a whole, or in each individual local authority area. The evidence from both parties would indicate that the minimum efficient scale is such that, even in the smallest local authority area, there are a sufficient number of customers to support at least three, if not more, operators. I am also satisfied that that competition in the market can only provide a reduction in costs to consumers, above and beyond that which is obtainable from either a local authority monopoly or by way of competitive tender. Concerns expressed by the respondents that with competition in the market it is likely that one or more private competitors may become dominant, although true, ignores the fact that with constant competition within the market, such dominance will be tempered by both the actions of other competitors and by competition law. If a dominant player charges excessively, it will undoubtedly be undercut by a competitor; if it abuses its position it is amenable to the Competition Authority and the Courts. On the other hand where there is a public or tendered monopolist, any increase in price will merely be borne by the public, and there will be no constraining force preventing such a situation. Further it will create a situation involving incumbent providers who will be at a significant advantage upon renewable of any contract. There is also the question of what the other competitors are to do in the meantime while they do not have the contract. Many operators who would have been able to operate under the fully competitive system will be forced to exit the market if unsuccessful in their tender. Nor are they likely to invest in the infrastructure needed if they are unlikely to succeed. I was also not impressed by the report of Dr. O'Toole. His assertions were of a hypothetical nature and of little application, in many situations, to this case. I found it extraordinary that he did not consider it necessary to define the potential number of markets within the Dublin region; such I would have thought would have been a prerequisite to determining if the Dublin region was a natural local monopoly, and if so to what extent. In this regard I would note that the general nature of his report may not be wholly his fault; he may have worked with what he was given. However, in circumstances where the burden is on the respondents to show that the Variation is objectively justified under s. 4(5) CA 2002, I would have expected far more empirical evidence showing that notwithstanding what potential forbearance with regards to the

Variation's effect on competition, it was in fact, when the figures were considered, both pro-competitive and to the benefit of consumers. No such evidence was presented in this case. In contrast the report of Dr. Jenkins contains figures obtained from Panda which at least attempt an empirical analysis of minimum efficient scales and the effects of changes in both scale and density on costs, as well as evidence of pricing in the local authority areas. I am left in no doubt but that the market is capable of supporting multiple operators in competition with each other, and that this is not a situation where a monopoly is either required or to be preferred.

120. I am also not convinced that the entry of private operators will result in decreased coverage. No evidence has been provided in support of this. In any event, I am satisfied that the unique demographic/geographic nature of the Dublin market is such that it is possible for private operators to efficiently collect 100% of the waste; that being the current level of coverage. There are no areas in Dublin which could be described as remote, compared for example with rural counties in the rest of Ireland. The "rural" populations identified by the respondents would indeed be similar to many towns and villages dotted around Ireland which successfully avail of private services. In these regards I also reject the contention that the entry of private operators will lead to an increase in fly-tipping or backyard burning. With regards to contentions of cherry-picking and concerns in relation to waiver customers being left un-serviced, there was, in my opinion: no evidence that the applicant had engaged in selective picking of customers in the way contended; and, there was evidence that the applicant supplied waiver customers on an equal and non-discriminatory basis. Regardless, I would say *obiter*, such a service obligation could, I am satisfied, be provided for in permits.

121. In any event, it is also clear that since the entry into the market of private operators there have been significant improvements in the service provided and the ultimate cost to the consumer. I cannot accept that the removal of such operators would improve the service to the benefit of the consumer. It is true that the entry into the market of private operators has increased costs for the respondents, however this is not the focus of s. 4(5). The focus, in the end, must be the consumer. I can see no benefit accruing to the consumer from the Variation – where once there was a choice of operators there will, upon its implementation, be none. The Variation will leave consumers with no choice but to accept whatever charges the local authority, either directly, or as controlled by the then successful tenderer, will apply; irrespective as to the nature and quality of service they provide. There will also, therefore, be less innovation in the market, because lack of competition will lead to less motivation to improve the service to the benefit of the consumer. Where there is competitive tendering this will only motivate competition as far as competition for the tender will apply. Thus a tenderer will be motivated not by what best suits the consumer, but what it thinks best suits the local authority. This too, even were it the only option available under the Variation, would be insufficient to satisfy the requirements of s. 4(5). However, there is also the possibility of the decision, which the respondents have expressly kept for themselves, that the local authorities may provide the service themselves to the exclusion of all others. In that case there will be no incentive to improve services or to reduce consumer costs. As stated, therefore, I can not see how the Variation can successfully traverse even the first part of s. 4(5).

122. As to the environmental concerns raised by the respondents in relation to multiple operators I consider such effect to be so minimal as to be irrelevant. It is quite clear that if the market share of one operator falls he will reduce his number of trucks on the road. Any increase brought about by increased operators will be counteracted by this. Overall, although there may be a slight increase in the number of trucks between a pure monopoly and multiple operators, the total number of trucks needed to collect waste from a given area will remain relatively constant. The effects from one or two extra trucks on the road must be considered below *de minimis*; it would only be the difference of a few extra HGVs in the city or a number of extra cars. It also fails to consider both the differences in collection trucks, both in terms of size and in terms of emissions, and in routes. It is therefore not possible to say that the entry of private operators will on the balance of probabilities have a directly associated negative impact on the environment: the proposition that more operators, means more trucks, which means greater emissions, is overly simplistic.

123. Nonetheless, should I be wrong in that regard, I move to consider whether the objectives of the Variation are indispensable to the improvements which they seek to bring about. Thus, could the objectives of the Variation have been achieved in a way less restrictive of competition? Do the means justify the ends? Are the terms imposed on the undertakings indispensable to the attainment of the objectives? The terms imposed on all private operators, including the applicant, are that they must exit the market and may not collect household waste unless successful in a tender process with one of the local authorities, should such even occur. This would cause significant loses to any undertaking currently operating. However, all private operators have accepted commercial risk in their entry into the market, and the mere legitimate alteration of rules by a statutory body or local authority will not be improper merely because it affects a private undertaking's income or profits. Nonetheless, the fact that it will cause considerable loss to many private operators currently operating in the market is a consideration in determining whether it is proportionate. Had the Variation been in place before or only shortly after the entry into the market of private operators it may have retained greater proportionality.

124. The end which the Variation seeks to attain, namely decreased costs to consumers and certain environmental concerns, could easily be met without the harsh terms of the Variation. The local authorities are given significant power in relation to the attachment of conditions to WCPs. If they had concerns as to the final destination of the waste, this could be covered in the permit. If there were concerns as to traffic so too could this. There must be significantly less intrusive methods available to the respondents other than the complete elimination of all competition in the market. Thus, even was I to have found that the Variation afforded benefits to consumers, I could not see how the elimination of all competition in the market was indispensable to any of those benefits.

125. Finally, s. 4(5) requires that the Variation would not afford the respondents the opportunity to eliminate competition in respect of a substantial part of the market. It should be noted that it is not required that it must be certain that it would eliminate such, only that there must be a possibility. In this regard I would state that it is clear that the Variation has this effect. As stated above, the Variation would allow the local authorities to either tender out the services or provide them in-house. Even were competition-for-the-market sufficient to satisfy the requirement that the Variation would not substantially eliminate competition, which I am not sure that it does, it is clear that where there is a possibility of the respondents wholly providing this service to the exclusion of all other competitors this must fall foul of the requirement in s. 4(5)(b). In any event I am satisfied that the Variation does afford the respondents the possibility of eliminating competition substantially in the market for the collection of household waste.

126. Given the foregoing, I am thus satisfied that the Variation breaches s. 4 CA 2002 and is not saved by virtue of the application of s. 4(5) because it will not contribute to the improvement of services to the benefit of consumers, it is not indispensable to the attainment of any legitimate aims (should there be any), and it substantially eliminates competition in

the market. In other words, it is not objectively justified under competition law.

Section 5 of Competition Act 2002:
127. Section 5 CA 2002, which is set out in full at para. 69 *supra*., states at s. 5(1):

> *"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."*

There are thus two matters which the Court must determine, firstly, are the respondents, either individually or collectively, dominant in the market for the provision of household waste collection, and secondly, if they are, have they abused that dominance?

Dominance:
128. The question of dominance must be determined in relation to the relevant market: as with the s. 4 analysis, market refers to both the product/service and geographic market. Again like the s. 4 assessment, there is no dispute about the product market; the respondents must therefore be assessed with regard to the geographic market, the question being whether they are dominant in their individual and distinct markets, and/or are collectively dominant in the greater Dublin market. Once more the relevant principles established by reference to Art. 82 are highly persuasive in this regard.

129. The concept of dominance was usefully outlined in *Aéroports de Paris v. Commission* [2000] ECR II-3929 at paras. 147-148:

> *"147. It is settled case-law that the dominant position referred to in [Article 82] of the Treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market giving it power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (see, in particular, Case 27/76 United Brands v Commission [1978] ECR 207, paragraphs 65 and 66, and Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 90).*
>
> *148. It also follows from the case-law that the application of [Article 82] is not precluded by the fact that the absence or restriction of competition is facilitated by laws and regulations (Case 311/84 CBEM [1985] ECR 3261, paragraph 16, and Case 30/87 Bodson [1988] ECR 2479, paragraph 26)."*

130. In this regard, it is therefore clear that the market share of the respondents in their geographic market is relevant, as is whether the market is easily contestable and whether there is any countervailing market power. So also are the respondents' statutory powers. The fact that any restriction of competition might be in furtherance of statutory powers will not preclude the application of Article 82 or of more importance to this case s. 5 CA 2002.

131. As stated by Costello J. in the High Court in *Donovan v. ESB* [1994] 2 I.R. 305, later approved by the Supreme Court [1997] 3 I.R. 573, talking of the ESB:

> *"The dominant position arises from the fact that the ESB can determine the conditions under which the supply of electricity will be given to customers of electrical contractors, and so, in effect, will determine what customers of electrical contractors will obtain electrical power and which will not."* ([1994] 2 I.R. 305 at 318)

132. The case law in this general area is well developed and it is not necessary for me to restate it here at any length (see, *e.g. Hoffman La-Roche v. Commission* [1976] ECR 461, para. 38; *United Brands v. Commission* [1978] ECR 207, para. 65; *Michelin* [1983] ECR I-3461*; Hilti AG* [1991] ECR II-1439). The real question underlying dominance is whether the undertaking in question is capable of acting independently of its competitors, consumers and customers, either by virtue of its economic power and influence, *i.e.* market share, or by virtue of some other reason, *i.e.* regulatory power. It should, because of its position, be able to exercise power so as to prevent effective competition in the market on which it operates.

133. It is, in my opinion, patently clear that, as in the ESB case, each local authority, to a significant extent, is able to act independently of any other competitor in the market for household waste collection. Only they may issue WCPs and attach conditions thereto, and unlike their competitors, they are not required to possess a WCP. Only they may make, review and vary WMPs, albeit after a consultation process. Evidence was given of the relevant market share of the respondents at the date of hearing. In all cases the relevant local authority held the vast majority of the market share (> 95%), except for Dun Laoghaire-Rathdown which held approximately 46% of the market; it having been the first local authority into whose area private operators penetrated. These market shares alone would be capable of supporting a presumption of dominance. Nonetheless, as stated above, market share is but one of the factors in determining dominance. The undertakings involved are unlike private dominant undertakings in that not only do they have a significant share of the market, but more importantly, they have the power to regulate it: to decide entry or no entry, to decide conditions of entry, and if allowed, to decide operative conditions. It is that regulation, independently of any given market share which they might enjoy, which gives them the power to act independently and therefore makes them dominant in their respective markets. That they have considerable power to affect the market is evidenced by the Variation. Were it to be put into practice it would instantly give the local authorities 100% of the market share. No private undertaking would be able to do such. It is therefore clear that each respondent is dominant in each of their individual areas.

Collective Dominance:
134. It is also possible that the local authorities are collectively dominant in the greater Dublin market. The ECJ in *Campagnie Maritime Belge Transports SA & Ors. v. Commission* [2000] ECR I-1365 at paras. 41 – 45, considered the issue of collective dominance, stating:

> *"41. In order to establish the existence of a collaborative entity … it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned…*
>
> *42. In particular it must be ascertained whether economic links exist between the undertakings concerned which enable them to act independently of their competitors, their customers and consumers (see Michelin).*
>
> *43. The mere fact that two or more undertakings are linked by an agreement, a decision … or a concerted practice within the meaning of [Article 81(1)] … does not, of itself, constitute a sufficient basis for such a finding.*
>
> *44. On the other hand, an agreement, decision or concerted practice (whether or not covered by the exception under [Article 81(3)]…) may undoubtedly, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves as a collective entity vis-à-vis their competitors, their trading partners and consumers.*
>
> *45. The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question."*

135. There is no doubt in this case but that the respondents can and do collectively determine WMPs, and variations thereto. It should however be acknowledged that the collaboration of the councils in this regard could not be condemned. Their co-operation is specifically provided for by the WMA 1996. However, the fact that such collusion is provided for by statute will not prevent a finding of collective dominance. The fact that there is no competition between the respondents, once again could not be criticised; they are local authorities who exercise their power within defined geographic bounds. However, such a situation, where there is collaborative action and no competition between the undertakings, supports a finding of collective dominance. They act in concert on many issues and viewed from the outside do constitute, in many respects, a collective entity: certainly *vis-à-vis* their competitors and consumers on this market. I would therefore find that the respondents are also collectively dominant in the greater Dublin area, as well as being dominant individually within each of their respective geographical areas.

Abuse:
136. Section 5 CA 2002, like Art. 82 of EC Treaty, does not provide that dominance per se is prohibited. It is the abuse of the dominant position which is. Thus it must be established that the Variation was an abuse. Guidance as to what may constitute abuse is given in s. 5(2) CA 2002, which gives four examples:

> *"(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers,*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
>
> *(d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."*

This list is not exhaustive and there may be other circumstances which may equally amount to an abuse under s. 5 (*British Airways plc. v. Commission* [1999] ECR II-753, paras. 276-277).

137. Costello J., in the High Court in *Donovan v. ESB* [1994] 2 I.R. 305 at 321, in this regard stated:

> *"[I]f it could be shown that the [respondent] entered into agreements, decisions or concerted practices which were prohibited by s. 4, this would amount to the imposition of unfair trading conditions within the meaning of s. 5, sub-s. 2 (a) and therefore an abuse of … dominant position."*

Given my finding that the Variation is an agreement or concerted practice contrary to s. 4 CA 2002 (see para. 126 *supra*.), it is thus clear that in circumstances where the respondents are also dominant, the Variation amounts to an abuse for the purposes of s. 5 CA 2002. However, even if I had not found the Variation to constitute a breach of s. 4, there are other circumstances surrounding the Variation which may point to it being an abuse of the respondents' dominant position on the market.

138. It was suggested by the CFI in *Aéroports de Paris*, at para. 170, that:

> *"[T]he concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market (Hoffmann-La Roche, cited above, paragraph 91) … [I]n*

Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraphs 27 and 29, the Court of Justice held that the strengthening of the position of an undertaking may be an abuse and prohibited under [Article 82] of the Treaty, regardless of the means and procedure by which it is achieved, and even irrespective of any fault." (Emphasis added)

Thus where an undertaking influences the structure of the market or seeks to strengthen its position on that market, either strategy may also constitute abuse. Further, such activities may constitute abuse regardless of the way in which they are implemented and irrespective of any fault. With regards to the issue of fault, the CFI continued at para. 173 (*ibid.*):

"[I]t should be recalled that the concept of abuse is an objective concept and implies no intention to cause harm… [For example], the fact that [an undertaking] has no interest in distorting competition on a market on which it is not present, and indeed that it endeavoured to maintain competition, even if proved, is in any event irrelevant."

139. Section 5 and Art. 82 have no equivalent of s. 4(5) or Art. 81(3). However, the ECJ and Commission have applied the concepts of objective justification and proportionality in Art. 82 cases, in order to temper the application of the Article's provisions (see *e.g. United Brands* [1978] ECR 207; *Hilti* [1991] ECR II-1439; Centre *Belge d'Etudes du Marché-Télémarketing (CBEM) v. CLT SA* [1985] ECR 3261). Craig and de Burca, *"EU Law (4th Ed.)"* at p. 1037, note however that:

"While objective justification and proportionality, therefore, imbue the application of the Article with added flexibility, the application of these concepts is not self-executing. The decision, for example, whether a refusal to supply is objectively justified and proportionate will often reflect certain assumptions concerning the relative importance of protecting competitors and consumers, or the relative significance of single-market integration and consumer welfare."

Continuing, Craig and de Burca also suggest another defence not explicitly referred to, namely that of efficiency; noting that the Commission in the DG Competition Discussion Paper on the Application of Art. 82 of the Treaty to Exclusionary Abuses (2005), indicated that such a defence should be available *"provided that the efficiencies outweigh the negative effects of the relevant conduct"* (*ibid.* at p. 1037).

140. Applying the above to the case at hand, it is clear that there has been abuse in this situation. The Variation, objectively, will demonstrably influence the structure of the market in question. It has the potential to effectively foreclose the market to all competition, or at least severely restrict it. It will also significantly strengthen the position of the respondents on the market – this is patently so. This Variation was designed to prevent so-called fracturing of the market, which had lead to a decrease in all of the respondents' market shares and increased their costs. The only bodies which ultimately benefit from the Variation are the respondents, since it would restore them to a *de facto* position of monopoly. It is therefore clear that the actions of the respondents amount to an abuse of their dominant position. As stated, in respect of considerations under s. 4(5) CA 2002, I am not persuaded by any of the justifications relied upon; thus even were I to apply by analogy the provisions of s. 4(5), I would not find the Variation justified. Such an approach in any event is not correct as clearly there is no equivalent of s. 4(5) in s. 5 itself. I am also satisfied that any efficiencies arguments advanced by the respondents, which almost entirely relate to efficiencies obtained by them rather than consumers, must also fail in this regard.

141. As is evident from what I have previously stated, I cannot agree with any of the arguments advanced to support objective justification or efficiencies which may otherwise have provided a defence to the respondents' actions. Further, I would add that the intentions of the respondents are irrelevant for the purpose of my findings in relation to s. 5, the abuse being judged objectively. The respondents, therefore, in my opinion have abused their dominant position:

i) By virtue of the finding that the Variation is an agreement or concerted practice contrary to s. 4 CA 2002; and/or,

ii) Because the Variation would substantially influence the structure of the market to the detriment of competition and *a fortiori* the consumer; and /or,

iii) Because the Variation would significantly strengthen the position of the respondents on the market.

Effect on Trade between Member States

142. The applicant has argued that the Variation will effect *inter* State trade. In this regard it notes that it will prevent the importation of waste collection services from other Member States, and given the Poolbeg project, it will affect the export of non-hazardous waste. The ECJ in *Sydenhaven Sten & Grus* [2000] ECR I-3743, at para. 51, held that in the absence of any indication of danger to the health or life of humans, animal, plants or the environment, restrictions on the export of waste were contrary to the EC Treaty. Further the population of the greater Dublin market is of considerable size, amounting to a significant proportion of the national population (almost one third), and indeed is larger than three Member States (Luxemburg, Cyprus and Malta) and close to that of a fourth (Estonia). The respondents on the other hand claim that the waste collection market is peculiarly local and therefore cannot affect *inter* State trade. They further cite *Remia v. Commission* [1985] ECR 2545, where the ECJ held that:

"[I]t must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that [the practice] may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the aim of a single market in all the Member States."

143. I am not satisfied that the Variation will have an appreciable effect on trade between Member States of the EU. As stated, the geographic market is greater Dublin. Although this contains a sizeable population, I do not believe that it could

prejudice the aims of the Single Market; I do not think it will. It would apply equally to any person seeking to operate in the greater Dublin area, but affects no more. I therefore do not think it would have any appreciable effect on the pattern of trade between Member States.

144. Given my findings in this regard I do not consider it necessary to enter into an analysis of the application of the EC Treaty provisions. Despite this however, it should be said that I did consider the issues arising out of Art. 86 and would state, wholly *obiter*, that, in any event, I was not satisfied that Art. 86 would have provided a defence to the actions of the respondents. I would further state that, regardless of any decision on *inter* State trade, my conclusions with regards to ss. 4 and 5 CA 2002 would apply *mutatis mutandis* to any finding which I might otherwise have made under Articles 81 and 82 of the EC Treaty.

Administrative Law Issues:-

***Ultra Vires* and Error of Law:**

145. Apart from the competition matters discussed above, a number of judicial review grounds were also advanced by the applicant. As many of these grounds also relate to the actions of the respondents under competition law, further comment on those is not required, save to say that where an action / activity is contrary to competition law it will almost certainly also be amenable to judicial review law. I therefore propose to deal only with those review matters which are not directly linked to competition matters.

146. The first issue is whether the Variation was *ultra vires* as alleged. An action may be *ultra vires* for many reasons, including classically, where the required power does not exist or where a given power is exercised in a way inconsistent with, or in excess of, its statutory base, or where such action could never have been contemplated by the Oireachtas. Further it is accepted without question that a body may not take unto itself power not otherwise given to it. In the context of a Minister making an instrument under statute, O'Higgins C.J. in *Cassidy v. Minister for Industry* [1978] I.R. 297 (in a passage followed by Blayney J. in *Purcell v. The Attorney General* [1996] 2 ILRM 153 at 305) stated the test in the following terms:

> *"If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have a duty to interfere."*

147. It is not disputed in this case that the respondents have the power under the WMAs 1996 – 2007 to make or amend Waste Management Plans; in fact they are obliged to do so under s. 22 of the 1996 Act, where sub-s. (2) states, *inter alia*, that;

> *"… each local authority shall … make a plan with regard to —*
>
> *(a) the prevention, minimisation, collection, recovery and disposal of non-hazardous waste within its functional area"* (Emphasis added)

In furtherance of this obligation, the respondents, in relation to non-hazardous waste, are mandated to insert in any such plan such objectives as appear to the local authority to be "*reasonable and necessary*:

> *(a) to prevent or minimise the production or harmful nature of waste,*
>
> *(b) to encourage and support the recovery of waste,*
>
> *(c) to ensure that such waste as cannot be prevented or recovered is disposed of without causing environmental pollution, and*
>
> *(d) to ensure in the context of waste disposal that regard is had to the need to give effect to the polluter pays principle…" (s. 22(6) WMA 1996)*

There are also a number of other provisions which are not immediately relevant.

148. A question arises as to whether the specifically provided objectives under s. 22(6), constrain the application of the general terms of s. 22(2). In particular, must the phrase "*a plan with regard to – the prevention, minimisation, collection, recovery and disposal*" of waste be read in light of the specific objectives?. The principle of *generalibus specialia derogant* (special provisions override general ones) would seem to suggest that the former specially expressed objectives may colour any interpretation of the latter more general terms. This becomes relevant only in the case of conflict.

149. Thus, is it the case that unless the objective of the Variation relates to "*prevention, minimisation, collection, recovery [or] disposal"* of waste and is reasonable and necessary to attain at least one of the objectives outlined in s. 22(6) (a-d), it could not be intra vires the terms of the Act? I would also point out that taken as a group, considering the principle *of ejusdem generis*, the objectives outlined in s. 22(6), even that specified in para. (d), all relate to environmental concerns. Therefore must the objectives of a WMP, if it is to be reasonable and necessary for the purposes of the Act, relate primarily to environmental objectives?

150. Whilst these statutory provisions relate to the Plan itself, they must equally, in my view, govern any variation to it. Therefore a variation could not contain an objective which a Plan, itself could not have. The respondents have relied on reports outlining their environmental concerns in relation to the current situation; *inter alia*, they say that the Variation was both reasonable and necessary in order to prevent an increase in environmental pollution related to an increase in the number of vehicles on the road, increased fly-tipping or other illegal waste disposal. Moreover they say that it is clear

that many private operators have been charging customers a flat rate charge, and thus are not giving effect to the polluter pays principle. It is therefore intra vires the terms of the Act.

151. With respect I do not believe that the Variation could be said to principally relate to environmental concerns. Although some such concerns are advanced they are, at most, secondary in nature, compared with the admitted primary objective of the Variation, which is to prevent uncontrolled fracturing of the market for household waste collection and thereby safeguard the viability of the local authorities' waste collection services. This is an economic objective. I am unconvinced by the evidence presented by the respondents that the operation of private waste collectors will result in increased fly-tipping or significant environmental or traffic concerns. Although there may be a slight increase in the number of trucks on the road, it will not be significant. Further, as the local authorities lose market share (if that should happen), they will require less trucks on the roads themselves: therefore the overall number of trucks required by all operators will remain relatively constant.

152. Further it is clear that "*What the statute does not expressly or impliedly authorise is to be taken to be prohibited" ("Halsbury (4th Ed.)*" Vol. 9, para. 133, as quoted with approval by Hamilton C.J. in *Keane v. An Bord Pleanála and Commissioners of Irish Lights* [1997] 1 I.R. 184). Thus with regards to the monopolisation of the market, since this is not provided for in the Act, it should be implied that such was not the intention of the Oireachtas. In fact the contrary is the situation in that a significant portion of the 1996 Act would appear to specifically envisage collection by private operators. Therefore local authorities do not have the power to achieve this end, and accordingly, should not attempt to do this by way of a WMP or Variation thereto.

153. Even where there are substantial and legitimate reasons for the enactment of regulation or for adopting some other course of conduct, that will not stop an action being *ultra vires*. In *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539 the Minister effectively created an exclusivity scheme whereby, for the purposes of licences granted pursuant to the Livestock (Artificial Insemination) Act 1947, the State was divided into nine administrative regions, with one licence holder per region. In the Supreme Court, Keane J. found that since artificial insemination of cattle was *prima facie* lawful, any person, who could satisfy the Minister that he had the appropriate technical qualifications, and was in a position to comply with whatever other requirements might reasonably be imposed, was entitled to a licence as a matter of right. The reasons for the scheme were summarised by in the High Court by Murphy J. as follows:

> *"… The organisation by regional monopoly ensured that the licensee was accountable and responsible for ensuring a proper artificial insemination service in the entire of its region; to ensure proper training, records and control, conception rates and progeny testing. The record keeping was complex, costly and required continuity of records. It was stressed that unless the licensee had exclusivity in a region, then it would be difficult for the Department to enforce the condition with regard to availability of a proper service throughout the region to both large and small herd owners." (ibid.* at 546*)*

Having reviewed these reasons Keane J. noted:

> *"There is no indication in the Act of 1947 that these undoubtedly laudable objectives constituted the underlying policy of the Act, with two qualifications. The evidence in the High Court established, and common sense would have in any event suggested that it was the case, that the major reason for introducing statutory controls over artificial insemination in 1947, was because of the desirability of controlling disease and improving the general quality of the national herd. The system of control spelled out is negative rather than positive: the practice of artificial insemination may only be carried out where a licence is granted. There is nothing in the Act to suggest that the Oireachtas intended that, for the reasons given in the passage from the High Court judgment already cited, the first respondent should divide the country into a number of regions, in respect of which only one licence was to be granted. I am satisfied that in adopting the exclusivity scheme the first respondent acted ultra vires the Act of 1947…" (ibid.* at 546)

154. There is also a presumption when exercising any statutory power that it will not be exercised so as to deprive persons of an otherwise lawful right (see *e.g. Limerick Corporation v. Sheridan* (1956) 90 ILTR 59). Murphy J. in the High Court in *O'Neill* found in relation to the regional exclusivity arrangement at issue in that case that:

> *"The scheme manifestly affects the right of citizens to work in an industry for which they may be qualified and the rights of potential customers to avail of such potential services. It is not that there is any reason to doubt that the scheme ultimately devised by the Minister was desirable, and may well have operated in the national interest, it is simply that such a scheme is so radical in qualifying limited numbers of persons and disqualifying all others who may be equally competent from engaging in business … I would be unwilling to accept that in using general words the Oireachtas contemplated such a far reaching intrusion on the rights of citizens."* ([1998] 1 I.R. 539 at 556)

155. Apart from the monopolisation of the market not being provided for by the Act, the applicant argues that the Variation would immediately trigger the application of s. 33(7) and would therefore vest *de facto* ownership of household waste in the respondents. It was noted by the applicant that s. 32(5) WMA 1996 allows any occupier to pass control of waste to an "*appropriate person*", including a local authority or other person properly authorised. Nothing in the WMA grants the respondents the right to demand that control of waste be passed to them, nor is there anything therein which limits the rights of householders to transfer waste to an "*appropriate person*". As stated above there is nothing in the WMA which would suggest to me that householders do not have the right to contract with whomsoever they wish to collect their waste, provided that person has the authority to collect such waste. In that regard, therefore, the Variation would seem to remove a right not so removed by the WMA 1996.

156. Thus: where the exclusive power to collect waste is not provided for in the legislation (indeed the elaborate system of permits and licences is tantamount to the contrary); where the collection of household waste by private operators is clearly contemplated (see e.g the permit regime, and s. 33(3)(a) and (c) and the 1997 Regulations); and, where the Act does not vest in the local authorities the *de facto*, or other, ownership of the waste, I am satisfied, *inter alia*, that the respondents sought through the Variation, to deprive persons of otherwise lawful rights in a similar way to the Minister in *O'Neill*.

157. For the above reasons it could therefore not be said that the objective of the Variation was such as would have been contemplated by the Oireachtas, when it granted local authorities the power to make WMPs, and in those circumstances I find that the Variation is *ultra vires* the powers vested in the respondents by the Legislation.

Bias *via* Prejudgment:

158. Where a decision of a public body is vitiated with prejudgment or other forms of bias it will be void. It need not be proved that there is actual prejudgment or bias; a reasonable suspicion or real likelihood will suffice (see *e.g. E.H. Cochraine Ltd. v. Minister for Transport* [1987] 1 NZLR 146 at 149; *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369 at 394 (dissent of Granpre J.)). In cases of this type of bias, objective or perceived, the decision will be stood down because of the perception that, in the absence of the factor constituting bias, the decision may have been different.

159. Keane C.J. in *Orange Communications Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 at 186 outlined the test for objective bias, stating that there is :

> *"… no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."*

160. Murray J. in *Spin Communications Ltd. v. I.R.T.C.* [2001] 4 I.R. 411 at 431 confirmed the correctness of this approach when he stated:

> *"I don't consider it necessary or useful to review … the authorities [in this regard]… In Bula Ltd. v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412, having reviewed a range of cases in this jurisdiction and other jurisdictions, McGuinness J. at p. 484 noted that:-*
>
> > *'The various decisions and dicta which I have set out above, taken together with the recent statement of the Chief Justice in Orange Ltd. [*sic.*] v. Director of Telecoms (No. 2) [2000] 4 I.R. 159 seem to me to establish without doubt that the test to be applied in the present case is that of the reasonable person's, reasonable apprehension of bias.'"*

161. Before leaving *Orange Communications*, it would be useful also to note how Murphy J., at p. 241 of the report, outlined the circumstances in which bias could be found:

> *"[T]o condemn as biased the decision of a judge or other decision maker involves two conclusions. First, that the adjudicator is affected by some factor external to the subject matter of his decision and, secondly, that in relation to the particular decision the external factor operated so as to tilt the judgment in favour of the successful part. The distinction is crucial. The existence of the extraneous factor must be proved as a fact on the balance of probabilities: the operative effect of an impermissible factor (where it does exist), is presumed."*

162. The decision of Barron J. likewise cannot be overlooked. Having stated that bias will always predate the actual or contemplated decision, the learned Judge continued at p. 221 of the report:

> *"Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing and in that way alert a party to the possibility of bias and so enable such party to establish facts which show that the attitude adopted by the decision maker in the course of the hearing was one which might have been expected having regard to those facts. The essence of bias then is the perception - the strength of that perception not being relevant for the purpose of this definition - once all the facts are known that the particular decision maker could never give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude. Obviously, if it is perceived that it may influence a decision yet to be given, it must exist at that stage."*

It should be noted however that vitiating factors, which arise for the first time during the course of a hearing, are not without a remedy: they are dealt with by fair procedures and natural justice, but not by means of bias.

163. With regards to prejudgment, a form of objectionable bias, a similar rule applies. Finlay C.J. stated in *O'Neill v. Beaumont* [1990] ILRM 419 at 438, that the question for decision in cases of prejudgment bias was:

> *"whether a person in the position of the plaintiff, … who was a reasonable man, should apprehend that his chance of a fair and independent hearing of the question … does not exist by reason of the pre-judgment of the issues which are involved … That in my view is the proper test to be applied…"* (See also *Dublin Wellwoman Centre Ltd. v. Ireland* [1995] 1 ILRM 408 at 420*)*

Therefore where a decision is vitiated by prejudgment is will be void; decision making bodies are required to approach matters before them with an open mind. Although the Supreme Court held in *McGrath v. Trustees of Maynooth College* [1979] ILRM 166 that a preconceived idea or strong view on a matter, did not invalidate a decision made by an administrative body, the body must still have been willing to hear the submissions of the parties and should not have resolved to come to a particular conclusion beforehand. This doe's not impose a requirement that the decision maker should have had no prior knowledge of the matter pre hearing (*O'Neill v. Beaumont Hospital Board* [1990] ILRM 419).

164. The recent Supreme Court case of *O'Callaghan v. Mahon* [2008] 2 I.R. 514 considered in extenso the jurisprudence relating to bias and prejudgment. Considering the reasonable person as expounded by Finlay C.J. in *O'Neill v. Beaumont Hospital*, Denham J. commented at p. 550:

> *"The appearance of what is being done is critical. It is essential that justice be seen to be done. Therefore, the test refers to a reasonable apprehension by a reasonable person, who has knowledge of all the facts, who sees*

what is being done. It is this reasonable person's objective view which is the test. This is the criterion which is required to be applied. It is not the apprehension of a party."

Fennelly J. echoed these view at p. 666:

"[P]rinciple requires that the test be strictly objective. Otherwise, it would be susceptible to variation dependant on the attitude of the individual party. The court is not required to find whether the complaining party is or is not reasonable. An unreasonable affected person is as much entitled to complain of objective bias as a reasonable one. It is the hypothetical objective observer that matters. He or she is always deemed to be reasonable.

However, Hardiman J. (dissenting) emphasises at p. 633 that:

"[T]he apprehensions of a party, who is a reasonable person, are not to be excluded in determining whether there is a reasonable apprehension of bias. In none of the cases cited were they in fact excluded. To do so would involve paying no attention to the authoritative statements of eminent judges. Finlay C.J. [in O'Reilly v. Cassidy [1995] 1 ILRM 306] considered the perspective of 'a person in the position of the plaintiff…'. Denham J. [in Dublin Wellwoman Centre v. Ireland [1995] 1 ILRM 408] asserted that 'neither party' should have reasonable grounds to apprehend bias. Barrick C.J. [in R. v. Watson, ex parte Armstrong (1976) 136 C.L.R. 248] referred to reasonable suspicion 'in the minds of those who came before the tribunal or in the minds of the public'. These formulations cannot be disregarded.

Neither, indeed, are the apprehensions of a wholly detached observer who is both reasonable and informed to be excluded."

165. In my opinion the correct test is an objective one, namely: that a reasonable person, knowing all relevant facts, would have a reasonable apprehension that the decision was vitiated by prejudgment. I would accept that it is not the parties' views as to the existence of bias or prejudgment which will be determinative. However, pragmatically, the views of the parties' will need to be taken into account when deciding if there is evidence of such prejudgment. It is in that context only that the views of the parties' are relevant; but the test is, as observed by Fennelly J., strictly objective.

166. The above principles apply equally to decisions of administrative bodies, but in such cases it has been suggested, that in the context of bias and/or prejudgment, there is some limitation or exception in favour of some form of necessity or structural bias. Such was commented upon by Finlay C.J., again in *O'Neill*:

"I think that in relation to this last point regard must be had to the doctrine of necessity. It is not a dominant doctrine, it could never defeat a real fear and a real reasonable fear of bias or injustice…"

The point was also discussed by Keane J. in *Radio Limerick One Ltd. v. Independent Radio and Television Commission* [1997] 2 I.R. 291 at 316, where the learned judge said:

"[A] body such as the commission may not, in given circumstances, present the appearance of strict impartiality required of a court administering justice. That, however, does not relieve the commission of the obligation to take every step reasonably open to it to ensure that its conclusions are reached in a manner, not merely free from bias, but also of the apprehension of bias in the minds of reasonable people. But where, as here, a body is obliged to carry out certain statutory functions and no issue arises as to the constitutionality of the relevant provisions, a court cannot by the strict application of the legal principles already referred to prevent the body from exercising those functions, where all practical steps have been taken by it to free itself, not merely from actual bias but the apprehension of bias in the minds of reasonable people: see the decision of this court in O'Neill v. Beaumont Hospital [1990] ILRM 419."

167. That passage was followed in *Northwall Quay Property Holding Co. Ltd. v. Dublin Docklands Development Authority* [2008] IEHC 305 at para. 99, where on the facts the learned judge found that, having regard to an Agreement which had been reached, there had been objective bias in the procedure for considering s. 25 applications, under the Dublin Docklands Development Authority Act 1997.

168. It was also argued by the respondents in this case that there could be no question of prejudgment, or bias affecting the decision, since the admitted comments, allegedly prejudicial, were made by Mr. Twomey (see para. 26 *supra.*) who, ultimately, did not make or adopt the disputed variation. Finlay Geoghegan J. in *Northwall Quay*, in considering representations made by "executives" of the respondent, who were not members of the Board, during "pre-section 25 application discussions", stated that the requirement of perceived impartiality:

"… appears to include having a procedure under which no commitment is given, not just by a member of the Board itself, but by the executives (who can only be or be perceived to be acting on behalf of the respondent), to any person as to the view to be taken (or a recommendation for a view) on an application for a s. 25 certificate prior to the determination of the application by the Board."

169. It is thus clear that where a person not a member of the decision-making body, but instead the occupier of a senior position within the organisation, makes representations or comments on the outcome of a decision yet to be taken, those statements may be sufficient to give a perception of prejudgment to the subsequent decision. Obviously not all statements by all persons employed by an administrative body will be capable of so tainting a subsequent decision. However, as stated the ultimate question must always be; would a reasonable person have a reasonable apprehension of bias on the part of the decision-making body. In this context, the more senior, and thus more influential, the person is who commits the impugned actions, the more likely it is that a reasonable person would conclude that those actions are attributable to the body as a whole and thus have a reasonable apprehension of bias with regards to a related decision of that body. This will be particularly the case if by reason of the authority and status of the person in question, and by virtue of the function and role assigned to and expected of him, that person either by a process of reporting or

recommendation, or otherwise, is in a position of real influence with the ultimate decision -maker. In such circumstances a reasonable person would reasonably apprehend that the bias of the presenter would become the bias of the decision-maker, and thus taint the decision in that way.

170. The above submission can effectively also be made in the context of fair procedures and natural justice.

171. It can also be made regarding the very performance itself, of the statutory functions vested in the respondents. There is no doubt but that they have the power to make and vary a Plan: they can only do so however within the legislative scheme so laid down. This scheme specifies an interaction process with the public, including those like the applicant, which have a vested interest in the framework which both governs and determines (in whole or in part), its business environment. As a result before a local authority even commences the preparation of a Variation, it must advertise its intention to so commence and invite written representations in respect of it (s. 22(5)). When a local authority decides to vary a Plan it must further publish that fact, again invite written representations and must inform the public that any such representations will be considered before making the Variation (s. 23(2)(b)). Moreover such an Authority is mandated by statute to consider such representations (s. 23(3)). It has no choice in this regard. This duly imposes upon the Authority an obligation to fairly look at the submissions and to objectively assess them. Such an exercise could not be said to take place if, by reason of some prior decision, their content, irrespective of merit, is to be disregarded. Any such consideration in those circumstances is empty of meaning and devoid of purpose. It would not be what the statutory scheme demanded: its provisions would have been circumvented by the foreclosure previously determined.

172. With regards to prejudgment there are two external factors relied upon in this case. One has been referred to as the Poolbeg contract, and the second is evidenced by the comments of Mr. Twomey above set out. With regards to Poolbeg, in my opinion, having considered the arguments put forth in relation thereto, the terms used in the contract are arguably wide enough to cover waste delivered to the facility by way of permit condition. However, I do not propose to express any definite opinion on this point – this would not be the correct forum in which to so do. In addition I have not been presented with all of the evidence or with full submissions which would allow me come to a decision on this important issue. Nonetheless, I am satisfied that in circumstances where the respondents may only direct waste to a tier within the waste hierarchy, and not a specific facility, and where they have obligations to deliver a minimum tonnage of waste to the Poolbeg facility, a reasonable person could suppose the existence of an interest which would facilitate their contractual obligations. Furthermore it would only be through re-monopolisation that they would conclusively ensure that all waste collected was delivered to the Poolbeg facility; without such, Poolbeg may be in competition with other incinerators, either public or privately run. This may not be the situation today but it may be the next day. Therefore it is at least arguable that the actions of the respondents, against the backdrop of this contract, could give rise to an appearance of bias on the part of the respondents. However, let me stress that these observations are *obiter*, and I make no definitive conclusion regarding this precise issue.

173. On the second point, I would say firstly that it is not now contested, although it was so initially, that Mr. Twomey did inform representatives of the applicant that it was his intention to stop it collecting household waste in the Dublin region and that he would do everything in his power to ensure that this took place (see para. 26 *supra.*, where the full extent of his comments are set out). There is no question in my mind but that statements of this nature, formally put on the record at his express request, could only be taken by a reasonable person to indicate a mind fettered by prejudgment. The context must be looked at by reference to the position of Dublin City Council as Regulator and as the lead Council also representing the other three authorities, and the position of Mr. Twomey as: (i) the Assistant City Manager of Dublin City Council with delegated responsibility for the Environmental and Engineering Services, (ii) the official in charge of Waste Management Services with delegated power under s. 22 of the WMA1996 to make, vary or replace the WMP; and (iii) the Chairman of the Dublin Regional Waste Steering Group which was appointed to provide guidance on the preparation of the WMP and which recommended the final draft WMP to the four Dublin City councils. In such roles he is involved in the issuing and enforcing of WCPs, in reviewing the WMP, through variation or otherwise, and in recommending the Variation. He also had, following the Variation, a public relations role; see, for example, his appearance on RTÉ Radio's Morning Ireland. He is exactly the sort of senior executive whose statements could, in the mind of the reasonable person, give rise to a reasonable apprehension of bias in any subsequent decision of the Councils, which give effect to his declared intentions. Above any other person he had extreme influence on the substance and the process, a position of power known to all.

174. The statements of Mr. Twomey, on 13th March 2007, were made at a point in time prior to any announcement about a review of the WMP, in fact in March 2007 the permit review had been spoken of but not the Plan review. Therefore for the purposes of this action, those comments were made before even the process of Plan review had commenced and evidently before the March 2008 decisions to adopt the Variation. More so, such statements were not created spontaneously: nor were they thought of simply at that time. In my view, as said by Barron J. in *Orange*, such comments were but proof of an existing stance previously taken by Mr. Twomey. Therefore in my opinion they satisfy the external requirement necessary to establish bias. Consequently I conclude that the applicant has made out a case to that end. In addition, for the reasons above-give, they also have affected the subsequent process and decision-making in such a way as to renter the Variation invalid.

175. I would further note that in the course of the hearing a number of draft reports, prepared by Dr. Francis O'Toole and RPS, were handed up to the Court. The drafts of the former, contained comments written by the respondents indicating which parts of earlier drafts were acceptable to them, and either deleting or re-wording those parts which would not have supported their position. There were also e-mail references to meetings with the authors of these reports as well as notes of some meetings (including 31/01/07) which would indicate that the findings of the reports were a foregone conclusion. Whether or not the City Managers were aware of this fact is, in my opinion, immaterial: Mr. Twomey certainly was. Such massaging of reports, which were later, in their edited versions, released publicly, is a strong indicator, to me, of unacceptable influence in a process, supposedly carried out in the public interest, and further elucidates a high level of prejudgment in the decision to vary the WMP.

176. I accept that when deciding whether to act or not, on any matter, an administrative body may have some outcome in mind. That does not amount to prejudgment, as previously stated. At most it is structural bias, in that some view must have been formed in order to even trigger the process in the first place. However, in my opinion, the actions of the respondents in this case, and particularly Mr. Twomey, go far beyond this. They indicate a rigidity of mind, so that from the start there could have been no other outcome. This is particularly serious; notwithstanding any subsequent public consultation. It is clear that such consultation not only did not have, but could not have had, any effect on the outcome

of the Variation process. It was a given from the start.

177. In those circumstances, I am satisfied that the decision to vary the WMP is vitiated by prejudgment, as it also is by the lack of fair procedure and statutory non-compliance, and therefore, for the above reasons, is invalid.

Rationality / Reasonableness:
178. The applicants have also sought to challenge the Variation on the basis that it is irrational and/or unreasonable. The traditional jurisdictional statement for such review, was made in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 233-234, the so-called *Wednesbury* test:

> *"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matter which ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."*

Or, as set out more succinctly by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 410:

> *"It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

179. The test was considered in this jurisdiction by the Supreme Court in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642. Henchy J. declined Lord Diplock's construction of the rule, in particular rejecting: the association of reasonableness with logic, since he felt that there were many legitimate decisions where logic may have been rejected "*in favour of other considerations*"; and, accepted moral standards, since such a concept was too "*vague [and] elusive*", representing a shifting standard which would, in any event, be difficult to ascertain. Instead Henchy J. at 568 that:

> *"[T]he test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limited of jurisdiction in all decision-making which affects rights of duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

180. The Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, overturning the decision of the High Court in the case, found that in order for a decision to be quashed on the ground of unreasonableness an applicant would have to show that: "*the decision-making authority had before it no relevant material which would support its decision*." (*ibid*. at 72). Finlay C.J. stressed that:

> *"The court cannot intervene with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised difference inferences or conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it." (ibid.* at 71*)*

181. What may be considered the highest expression of the standard of review for unreasonableness may be seen from the decision of O'Sullivan J. in *Aer Rianta cpt v. Commissioner for Aviation Regulation* [2003] IEHC 12. As stated by Gilligan J. in *Byrne v. Judge O'Leary & Ors*. [2006] IEHC 412 "*the unreasonableness standard has been heightened even further in recent times, arising from the decision of O'Sullivan J.".* The test enunciated by O'Sullivan J. in *Aer Rianta* was that:

> *"the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality."*

As I stated before in *Donnellan v. Minister for Justice* (Unreported, 25th July, 2008), this decision, when viewed as a whole, was heavily influenced by deference to specialised bodies. Furthermore, at a time when *O'Keeffe* was under active, if not intense, scrutiny it is unlikely that the learned judge intended to raise the threshold even higher than the one propounded in that case. Personally I would not be in favour of reformulating the test in the manner indicated. In my view it is not possible to have as a requirement of unreasonableness insanity before the courts may intervene. I would be inclined to agree with the applicant's submission that, were this test to be applied generally, there could be a risk of it offending the Remedies Directive (89/665/EEC). Indeed Fennelly J. in *SIAC Construction v. Mayo County Council* [2002] 3 I.R. 148 at 176, considering the ECJ decision of *Upjohn v. Licensing Authority* [1999] ECR I-223, stated:

> *"I do not think, however, that the test of manifest error is to be equated with the test adopted by the trial judge, namely that, in order to qualify for quashing, a decision must 'plainly and unambiguously fly in the face of fundamental reason and common sense'. It cannot be ignored that the Advocate General [in Upjohn] thought the test should be 'rather less extreme'. Such a formulation of the test would run the risk of not offering what the Remedies Directive clearly mandates, namely a judicial remedy which will be effective in the protection of the interests of disappointed tenderers."*

It is worth noting that this decision pre-dates O'Sullivan J.'s decision in *Aer Rianta*. I therefore wonder how the Advocate General in *Upjohn* would have treated a test of inexplicable madness.

182. Nevertheless, it is clear from the preceding case law, that the question of reasonableness should be judged on the materials before the decision maker and the conclusion reached thereon. If there is no evidence upon which the impugned decision could be based, then it will be unreasonable. I also would note that in England there has been some building disquiet with regards to the *Wednesbury* test in general. De Blacam, "*Judicial Review (2nd Ed.)*", comments at p. 347:

> *"[J]udges in England have become increasingly vociferous in their rejection of the Wednesbury standard. Indeed the Court of Appeal has found it difficult to see any justification for retaining the test, but has decided that the 'burial rites are a matter for the House of Lords."*

Nonetheless, I am satisfied to apply the tests as laid down by the Supreme Court in *Keegan* and *O'Keeffe* as enunciated above.

183. Given the strict nature of review on the ground of unreasonableness, and its rare and limited application, I am not convinced that the Variation, although otherwise biased, prejudged, and *ultra vires*, is explicitly unreasonable or irrational in the sense of the test. The decision-makers had before them material which showed problems with the direction of the market, and indicated that the local authorities, unless action was taken, would either be forced to exit the market, or else increase subsidisation of the service. Further, a number of environmental concerns were identified to them. I am not sure that some action on the part of the authorities was therefore wholly irrational or unreasonable. The scope of the Variation is undoubtedly too broad and disproportionate in its application, but the reasons for its adoption are not such that, it could be said that no decision-maker would ever have made it. In those circumstances I must find that the Variation was not unreasonable or irrational.

Legitimate Expectation:

184. As this claim was not laboured by the applicants at hearing, I therefore propose to deal with the matter only briefly. The general rule with regards to legitimate expectation is that where a public body makes representations and those are relied upon to the detriment of a party, that party is permitted to rely on those representations in recovering the loss suffered. As stated in *Council of Civil Service Unions v. Minister for the Public Service* [1985] AC 374 at 401:

> *"Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*

185. This rule is however restricted in a number of respects. A public body may not, as a matter of law, unduly fetter its future decision making powers by contract (*Kenny v. Cosgrave* [1926] I.R. 517 at 523-528: *"It is a long established principle of administrative law that a public authority cannot by contract disable itself from exercising discretionary power conferred on it by the legislature.").* Nor can a legitimate expectation prevail against legislation (*Pesca Valentia Ltd. v. Minister for Fisheries* [1990] 2 I.R. 305).

186. A good elaboration of the general principles of legitimate expectation is found in *Tara Prospecting Ltd. v. Minister for Energy* [1993] ILRM 771. The explanation of Costello J., at 788-789, can be summarised thusly:

> i) There is a duty on public bodies exercising discretionary powers which may affect rights or interests to adopt fair procedures, *e.g.* representations as to consultation or hearings.
>
> ii) The existence of a legitimate expectation does not give rise to any legal or equitable right to the benefit itself which could be enforced by an order of *mandamus* or otherwise.
>
> iii) Where the case involves the exercise of a discretionary statutory power, any legitimate expectation is a conditional one, namely that "*a benefit will be conferred provided that at the time the minister considered that it is a proper exercise of the statutory power in light of current policy to grant it.*"
>
> iv) Where the expectation arises from a promise in relation to the exercise of a discretionary power, no enforceable right arises, since a public body / Minister cannot estop either themselves or their successors from exercising a discretionary power in the manner prescribed by law.

187. The Supreme Court, *per* Fennelly J., in *Glencar Explorations Ltd. v. May County Council (No. 2)* [2002] 1 I.R. 84 at 161 *et seq*., considered, in light of the judgment in *Tara Prospecting Ltd. v. Minister for Energy* [1993] ILRM 771, whether the doctrine "*confers only a 'conditional expectation' capable of being withdrawn by the authority, following a fair hearing in the public interest, or whether it is capable of conferring substantive rights"*; deciding in that case, in any event, that no meaningful legitimate expectation had been identified. Fennelly J. continued:

> *"It is true that an official exercising a statutory power will, in most cases, have no greater obligation than to afford a hearing to an affected individual before departing from a prior position or policy. In other cases, this may not be enough. The damage may be done. It may not be possible to restore the status quo. If the official position is altered, the court may have to furnish 'such remedy as the equity of the case demands' (per Denning M.R. in Amalgamated Property Co. Ltd. v. Texas Bank [1982] Q.B. 84 at p. 122). The Court of Justice seems to me to accord due weight to the competing imperatives of private justice and public policy in an often quoted passage Tomadini v. Amministrazione delle Finanze dello Stato (Case 84/78) [1979] E.C.R. 1801, at para. 20… In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a*

statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine."

188. It is clear from the case law that the grant of a licence does not in itself give rise to a legitimate expectation. There must be some representation which is relied upon by a party to their detriment, which is reasonable and which would not fetter the exercise of a statutory power.

189. In the current case, it would seem that the applicant seeks to rely on the WCP and its assertions that it is permitted to collect household waste from the stated council areas. There is a requirement under the WMA 1996 that such permits be reviewed on a regular basis, and no representations apart from the WCP were made to the applicant to the effect that he was entitled to collect household waste; quite the contrary, it is clear that very soon after the entry of the applicant into the market the respondents made their position in relation to that entry quite clear: they were against it, they had never anticipated it, and they wished it to stop. In those circumstances I cannot see how the applicant could have had any expectation that the respondents would allow him to continue to collect household waste, or that they were acquiescing to it. Any reliance placed on the WCP as a source of rights in these circumstances it did so at its own risk. The applicant is therefore responsible for any loss it may have suffered as a result of such reliance. I therefore find that it had no legitimate expectation in this regard.

Disproportionate Interference with Property Rights:
190. As with legitimate expectation, this may be dealt with in a brief manner. The applicant contends that the Variation breaches its property rights and its right to earn a livelihood, relying on Articles 40.3.1°, 40.3.2°, 43, 45.2.i, and 45.3.1°, and any concurrent right under the European Convention of Human Rights.

191. With regards to property rights, interests generated by State regulation will not generally give rise to a compensable right. *In Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20 regulations which had the effect of reducing the value of taxi licences was held not to be an unjust attack on property rights. Similarly, Denham J. in *Maher v. Minister for Agriculture, Food and Rural Development* [2001] 2 I.R. 139 found that milk quotas could not be considered property for the purposes of the Constitution, noting that even if they could be found to be such, there were naturally subject to the exigencies of the common good and proportionality, and because they would be subject to constant change, a reduction in their value could not be considered an unjust attack on property rights. Murray J., in *Maher* at p. 234, noted:

"Property rights generate notions of proprietorship and dominion. In the context of this scheme I do not consider that the applicants had a proprietary interest in the selling at the particular 'market price' which they seek to rely on."

192. With regards to the right to earn a livelihood, it must first be noted that this right is not unqualified; there is no right to earn a particular livelihood, or to engage in particular employment. In *Attorney General v. Paperlink Ltd*. [1984] ILRM 373 at 384, Costello J., considering whether the postal monopoly provided for in the Post Office Act 1908 infringed the right of the defendant firm to earn a livelihood, stated:

"It seems to me to be inaccurate and potentially confusing to state without qualification that each citizen has a constitutional right to carry on the occupation in which he is actually earning his living. The defendants like all citizens have a constitutional right to earn a living; they may chose to exercise that right by doing manual work or non-manual work, by entering a profession or by entering employment, by engaging in commerce (either alone or with others), by manufacturing goods, providing a service, or engaging in agriculture. Their freedom to exercise this constitutional right is not an absolute one, however, and it may be subject to legitimate legal restraints."

This passage was subsequently cited with approval by Lardiner J. in *Scally v. Minister for the Environment* [1996] 1 I.R. 367, and by McCracken J. in *Shanley v. Galway Corporation* [1995] 1 I.R. 396. Similarly, Geoghegan J., in *Greally v. Minister for Education (No. 2)* [1999] 1 I.R. 1, held that the right to earn a livelihood, does not encompass a right to receive employment from any particular vocation.

193. I cannot see how the Variation could be said in this context to be a disproportionate interference with either the applicant's property rights or right to earn a livelihood. The Variation does not attempt to expropriate any of the company's property, and no compensable property right vests in a party merely by the possession of a licence, for similar reasons that it cannot give rise to a legitimate expectation. Nor could it be said that the applicant's right to earn a livelihood has been infringed. This right is a narrow one. It is not a right to earn a livelihood from performing a particular job or task. It is merely a right not to be prevented from working. In this respect I would agree with the respondents that it should be noted that the applicant was trading successfully prior to its entry into the market for the collection of household waste. It is thus the case that, were they prevented from collecting household waste, it would not leave them without a source of income. It is therefore clear to me that the Variation does not infringe the applicant's property rights or their right to earn a livelihood.

Conclusion:
194. In conclusion I have made the following findings:

i) The respondents are undertakings for the purposes of the CA 2002;

ii) Both ss. 4 and 5 CA 2002 are applicable to the actions of the respondents;

iii) The Variation is an agreement between undertakings or concerted practice within the meaning of s. 4 CA 2002;

iv) There is no objective justification which would save the Variation under s. 4(5) CA 2002;

v) The respondents have therefore breached s. 4 CA 2002;

vi) The respondents are dominant in each of their respective areas and collectively dominant in the greater Dublin area in the market for the collection of household waste;

vii) They have abused that position of dominance because the Variation:

a) is an agreement or concerted practice in breach of s. 4 CA 2002, or

b) would substantially influence the structure of the market to the detriment of competition, or

c) would significantly strengthen the position of the respondents on the market.

viii) The Variation is not saved by virtue of any consideration of efficiencies or objective justification under s. 5 CA 2002;

ix) The Variation would not have an appreciable effect on *inter* State trade, thus Articles 10, 81, 82, 86 of the EC Treaty are not applicable; if however it did, the above findings with regard to ss. 4 and 5 would equally apply, where so capable of application;

x) The Variation is *ultra vires* the powers granted under the WMA 1996 since it clearly goes beyond what could have been contemplated by the Oireachtas in seeking to re-monopolise the market for household waste collection;

xi) The Variation is vitiated by bias and prejudgment because of the statements of Mr. Twomey, and the partial nature of the reports relied upon to ground it;

xii) The Variation cannot be said to be unreasonable or irrational by the *Keegan* or *O'Keeffe* standards;

xiii) The actions of the respondents gave rise to no legitimate expectation on the part of the applicant;

xiv) The Variation does not disproportionately interfere with the applicant's property rights or right to earn a livelihood.

195. In those circumstances I would therefore accede generally to the applicant's case and order that the Variation be quashed.