Neutral Citation Number: [2012] IEHC 432

**THE HIGH COURT**

**COMPETITION**

**[2011 No. 6526 P]**

**BETWEEN:**

**LIFELINE AMBULANCE SERVICES LIMITED**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Mr. Justice Cooke delivered the 23rd day of October, 2012**

1. The plaintiff in this action is an undertaking that operates a fleet of ambulances and is engaged in the business of providing transport for hospital patients and others in need of such services. The defendant is a public authority established under the Health Act 2004, charged with statutory responsibility for the provision and administration of the wide range of the State's health services, including hospitals, clinics and other health facilities. The defendant too, operates a fleet of ambulances called the "National Ambulance Service" ("NAS").

2. The plaintiff claims declaratory and injunctive relief against the defendant based upon s. 5 of the Competition Act 2002 and Article 102 TFEU. It alleges that it is at risk of being eliminated from the market in which it has been operating by the decision or strategy of the defendant to reduce and eventually to do away with any reliance upon the purchase of ambulance services such as those offered by the plaintiff in order to supplement those provided by the defendant's own fleet.

3. Essentially, the central issue of legal principle raised by the claims in the action can be expressed in the form of a question. Can a public authority, if it operates as an "undertaking" in the sense of the definition of that term in the Act of 2002, be required on the basis of s. 5 of that Act to continue to purchase a minimum level of services from outside private contractors in order to preserve the presence of those contractors in the relevant market? This is the judgment of the Court on a series of preliminary issues that it has directed to be tried arising out of those claims (see paragraph 13 below).

4. It is fair to say that the provision of healthcare services in the State is a somewhat complex mixture of State-provided or State-funded services on the one hand and privately provided and insurance funded services on the other. There are three broad categories of healthcare services: primary healthcare, which is that provided immediately by general practitioners, dentists and other healthcare workers directly to their patients; secondary healthcare which is mainly medical treatment carried out in hospitals, clinics and other facilities; and tertiary healthcare which comprises nursing homes, convalescent homes and similar facilities. The HSE has a variety of roles in each of these areas.

5. Public healthcare in the State is provided through the defendant. Private healthcare must be paid for by patients or by their insurers. The defendant owns and operates hospitals and other healthcare facilities in which public patients are treated. The defendant's public hospitals also have a substantial proportion of beds in which private patients are treated and for which the defendant charges the patients or their insurers. A major sector of the healthcare system, however, is made up of the private or "voluntary" hospitals in which private/insured patients are treated. A substantial number of "public" patients are also treated in voluntary hospitals and the cost of their treatment is borne by the State and paid for through the defendant. Hence the description of the healthcare system as being "mixed".

6. It goes without saying that the availability of a nationwide ambulance service is crucial to the delivery of effective healthcare services, both emergency and non emergency services. Patients need to be brought to hospital from home or the scenes of accidents and to be transferred between hospitals or other facilities often over long distances and under conditions requiring critical medical or paramedical care or supervision. In Ireland the ambulance services have also been "mixed" in the sense of being largely supplied by the defendant's National Ambulance Service and partly by private operators such as the plaintiff, as well as by the Fire Brigade ambulance services of local authorities and the services of medical aid organizations such as St. John's Ambulance and the Order of Malta. As indicated, the defendant's National Ambulance Service is the single biggest fleet of ambulances in the State comprising some 400 ambulances operating from 83 ambulance stations. The plaintiff, on the other hand, has been providing ambulance transport services for both public and private patients in the State since it was established in 1999. As of December 2011, it claims to have a fleet of 38 vehicles and to employ 68 personnel including highly trained paramedical staff who operate the vehicles. It is one of a number of undertakings providing ambulance services on a commercial basis throughout the country. The plaintiff points out in evidence that such operators have offered such services for over 50 years since at least the establishment of the Waverly Ambulance Service in the mid-1950's.

7. Those availing of the health services within the State fall broadly into two categories. Public patients are those whose costs of treatment (including ambulance transport,) are met by the State through the defendant out of public funds. Private patients bear the cost of treatment (including any ambulance transport) themselves and mainly by means of health insurance.

8. Although the plaintiff has been providing ambulance services for the defendant from its commencement of operations in 1999, it has done so since 2008 under a series of contracts concluded with the HSE following tenders for a "Framework Agreement" followed by a series of what are called "mini-competitions". Thus, in May 2007, the HSE invited "requests to participate" in a tender process for the provision of ambulance transport services by private operators for the defendant's patients in three categories: emergency response services; patient transfer services to and from hospitals and health facilities; and inter-hospital critical care services.

9. The plaintiff was successful in its tender and became the "first option provider" under a "multi-supplier framework agreement" which

came into operation at the beginning of2008. The Framework Agreement was expressed to operate for a period of 24 months with the possibility of being extended for a further 12 months. Following "mini-competitions" in 2008 and 2009, "service level agreements" were entered into by the plaintiff with the HSE in July 2008, and July 2009 for terms of 12 and 18 months respectively to provide those services. In each agreement it was stipulated by the defendant that while it expended approximately €5.5 million per annum on such services, no warranty was given as to the level of expenditure which would be made during the contract period.

10. According to the plaintiff, the services which it supplied under those contracts in the years 2008 to 2010 were valued at €2.3 million per annum of which approximately €1.6 million represented inter-hospital critical care services for public patients and approximately €700,000 represented emergency transport services for public patients.

11. In June 2011, the HSE issued an invitation to tender for a new framework agreement for patient transport services that would replace the 2008 Framework Agreement. Under this invitation to tender the scope and type of service required by the HSE was altered and reduced in that it covered "non-emergency patient transfer services" and, only "in very exceptional circumstances," any inter-hospital critical care services. Thus emergency response services were no longer included and the invitation stated clearly "it is anticipated that the use of external providers will decrease over time". It is this change of strategy or policy on the part of the HSE to reduce its reliance upon services contracted from private operators that is at the heart of the plaintiffs claim in this proceeding. The plaintiff alleges that it is the intention of the HSE to eliminate reliance upon private operators entirely in respect of emergency response services and to have recourse to them for inter-hospital critical care services only in "very exceptional circumstances". The plaintiffs evidence is that the emergency response work allocated to it reduced from €976,000 in 2008 to €159,000 in 2010 and that in 2011, no emergency response work had been allocated to it. These changes are not disputed as matters of fact by the HSE - it asserts that this something that it is perfectly entitled to do.

12. All uses made of ambulances for particular jobs whether by the NAS, the plaintiff, the fire brigade ambulances of local authorities or of other charity or private operators originate in telephone calls made to a number of call centres operated by the defendant. Whether the call is a 112/999 emergency call or a request for the transfer of a patient from one hospital to another made by a hospital, it is received in the relevant call centre and then allocated according to the protocol or rota described in more detail in the Court's judgment in *Medicall Ambulance Limited v. Health Service Executive* [2011] 1 IR 402 at paragraphs [4] -[9]. ( The *"Medicall case").* The ambulance fleet of the defendant is used primarily for the transport of its public patients and for the emergency response service. (In the Dublin area the emergency response service is provided on behalf of the defendant by the Dublin Fire Brigade service.) The emergency response services are provided without regard to whether the patient involved is a public or private patient. According to the defendant, in non emergency cases, the NAS only becomes involved in transporting a private patient where no private ambulance provider is available and the NAS is looked to as a last resort. When that happens, a non-profit charge equivalent to the economic cost of the job is made to that patient or the patient's insurer. Thus, it is strongly maintained on the part of the defendant that it is not involved in any economic activity and is not operating in any market so far as services of transport by ambulance of public patients are concerned. It asserts that no market exists for ambulance services provided for public patients.

13. That, accordingly, is the context in which the Court directed that a series or preliminary issues be tried as follows:

> 1. In the market for the provision of ambulance services for inter-hospital transport of patients and for emergency services, does the defendant operate as an "undertaking" in the sense of the definition of that term in s. 3(1) of the Competition Act 2002 (as amended)?
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> 2. If so, how is that market to be defined and in particular are there distinct markets or sub-markets to be defined by reference to the uses made of ambulances for transport of public as opposed to private patients, for emergency services or otherwise?
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> 3. In such a market or markets does the defendant operate as an "undertaking" as so defined when purchasing ambulance services to supplement the services of its National Ambulance Service?
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> 4. If so, does the defendant occupy a dominant position in the relevant market as a purchaser of such services?
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> 5. If so, does the defendant have an obligation by virtue of s. 5 of the said Act to maintain or to continue to make any level of purchases of services from private undertakings and particularly from the plaintiff?
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> 6. Does the defendant have any such obligation to refrain from conduct that has the object or effect, including the potential effect, of diminishing or eliminating the extent of the plaintiffs participation in that market?

14. It will be noted that although the pleadings referred to above also invoke an infringement of Article 102 TFEU (abuse of a dominant position,) these preliminary issues are concerned only with the analogous rule in s. 5 of the Competition Act 2002. The Court is satisfied that the issues raised in this litigation fall to be considered exclusively by reference to that Act. The services which are the subject matter of the plaintiffs claims are entirely domestic in character and extent. No evidence has been put before the Court as to the existence or potential existence of any element of "effect on inter State trade" such as would possibly bring into play the duty of the Court to apply Article 102 TFEU pursuant to Article 2 of Regulation 1/2003 and no facts have been pleaded which would support such an assertion. The services purchased by the defendant which are the subject of the plaintiffs grievances are confined to transport of patients to and from and between hospitals and other locations within the State and there is no evidence of offers by, or interest, on the part of inter-state service providers in participating in such operations.

15. It is convenient to address together in the first instance the issues 1), 2) and 3) at paragraph 13 above. As already indicated, much of the argument between the parties has been directed at the first issue as to whether in the particular circumstances of this claim and the markets to which it is alleged to relate, the HSE is to be taken as "an undertaking" for the purpose of s. 3(1) of the Act of 2002.

16. The definition in that subsection is as follows: ""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".

17. Understandably, the plaintiff relies heavily in its submissions on this issue upon the judgment of this Court in the similar case of *Medicall* (supra para. 12,) in which that definition was considered and in which it was held that the HSE was indeed to be treated as an "undertaking" in relation to the particular operations of its National Ambulance Service which were at issue in that case. It is clear, however, that the findings made by the Court in that case are not determinative of the issues now before the Court, because there are at least two important differences between that and the present case. As explained in more detail in the *Medicall* judgment (see in particular paragraphs 4- 9,) that case is concerned primarily with the role of the National Ambulance Service in the provision of

transport for private patients. (The judgment in question deals with preliminary issues; the substantive case remains outstanding.) That plaintiffs claims are directed at the operation of the "Booking Protocol" introduced by the HSE to govern the way in which calls for ambulances for private patients were allocated amongst the private operators and, as a last resort when none was available, to the NAS fleet. The Court held that in those circumstances the HSE fell to be regarded as a "undertaking" because, in effect, its fleet was present on a commercial market for private ambulance services (even if only as a last resort,) and for which it made a non-profit charge; and also because its fleet was made available (for gain,) in the "events market" where private operators were also interested in making services available. Thus, the *Medicall* case was concerned with the operations of the National Ambulance Service in providing transport services in areas where private operators also provided, or were interested in providing, services on a competing, commercial basis. Secondly, the present claim is not directed at the HSE as a provider of such services, but as a purchaser of private ambulance services for the purpose of supplementing its own publicly provided service. Thus, unlike the *Medicall* case, the present case is exclusively (or almost exclusively,) concerned first with services provided in respect of public patients, the cost of which is borne by the State and, secondly, with the role of the HSE as a purchaser of services in discharge of its public functions as a health authority.

18. In these circumstances, a number of questions obviously arise. How is the statutory definition to be construed and applied in the case of an entity which provides a variety of services, some of which are considered to be provided "for gain" while other similar services are provided without charge pursuant to a statutory social function or, in the vocabulary of EU competition law (see below) on the basis of "the principle of national solidarity", i.e. where the cost is borne from public funds? If a service provider is an undertaking for some of its services, is it necessarily so for all of its activities, or is it appropriate to treat it as an "undertaking" only in respect of those services where it is engaged in providing them "for gain"? Furthermore, if the entity is an undertaking by reason of its presence on the supply side of a market as a provider of services, is it also to be treated as an undertaking on the demand side when purchasing such services for its own use?

19. As is often noted, one of the distinctions between the national competition regime in this country and the prohibitions contained in Articles 101 and 102 TFEU is that the Treaty contains no definition of "undertaking" comparable to that ins. 3(1) of the Act of 2002. It is well settled in EU law that any entity engaged in an "economic activity" is liable to be considered an "undertaking" irrespective of its legal status or whether it has a profit-orientated commercial purpose. In his judgment on behalf of the Supreme Court in *Competition Authority v. O'Regan* [2007] 4 I.R. 737 at 760, Fennelly J. adopted as a statement of the constant law on the notion of "undertaking" in Union law the description of the Court of Justice in Case C-41190 *Hofner & Elser* [1991] ECR 1-1979 para. 21:-

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

Thus, the distinction of the Irish definition is the element of being engaged "for gain" in the production, supply or distribution of goods or the provision of a service. The term "for gain" was considered by the Supreme Court in *Deane v. VHI* [1992] 2 I.R. 319. The Court rejected an argument to the effect that an "undertaking" had to be engaged in the market for the purpose of making a profit and held that the term connoted "merely an activity carried on or a service supplied...which is done in return for a charge or payment". It is instructive to note that the approach of the Supreme Court was based upon canons of construction of common law while acknowledging the fact that the Irish Act had been explicitly adopted, according to its long title, by analogy with the EU provisions. The Court's analysis harked back to the case of *In re Arthur Average Association for British, Foreign and Colonial Ships* (1875) 10 L.R. Ch. App. 542.

20. It is important, therefore, to bear in mind that the Act of 2002 remains a national statute and accordingly falls to be construed according to the canons of statutory interpretation in Irish law subject, of course, to such force as falls to be given to the explicit reference in the long title to its having been "enacted to make new provision, by analogy with" what are now Articles 101 and 102 TFEU for the prohibition of activities which prevent, restrict or distort competition. There has, however, been an important development since the Supreme Court judgment in the Deane case which must also be borne in mind whenever it is necessary to reconcile the national and EU competition rules, namely, the "modernisation" regime embodied in Council Regulation No. 1/2003(EC) of 16th December, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (O.J. L1 of 4.1.2003 p.1 ).

21. As is well known, Regulation No.l/2003 effected an important restructuring of the relationship between the EU institutions and the Member States in the enforcement of EU competition rules by, *inter alia*, extending to the national competition authorities and national courts, adjudication, exemption and enforcement functions hitherto reserved to the European Commission. To this end, Article 3.1 of the Regulation provides that:-

> "...Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by [Article 102] of the Treaty, they shall also apply [Article 102] of the Treaty."

22. It is also relevant to note that under Article 35 of the Regulation, the Member States were required to designate:-

> "the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts."

The High Court has been so designated by the European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 (S. I. No.195/2004.)

23. Although, as mentioned in para. 14 above, the present case falls to be decided by reference to s. 5 of the 2002 Act, it is relevant to refer to the provisions of EU law and the associated case law because it is obviously desirable to ensure that, so far as national rules of statutory interpretation will permit, divergences of interpretation in the application of the prohibitions are not unnecessarily created between ss. 4 and 5 of the Act of2002 and the approach of EU law to Article 101 and 102 TFEU given that it will fall to the competition authorities of the State (including the designated courts,) to apply both sets of provisions simultaneously in appropriate cases. Moreover, while the issues raised by the questions suggested in paragraph 18 above are novel under the Act of 2002, they have received consideration in case-law at Union level and the cases in question are helpful as illustrations of the approach to market analysis even if they do not constitute legal precedent for statutory interpretation in the common law sense.

24. It is necessary, therefore, to consider first the precise scope of s. 5 in relation to the claims made by the plaintiff. The plaintiff alleges that the defendant is an "undertaking" which abuses a dominant position in the operation of the State's largest ambulance fleet in a manner which is intended to reduce and eventually eliminate the defendant's reliance upon supplementary services

previously purchased by it for its public patient operations from the plaintiff and other private operators. Bluntly put, the plaintiff alleges that the HSE is abusing its position as operator of the State's largest ambulance fleet in a way which has as its purpose or consequence to exclude the plaintiff and other private undertakings from what it says is an existing commercial market for the provision of services for transport of public patients.

25. Taking a literal view of the plain meaning of the words in the definition, that claim does not obviously come within the scope of the 2002 Act. The definition is clearly focused on the supply side of transactions namely, the production, supply or distribution of goods or the provision of services and is thus addressed to the manufacturers, suppliers and distributors of products and the providers of services. An entity which is a purchaser of goods or services for its own exclusive use and end consumption would not, according to the ordinary meaning of the words used, appear to be acting as a "provider" of services if that is the activity which is to be considered.

26. Furthermore, insofar as the plaintiffs claim is directed at its exclusion from what is says is a market for the transport of public patients on behalf of the defendant, it cannot, in the view of the Court, be said that the HSE operates its ambulance service in that regard "for gain". When the NAS fleet is deployed on emergency services or for the purpose of transporting public patients, no charge is made and the cost is borne through the HSE budget by the State from public funds according, in the language already referred to above, to "the principle of national solidarity". Thus, if the definition is applied according to its plain meaning to the activities of the defendant in transporting public patients for treatment either in the HSE's own hospitals or in voluntary hospitals where their treatment costs are borne by the HSE, the activities would not seem to constitute services provided "for gain" and therefore to fall outside the scope of the Act.

27. It is true of course, as is apparent from the judgment in the *Medicall* case that the HSE is also engaged in the provision of ambulance services for gain when it makes its fleet available, albeit on a non-profit basis, to transport private patients or stand-by cover in the so-called "events" market. For the reasons which will be explained below by reference to the analogous provisions of EU law, however, this fact is not necessarily sufficient to bring its public function services within the scope of the s. 5 prohibition.

28. As already mentioned above, the role of public authorities as "undertakings" for the purpose of Article 102 TFEU and the basis for distinguishing between their public or social functions on the one hand and their economic or commercial activities on the other, has been the subject of consideration in a number of cases of the European Courts over the years. These have included, in particular, cases concerned with the functions of public authorities in the health sector. It is appropriate, accordingly, to consider the approach thus adopted by the European Courts not so much as a matter of legal precedent, as providing a useful illustration of the economic rationale adopted in applying the Treaty prohibition. In doing so, however, it is important to bear in mind the other major distinction between the prohibition regime of ss. 4 and 5 of the Act of 2002, and that of Articles 101 and 102 TFEU. This is the presence in the latter regime of Article 106, which reaffirms the proposition that a public authority can be an "undertaking" to which the prohibitions apply, while at the same time mitigating the prohibitions by recognising that in the cases of undertakings entrusted with the operation of services of general economic interest, the prohibitions apply only to the extent that compliance with the rules does not obstruct the performance, in law and fact of the tasks which have been assigned to them. Clearly, no analogous provision has been adopted in the Act of 2002, in relation to such undertakings within this Member State.

29. In the *Euro Control* case (case C-364/92 SAT *Fluggesellschaft mbH v Eurocontrol* [1994] ECR 1-0043), the Court of Justice was required to consider the question as to whether Eurocontrol, a public body established by international Convention with responsibility for overseeing air traffic control and navigation services in Europe was an "undertaking" within the meaning of Articles 86 and 90EC [now102 and 106TFEU]. As such, Eurocontrol was responsible for collecting charges levied on airlines using air navigation services under a common system agreed between the states who were parties to the Convention, including Member States of the European Union. The applicant company had refused to pay charges levied upon it, and argued before the Belgian Court that Eurocontrol had abused a dominant position by fixing its charges at variable amounts for services which were essentially the same. It was argued that both the services involving the collection of route charges and the other research and coordination activities carried on by Eurocontrol were economic activities well capable of being carried on by bodies covered by private law and that air navigation control was itself an economic activity. The European Commission and the Member States supporting it, maintained that Eurocontrol was not an undertaking for the purpose of the Treaty provisions upon the basis that it was a public authority exercising powers conferred upon it in the interest of public safety. Air navigation control is a task of public authority in the interest of protecting both users of airlines and the populations over which airlines fly.

30. In its judgment (para. 18) the Court of Justice reiterated its basic statement in the case of *Hofner & Elser* that"... in Community competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". It then examined the nature of Eurocontrol's activities which it found comprised research, planning, coordination of national policies, staff training in the area of air traffic control as well as its function of establishing and collecting route charges for use of air space. It found that the particular "rate per unit" which formed the basis of the charges was not fixed by Eurocontrol but by the contracting states involved, each of which fixed a rate for use of its own air space. The Court noted as relevant the fact that under its rules Eurocontrol was "required to provide navigation control in that air space for the benefit of any aircraft travelling through it (the airspace), even where the owner of the aircraft has not paid the route charges owed to Eurocontrol" (para. 25).

31. The Court held (at paras. 27 and 28) that Eurocontrol therefore was involved in tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety and that "the collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organisation's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services ... Euro control must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers" as the Court had earlier held in Case 29/76 *L.T U v. Eurocontrol* [1976] ECR 1541. It concluded: "Eurocontrol acts in that capacity on behalf of the Contracting States without really having any influence over the amount of the route charges. Responsibility for the fact ... that the amounts of the charges vary in time or with respect to the areas overflown, cannot be attributed to Eurocontrol, which merely establishes and applies a common formula in the circumstances set out above, but to the Contracting States which set the amount of the rates per unit. 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". (paras. 29/30).

32. This case illustrates on the one hand the fact that a public authority irrespective of how it is established or financed or of its legal status can in principle be "an undertaking" if it is engaged in an economic activity. On the other hand, it also illustrates the fact that such a public undertaking will nevertheless be excluded from the competition rules even where it is engaged in the provision of a service which could conceivably be carried out by private undertakings and even where it makes a charge for those services; provided it is performing those services exclusively in exercise of its powers as a public authority with the objective of securing a

benefit in the public interest.

33. The next and more obviously analogous case is that of *Ambulanz Glöckner* which was examined in detail in the Court's judgment in the *Medicall* case. *(Firma Ambulanz Glöckner v. Landkreis Sudwestpfalz* case C475/99 [2001] ECR 1-8089).

34. Under the relevant German legislation the provision of ambulance services was regulated and operators were required to be licensed. The issues posed for the Court of Justice in the case arose when the applicant, a private undertaking providing ambulance services, was refused a renewal of its licence by the relevant local authority. The legislation distinguished between two types of ambulance service: emergency transport and patient transport. The law permitted the competent authority in each administrative area to entrust the operation of public ambulance services to the recognised medical aid organisations (the equivalents of the Red Cross, St. John's Ambulance, Order of Malta etc.), and also provided that the service might be assigned to other operators only if the medical aid organisations were unwilling or unable to operate the service. When the applicant applied to the respondent authority for its renewal the latter invited the two medical aid organisations currently operating the public ambulance service in the area to give their views on the effects such a renewal would have. The response was that the organisations' facilities in the area were not being fully exploited and were operating at a loss so that the addition of a new operator would require them either to increase charges or reduce services. On that basis the renewal was refused. On appeal against the refusal, an issue arose before the German Court as to whether such an arrangement conferring a monopoly on the medical aid organisations was compatible with Articles 101, 102 and 106 TFEU.

35. In considering the question as to whether in those circumstances the medical aid organisations operated as "undertakings" the Court held at para. 20 of its judgment:

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

36. Once again, accordingly, the Court of Justice confirmed that for the purpose of Article 102TFEU the mere fact that an entity was entrusted with pubic service obligations or special or exclusive rights or was financed from public funds did not preclude its activities from being regarded as economic activities.

37. The Court proceeded, however, to consider whether there had been an infringement of Article 106(1) in conjunction with Article 102, that is, an abuse of dominant position on the part of the medical aid organisations as undertakings endowed with special rights. The Court upheld the Commission argument that there were two different service markets, namely, that for emergency transport, and the market for patient transport. It said:

> "Whilst the services in question are related, they are still not interchangeable or substitutable by reason of their characteristics, their prices or their intended use. Not only do non-emergency transport services not necessarily offer a valid substitute for emergency transport services, which require highly qualified personnel and particularly sophisticated equipment 24 hours a day, but emergency transport, which is particularly costly, cannot be regarded as a valid substitute for non-emergency transport."

38. It then pointed out that the mere creation of a dominant position by the grant of special or exclusive rights to an undertaking did not involve an infringement of Article 102. An infringement will only arise where the undertaking in question, by mere exercise of those rights, is led to abuse its dominant position or where such rights are liable to create a situation in which the undertaking is led to commit abuses. The court also pointed out however, that an abuse would occur where, without any objective necessity, a dominant undertaking on a particular market reserves to itself an ancillary activity which could be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from that undertaking. (para. 40). The applicant in the case had argued that it was excluded from the market for patient transport because the legislative provision in question enabled the medical aid organisations to restrict access to the market when consulted by the public authority. The Court concluded that:

> "In enacting (the relevant statutory provision) the application of which involves prior consultation of the medical aid organisations in respect of any application for authorisation to provide non-emergency patient transport services submitted by an independent operator, the legislature of the (Land of Rheinland-Pfalz) gave an advantage to those organisations, which already had an exclusive right on the urgent transport market, by also allowing them to provide such services exclusively. [The provision] therefore has the effect of limiting markets ... to the prejudice of consumers within the meaning of Article 102(b) of the Treaty by reserving to those medical aid organisations an ancillary transport activity which could be carried on by independent operators."

39. The Court then proceeded to consider the question as to whether such a provision could nevertheless be justified under Article 90(2) of the Treaty and held that it could, "provided that it does not bar the grant of an authorisation to independent operators where it is established that the medical aid organisations entrusted with the operation of the public emergency ambulance service are manifestly unable to satisfy demand in the area of emergency transport and patient transport services".

40. The ambulance *Glöckner* case is, accordingly illustrative of the following basic points:-

> (a) The provision of emergency and non emergency ambulance services for which users are charged is an economic activity irrespective of the status or funding of the service provider;
>
> (b) The mere fact that the services are provided by non-profit, charitable organisations does not preclude those organisations qualifying as undertakings;
>
> (c) The assignment by law of ambulance service provision to a limited number of such organisations does involve conferring on them a special or exclusive right for the purpose of Article 106 TFEU;

(d) If such a statutory provision involves the licensing authority in consulting incumbent emergency service providers before licensing an additional entrant to the market for non-emergency services, an infringement of Article 102TFEU may arise, in that it prejudices consumers by giving an advantage to the incumbent service providers thereby enabling them to exclude a competitor from a neighbouring market for non emergency services. (para. 43).

(e) Nevertheless, such a provision may be justified under Article 106(2) TFEU if it is shown that it does not prevent the licensing of an independent operator where the incumbent providers are manifestly unable to satisfy demand for non-emergency services.

41. Questions arising out of the overlap between regulatory functions and the provision of potentially economic services were also raised for consideration by the Court of Justice in case C-49/07 *MOTOE* [2008] ECR 1-4863. The Greek Automobile Club - ELPA - had dual roles in that it was responsible for organising motor sports competitions and also participated in the authorising by a public body of motor cycle events under Greek law as its consent was required by the licensing authority. The applicant MOTOE was an independent motor cycling association which had sought to organise its own motorcycling events in Greece, but obtained no authorisation from the public authority because ELPA refused its consent. In those circumstances, a question arose as to whether the activities of ELPA as a non profit organisation for sporting activities came within the scope of Articles 102 and 106 TFEU.

42. The Court noted that in addition to its regulatory activities ELPA was also involved in organising motor cycling events, and for that purpose was entering into sponsorship, advertising and insurance contracts in connection with such events as a source of income to the organisation. The Court reaffirmed the basic proposition that the fact that an entity is entrusted with the exercise of public powers does not prevent it from being classified as an undertaking for the purpose of the competition rules in respect of other activities in which it is engaged as economic activities. (para. 25 of the judgment). The Court said:

"In the present case, it is necessary to distinguish the participation of a legal person such as ELPA in the decision-making process of the public authorities from the economic activities engaged in by that same legal person, such as the organisation and commercial exploitation of motor cycling events. It follows that the power of such a legal person to give its consent to applications for authorisation to organise those events does not prevent its being considered an undertaking for the purposes of Community competition law so far as concerns its economic activities ...."

43. The Court then proceeded to examine whether ELPA occupied a dominant position in respect of its different activities and concluded that in respect of its organisation and authorisation of motor cycling events it had not been entrusted with the exercise of those activities by active public authority. Its power to consent to authorisations for the organisation of motor cycling events under the Greek road traffic code did derive from an act of public authority, but could not be classified as an economic activity. For that reason ELPA could not be considered an undertaking entrusted with a service of general economic interest within the meaning of Article 106(2) TFEU. The Court then concluded (para. 53):

"... that a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motor cycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 102 and 106 TFEU. Those Articles preclude a national rule which confers on a legal person, which organises motor cycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review".

44. A further case considered by the Court of Justice which is particularly apt to the circumstances of the present case is that of case C-205.03P *FENIN* which concerned an appeal by an association of undertakings operating in the market for medical goods and equipment used in hospitals by the Spanish National Health Services (the SNS) against a decision of the European Commission refusing its complaint of abuse of dominance on the part of the public agencies of the SNS responsible for purchasing and paying for such goods. It was alleged that they collectively held a dominant position in the market for the purchase of such goods and equipment and that they abused that position by delaying considerably in paying invoices submitted by members of the applicant association. The matter came before the Court of Justice on appeal against the judgment of the Court of First Instance which had upheld the Commission decision to the effect that the competition rule in question did not apply to those bodies because they were not undertakings.

45. In his opinion of the 10th November, 2005, the Advocate General underlined the difficulty of that issue in some introductory remarks:-

"While it is accepted that certain tasks in the public interest such as the maintenance and improvement of air navigation safety and the protection of the environment are not economic in nature, it is less easy, where activities are linked to the operation of the national social security system, to determine when they may be classified as non-economic, since the case law in this field undertakes a case by case analysis and asks whether the principle of solidarity requires that the application of the Community competition rules be excluded. It is difficult to specify the circumstances in which that principle will result in an activity being classified as non economic in nature....Two issues are of particular importance. It is necessary, first, to establish whether the fact that the activity carried on by that body is subject to the principle of solidarity prevents it being classified as an undertaking and, secondly, whether it is possible to separate its purchasing activities from those of providing health services."

46. In considering the first of those issues the Advocate General found it useful to look at the case law of the Court of Justice in the area of freedom to provide services and pointed out that in that context the Court had ruled that medical services fall within the scope of Article 50 of the EC Treaty [now Article 57TFEU], and it was clear that medical services did not cease to be "services" within the meaning of the Treaty for purposes of the freedom of movement principles merely because they were not provided in return for remuneration. He pointed out that in Case C-157/99 *Gerats-Smits and Peerbooms* [2001] ECR 1-5473, the Court had held that health services provided free of charge by hospitals are services within the meaning of Article 49 EC [now Article 56TFEU]. Nevertheless, he acknowledged that the scope of freedom of competition and freedom to provide services under the Treaty are not identical and that there was nothing to prevent a transaction involving an exchange qualifying as a provision of services even where the parties to the exchange are not undertakings for the purpose of the competition rules. He noted however, that the information before the Court had indicated that some health care services were provided in Spain by the private sector and on that basis he recommended to the Court of Justice that the matter be referred back to the Court of First Instance for the purpose of having findings of fact made to determine whether or not the bodies responsible for the management of the SNS activities were engaged in activities which were economic in nature.

47. The Advocate General proceeded, however, to examine the remaining issue on the basis that the Court might uphold the lower court's view that the provision of free health care was a non-economic activity. The Court of First Instance had held that "it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, not the business of purchasing, as such". This was challenged on appeal on the basis that it was wrong in law to distinguish between the act of purchasing on the one hand and the subsequent use to which the purchased goods were put on the other. -26-

48. The Advocate General, however, agreed with the analysis of the Court of First Instance. He said:

> "Where public organisations carry out both economic activities and activities of another kind, it is only demand which is linked to their economic activities which may fall within the scope of competition law. By contrast, purchases intended for use in non-economic activities are comparable to final demand by consumers and are not subject to competition law. But it cannot be denied in the present case that the purchase of medical goods and equipment is linked to the activity of the SNS in providing health care services".

49. The Advocate General also pointed to the *Ambulanz Glöckner* case as supportive of the Commission's position. The conclusion that where a purchase is linked to the performance of non economic functions, it will fall outside the scope of competition law is "consistent with the economic theory according to which the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market. There is therefore no reason to set aside the judgment under appeal on the ground that it incorrectly interpreted the case law relating to whether or not a purchase is an economic activity".

50. His final observation was as follows:

> "It is true that it is sometimes difficult to separate economic activities from those which are not economic when they are carried on by the same body or organisation. However, and contrary to what the appellant contends, that difficulty does not change the criterion for determining whether competition law applies, which is that of the exercise of an economic activity. The inevitable result of that criterion thus remains that organisations carrying on mixed activities are subject to competition law only in respect of that part of their activities which is economic in nature".

51. In its subsequent judgment of the 11th July, 2006, the Court of Justice rejected the appeal and upheld the determination of the lower court on both issues. It did so, however, without considering it necessary to refer the issues of fact identified by the Advocate General back to the Court of First Instance. It held that part of the applicant's ground of appeal that the lower Court should have considered whether purchasing activity is economic in nature was a ground which had not been put forward prior to the appeal stage and was therefore inadmissible. (para. 21). It upheld the Court of First Instance however, in its determination that it is the activity of offering goods and services on a given market that is the characteristic feature of an economic activity and held "there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity".

52. Finally, for the purpose of illustration it is also useful to refer to another case closer to home and mentioned by the Advocate General a para. 24 of his opinion namely, the decision of the Competition Appeal Commission Tribunal in the United Kingdom on 1st August, 2002 in *Bettercare Group Ltd v. Director General of Fair Trading* (Case No. 1006/2/1/01 [2002] Competition Appeal Reports 299). That case concerned nursing home and residential care services for the elderly provided under statute by the North and West Belfast Health and Social Services Trust ("N&W") in the Northern Ireland. The N&W was both the owner of nursing homes, some of which were managed for it by private undertakings, and a purchaser of residential care services from private providers such as Bettercare. It had been complained that the N&W was abusing a dominant position because, as the sole purchaser of Bettercare services, it imposed unduly low prices. Thus, N&W was both providing residential care directly on its own account and was therefore in competition with private service providers such as the complainants; and, at the same time, it was purchasing the services of the private operators for the care of patients for whom it was responsible. The Director General had refused the complaint upon the ground that the "Trust was not engaged in purchasing care for its patients as an undertaking" because its service was being financed from public funds. The relationship between the Trust and Bettercare took the form of a standard contract under which the Trust agreed to pay an agreed price for the residential care in Bettercare nursing homes of residents placed there on its behalf. The choice of home was a matter for the patient/resident and the Trust agreed to pay Bettercare an amount greater than its agreed fixed price where the place chosen by the resident was more expensive, provided the difference was paid by a third party.

53. The judgment of the Tribunal contains a detailed and comprehensive review of the relevant case law of the Court of Justice (including some of the above cases) as at the date in question. It noted that in Northern Ireland there had been an important expansion in the provision of nursing and residential care for the elderly by private operators and that N&W had "contracted out" a large proportion of the residential and nursing services it was responsible to provide by purchasing beds from independent providers "on a considerable scale". It did so by entering into "agreements with the residents" placed in the homes of independent providers with a view to recovering from the resident the full cost, or such lesser proportion of the full cost as the resident can afford, as assessed in accordance with applicable regulations for the "beds" purchased by it from the independent provider. It also noted that where the Trust "itself offers residential care for the elderly in its statutory homes, that is again on the basis of full cost recovery or the recovery from the resident of such lesser amount as the resident can afford".

54. On that basis the Tribunal found that "contracting out" to independent providers "may properly be described as engaging in commercial transactions and services. In effect, the essence of many if not most, "economic" activities is the making of commercial contracts. North and West appears to be engaged, on a regular basis in entering to commercial contracts affecting some 30 homes managed by independent providers in (its) operational area. The independent providers in question are providing services for which North and West has a demand. That demand results from the fact that North and West has decided to fulfil its functions on the basis of commercial transactions.... In making such contracts, it seems to us that North and West is necessarily engaged in transactions of an economic character and thus in an "economic activity" for the purposes of the application of the competition rules". (see paragraphs.191-192 & 277.).

55. The Tribunal then proceeded to reject the argument that the activity in question would not be an "economic" activity because N & W was purchasing rather than selling services. It said: "It does not seem to us to matter that in this particular case North and West is the acquirer, rather than the offerer, of the services in question". It pointed out that the wording of s. 18(2)(a) of the Competition Act 1998 like article 102(2)TFEU, (and for that matters. 5(2)(a) of the Act of2002,) identifies as a possible abuse the imposition by a dominant undertaking either directly or indirectly of "unfair purchase prices" or "unfair trading conditions". Moreover, para. (d) of each of the three provisions in question identifies as another potential abuse the "making of the conclusion of contract subject to the

acceptance by other parties of supplementary obligations" and there did not appear to be any reason why that wording should exclude a dominant purchaser.

56. The Tribunal found that N&W was active in the market in question in that it ran eight residential homes of its own and was therefore offering that service in a market for residential care services where private operators were also engaged. The Tribunal also pointed out that N&W was not supplying its services gratuitously but sought to recover as much as possible of the costs from the residents in question: "It may not, in most cases, be able to recover the full cost, but it is undoubtedly remunerated for the activities that it carries on. That seems to us, again, to be "economic" activity."

57. The Tribunal also rejected the Director General's argument that N & W's activities were not economic activities because the Trust performed an exclusively social function based on the principle of solidarity. It considered that the activities of N &W had two dimensions, one, a "social dimension", and the other "business dimension". It was in error, it found, to focus exclusively on the former and to overlook the latter. It pointed out that although the funding of the N&W had a social purpose, it chose to carry out or deliver its functions by using business methods. Although the case in question was concerned with the exercise of the right of establishment and the opinion was not otherwise followed by the Court of Justice in its judgment, the Tribunal adopted the reasoning expressed by Advocate General Fennelly in his opinion in the *Sodemare* case (C-70/95 [1997] ECR 1-3395) at para.

> "The relations of other persons, as providers of goods or services, with such systems of social provision can, nonetheless, be economic in character. Community law requires that such systems comply with Treaty rules insofar as they affect the economic activity of others in ways which are not essential to the achievement of their social objectives ... Thus to the extent that Member States co-opt private economic operators into their social security systems, or contract out the provision of certain benefits to such operators, or subsidise the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, *inter alia*, the freedom of establishment."

58. The Tribunal took the view that the "contracting out" activities of N & W meant that private operators had been "co-opted into the social security system" so that the competition rules of the UK Act applied.

59. It is relevant to point out that the judgment of the Tribunal given on the 1st August, 2002, was handed down before the Court of First Instance gave its judgment in case T-319/99 *FENIN* on the 4th March, 2003, although subsequent to the original contested decision of the Commission in that case on the 26th August, 1999.

60. On the face of it, the approach of the Tribunal in *Bettercare* would appear to be at odds with that of the European Commission and the European courts in *FENIN.* In the view of this Court however, the divergence is explained by the fact that in *Bettercare* the N&W was also present as a competing service-provider on the market in which it was a purchaser of the same services and therefore potentially in a position to influence prices in it. In *FENIN* the SNS was engaged only in the purchase of goods on the market for its own end use. (The Court shares the view expressed by the Competition Authority on this difficulty as expressed at footnote 56 of its Decision ED/01/008 mentioned at paragraph 67 below.)

61. From this case law relating to the distinction between economic and non economic activities when engaged in by public authorities, it seems to the Court possible to distil a number of points which are of a guidance in understanding the scope of application of Article 102 TFEU:-

> (a) A public body funded from public monies and exclusively engaged in the exercise of entrusted functions which have the object of securing some public interest benefit will not come within the scope of the prohibition as an economic activity even where it makes a charge for the services it provides and notwithstanding the possibility that those services could be provided by private undertakings: *(Euro Control).*
>
> (b) A non profit organisation entrusted by law with responsibility for both emergency and non-emergency ambulance services maybe considered to engage in an economic activity in respect of its non emergency services when provided for remuneration where similar services are also provided by private operators: *(Ambulanz Glöckner)*
>
> (c) A public authority which occupies a dominant position in a service market by virtue of being entrusted with special rights in the public interest does not by virtue of that fact alone infringe Article 102, unless the very exercise of those rights lead it to commit an abuse;
>
> (d) Such an abuse may arise if the exercise of the right enables the undertaking to reserve to itself the provision of an ancillary service on a related but distinct market where private operators are present; *(Ambulanz Glöckner)*
>
> (e) Where the functions of a public authority involve it in activities some of which are economic and others are non economic, it will come within the scope of the prohibition in respect of the economic activities only and will not be excluded from it by the fact that its public functions are partly non economic;
>
> (f) A public agency exclusively engaged in providing services on a non economic basis in the public interest does not become engaged in an economic activity because it concludes contracts to purchase services from private operators provided it does so as an end user of those purchases in its non economic activity; *(FENIN)*
>
> (g) Where, however, a public authority is itself also engaged in providing services for remuneration in the market on which it purchases services for its own use, its activities may be treated as economic activities and it will then come within the scope of a prohibition*. (Bettercare)*

62. In the judgment of the Court, the rationale evident in the approach to the application of Article 102 TFEU does not appear to pose any difficulty for or require any altered interpretation of s. 2 of the Act of 2002. As already mentioned above, no special position is reserved in the Act of 2002 for public bodies or entities entrusted with special rights.. Any entity is capable coming within the scope of the prohibition ins. 5(1) if it is shown to be a body engaged for gain in the production, supply or distribution of goods or the provision of a service. While the Court has drawn attention to the supply side orientation of the definition it does not follow that the prohibition is incapable in appropriate circumstances of applying to a dominant undertaking when it is alleged to abuse its dominance by the exercise of purchasing powers. As already pointed out above, by reference to the *Bettercare* case, s. 5(2) includes amongst its examples of abuses that of imposing unfair purchase prices. In the view of the Court, the distinction is this. To qualify as an "undertaking" the body must be engaged for gain in an activity on the supply side, that is, for present purposes, as the provider for gain of some service. Once that condition is satisfied, however, purchasing activities related to its provision of services may come under scrutiny for the purpose of section 5. A simple example can be given. Suppose a public agency is charged by law with, say,

providing student text books to all schools in the State: it supplies its books at cost and is an undertaking because it is thereby engaged in those activities for gain and the supply and distribution of books is an economic activity which can be carried out by private operators. If in that capacity the agency is a major consumer of specialist printing services and is judged to be dominant as a purchaser in the market for printing services, an attempt by it to impose unfair purchase prices on its suppliers will expose it to scrutiny under s. 5(1) of the Act.

63. The claims made by the plaintiff in the present case, however, are concerned with the role of the defendant in the provision of ambulance services for the transport of public patients. The complaint made by the plaintiff is that since 1999, it has been in the business of providing emergency and non emergency services both to the public hospitals and to the private and voluntary hospitals and in respect of both public and private patients. Since the adoption of the new contract regime in 2007, the plaintiff has seen its provision of emergency services eliminated and its provision of the two classes of non emergency services radically reduced during 2008 and 2009. The terms of the 2011 proposal explicitly envisage the elimination by the defendant of any reliance upon supplementary services purchased from the plaintiff and the other private operators. The plaintiff thus pleads that these actions on the part of the defendant "constitute an abuse of the defendant's dominant position in the market for the provision of ambulance services for public patients contrary to the prohibition in s. 5(1) of the Act of2002".

64. In the judgment of the Court, this is a situation in which it is necessary to make the distinction illustrated in the approach of the European Union case law set out above, namely, the distinction between the economic and non economic activities of a body which is both required and empowered by law to provide a variety of services with an objective of securing a public interest benefit. Where a body has mixed tasks assigned to it, some of which are economic and others are not, it is necessary, as the Advocate General pointed out in the FENIN case (supra paragraph 50,) to separate them because it is only in respect of its economic activities that it comes within the scope of the competition rules.

65. As the plaintiff has emphasised, the HSE has statutory obligations to provide wide range of health care services under the Acts, but by virtue of s. 57 of the Health Act 1970, it is empowered to make arrangements for the provision of ambulance services without being under a statutory obligation to provide them directly through its own fleet. While this is undoubtedly so, the issue before the Court is not dependent upon the construction of the defendant's statutory obligations or powers, but on an analysis of the nature of the functions which it actually performs in practice. In that regard the evidence before the Court clearly indicates that there is a distinction to be made between the defendant's functions in providing emergency services and non-emergency ambulance services for the transport of public patients on the one hand and its involvement in services provided to private patients on the other. In the judgment of the Court, it is quite clear that in the use of its NAS fleet both for emergency services and for the transport of public patients, the defendant is not "engaged for gain in the provision of a service". In neither case is any charge made nor remuneration obtained by the defendant and, in the case of emergency services, that is so even though the patient or victim carried in the emergency may subsequently turn out to be an insured private patient. The public patient service is also distinguished from the services provided for transport of private patients by the fact that, as the plaintiff itself points out, the services to public patient are provided almost in their entirety (99%) by the defendant's fleet while the private patient services are supplied by the plaintiff and a considerable number of other private operators and are provided by them on a commercial basis "for gain". According to the evidence, it is only in instances of "last resort" when no private operator vehicle is available for a particular private patient service that the NAS fleet may be called upon for a specific job.

66. It is true, of course, that while not "engaged for gain" in providing ambulance services for the transport of public patients the defendant has and still does to a diminishing extent, seek to supplement its own services when necessary by purchasing services from the plaintiff and other economic operators. It also the case that the defendant sees itself as applying a commercial approach to such purchases. Thus, in the letter of 21st July 2009 concluding the 18 month Service Level Agreement to commence on 1 August of that year the defendant expressly reserved to itself (and the plaintiff by signing the letter accepted,) "the right to test the market at any time during the 18 month contract" and to "... make alternative arrangements for some or all of the work ... if it is more economically advantageous to do so." (Under s. 7 of the Health Act 2004 the defendant is charged with the statutory objective of using its available resources "in the most beneficial, effective and efficient manner" and a duty, to the extent practicable, to further that object.) This does not, however, have the result in the view of the Court that by making arrangements for such supplementary purchases the HSE is, in the words of Advocate General Fennelly in the *Sodemare* case (supra paragraph 57), co-opting private economic operators into its system for providing public health services. It makes the purchases as an end user of those services for the transport of patients for which it has statutory responsibility in delivering hospital treatment and health care. In that regard its position is clearly distinct, in the view of the Court, from the situation considered by the UK Tribunal in the *Bettercare* case discussed above in which the N&W charged for all of its services whether provided by it directly in its own homes or provided for it by *Bettercare* in the latter's homes.

67. This conclusion is, in the view of the Court, consistent with the assessment made by the Competition Authority in its Enforcement Decision (ED/01/008) of 10 October 2008 (where the Community law rules were being applied,) in which it decided that the HSE was not acting as an undertaking when it negotiated with the pharmaceutical industry to secure reductions in the ex factory prices of certain drugs nor when purchasing pharmacy services from private pharmacy undertakings for provision to the general public. The Court does not consider that there is any material distinction to be made between the role of the HSE in those activities and its role in purchasing supplementary ambulance services for the needs of its public patients.

68. Nor, in the judgment of the Court, is this assessment of the defendant's role as an ambulance service provider for public patients altered by the fact that, as the Court held in the *Medicall* case, it falls to be treated as distinctly involved in an economic activity when making use of its fleet "for gain" for the transport of private patients or in the so-called "events" market. The HSE is not alleged to be a dominant undertaking as a supplier of those services in that market by reason of the size of its fleet or the volume of the services it offers. In essence, its dominant position is claimed to be attributable to its control over the allocation of specific jobs by virtue of its being the exclusive operator of the control centres through which requests for services are directed.

69. For sake of completeness, in view of the plaintiff's reliance on cases such as Case C-7/97 *Oscar Bronner GmbHv Mediaprint* [1978] ECR1-7791, and Case 418/01 *IMS Health GmbH v. NDC Health* [2004] ECR 1-5039, the Court should make it clear that it does not find that the circumstances of the present case can be characterised as an instance of a "refusal to supply" or of "refusal of access to an essential facility". As already indicated, the HSE does not engage in an economic activity in providing emergency and public patient ambulance services; and such services as it purchases from economic operators like the plaintiff are acquired for its own end use only. It is an essential feature of the rationale of those cases that the impugned refusal is by an "undertaking" and one which is dominant in one market and that access to the property or facility which is the subject of the refusal is necessary to enable a complainant undertaking to enter or to operate upon an adjacent or ancillary market where there is a demand for its goods or services or for some new product or service which it seeks to provide. Those elements have not been shown to be present here and the reduction in HSE purchases of public patient transport services does not have any proven or claimed effect on the ability of the plaintiff to continue to operate on the market for the provision of private patient transport services.

70. For all these reasons the Court is satisfied that it is appropriate to reply to the first three issues identified in para. 13 above by holding first, that in the particular circumstances of the operation of ambulance services in the State a clear distinction for competition law purposes has to be made between on the one hand, emergency services and the services for the transport of public patients for which the HSE has a statutory responsibility; and on the other, services provided for the transport of private patients in respect of which there is a distinct market as was held in the *Medicall* case.

71. Secondly, the Court finds that the defendant does not operate as an "undertaking" in the use of its ambulance fleet for emergency services and for the transport of public patients because its provision of those services is not an economic activity in which it is engaged "for gain" in the sense of the definition. Furthermore and in any event, the activity of purchasing supplementary services which is the subject of the abuse claim in this action is one carried out by the defendant as an end user of those services and not one engaged in for the purpose of some other economic activity or with the object or the effect of procuring some advantage in some neighbouring market.

72. Strictly speaking, it is possibly unnecessary to then address the remaining issues. However, in order to facilitate any further consideration of the entirety of these claims in the event that the issues are taken further on appeal, the Court will briefly express the finding it would make should it be held that the HSE acts as an undertaking when providing ambulance services for public patients or in purchasing such services from private operators. In such a situation it is clear that the HSE would occupy a dominant position in respect of the operation of services for public patients in that it is the provider of 99% of such services and the only purchaser of those it does not itself provide. A private operator has no alternative customer to which it can look for the sale of such services as it has in the private patient sector. Nevertheless, in the judgment of the Court, such findings would not lead to the result that the defendant abuses that position by reducing and ultimately eliminating its supplementary reliance on services purchased from private operators including the plaintiff. In the first place, such a policy or conduct does not have the object or effect of procuring any competitive advantage for the HSE in the operation of its ambulance fleet. It has not been demonstrated that such a strategy has any purpose or effect in seeking to enhance or procure a benefit for the HSE in such services as it provides in the neighbouring area of the market for services to private patients. Secondly, to compel the HSE to continue to use and to pay for services from private operators which it does not need would, in the view of the Court, cut across one of the basic objectives of competition rules, that of ensuring "allocative effiency" in the operation of markets. To do so would require the defendant to carry the cost of inefficiencies brought about by the resulting under-use of its own resources.

73. In this regard the statutory objective of the defendant under s. 7 of the Health Act 2004 has already been quoted above (see paragraph 66). Having regard to the absence in the Act of 2002 of any modification of the prohibitions of ss. 4 and 5 by a provision analogous to Article 106TFEU, it appears to the Court to be appropriate and correct, so far as national canons of interpretation permit, to interpret and apply those rules to the activities of public bodies in a manner which pays due regard to tasks and obligations which the Oireachtas has enacted for them where it has done so since these rules were first introduced in the Competition Act 1991 and the issues fall to be decided, as here, exclusively by recourse to the national provisions. Where the EU competition rules have no application, it is clearly competent for the Oireachtas to make special provision for the application of competition rules in particular sectors (groceries and newspapers, for example, are often proposed for special treatment,) or to specific undertakings or public bodies. In the circumstances of the present claims however, even if it should be considered that the HSE is an undertaking, it would be unnecessary to consider whether that was the intention in s. 7 of the Act of 2004 given that the defendant's pursuit of that statutory objective would not, of itself, require it to commit an abuse.

74. In this judgment the Court has confined itself to the issues directed to be tried as set out in paragraph 13 above. In the pleadings the plaintiff has relied upon some additional facts and assertions notably in relation to the role of the defendant in maintaining an institute for the training of paramedical personnel of the kind employed in the operation of ambulance services. These matters have not been adverted to in the legal submissions on these issues and it has not been clear to the Court whether they are facets of the alleged dominant position of the defendant as provider of ambulance services for public patients or as the basis for the existence of an alleged position of dominance in a market for a distinct service. If necessary, the Court will hear the parties further on those matters in the light of the rulings made on the preliminary issues in the present judgment.