Neutral citation: [2002] CAT 7

IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Case No. 1006/2/1/01

New Court
Carey Street
London WC2A 2JT

1 August 2002

Before:

SIR CHRISTOPHER BELLAMY
(President)
MR MICHAEL DAVEY
MR DAVID SUMMERS

Sitting as a tribunal in Northern Ireland

BETWEEN:

BETTERCARE GROUP LIMITED

Applicant

supported by

THE REGISTERED HOMES CONFEDERATION OF NORTHERN IRELAND LIMITED

BEDFORDSHIRE CARE GROUP

Interveners

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Mr James Flynn (instructed by Messrs L'Estrange & Brett) appeared for the applicant and the interveners.

Mr Jon Turner (instructed by The Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Heard at the Royal Courts of Justice, Belfast, on 23 May 2002.

JUDGMENT

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I INTRODUCTION

1. The appellant Bettercare Group Limited ("Bettercare") is engaged in the provision of nursing home and residential care services in Northern Ireland. Bettercare has two facilities in the Shankhill area of Belfast, the Glencairn Care Centre and the Tennent Street Care Centre, which are registered with the Eastern Health and Social Services Board ("the EHSSB"). The North and West Belfast Health and Social Services Trust ("North & West") purchases from Bettercare nursing care services and accommodation at those two centres under a standard contract, renewable annually, issued by North & West. North & West itself manages eight residential homes, five of which provide services for the elderly.

2. North & West purchases the vast majority of the services provided by the two centres operated by Bettercare.

3. On 23 November 2000 the Managing Director of Bettercare wrote to the Office of Fair Trading complaining, in effect, that North & West was abusing its dominant position as the sole purchaser of care services from Bettercare, by offering unreasonably low contract prices and unfair terms, contrary to the Chapter II prohibition imposed by the Competition Act 1998 ("the Act"). According to Bettercare, this made it very difficult for Bettercare to continue in business, particularly since North & West could offer much higher salaries to attract trained staff to work in its own residential homes.

4. The Chapter II prohibition is set out in section 18(1) of the Act:

> "…[A]ny conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom"

5. Section 18(2) provides that

> "Conduct may, in particular, constitute such an abuse if it consists 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 acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts."

6. In applying those provisions, the principles of Community law are to be followed, so far as possible, in accordance with section 60 of the Act. We revert to section 60 at paragraphs 28 et seq below.

7. Following Bettercare's complaint, correspondence passed between the Director's officials and Bettercare's solicitors, L'Estrange & Brett. The upshot of that correspondence was that by letters of 29 November 2000, 25 July 2001, 21 September 2001 and 2 November 2001, the Director's officials declined to investigate Bettercare's complaint. The essential reason given was that North & West was not acting as an "undertaking" within the meaning of section 18(1) of the Act when purchasing care services and accommodation from Bettercare.

8. By an application dated 21 November 2001 Bettercare appealed to this Tribunal under section 47 of the Act, which provides for third party appeals from certain decisions of the Director.

9. The Director then contended that the appeal was inadmissible, on the grounds that the correspondence between the parties relied on by Bettercare did not amount to a "decision" capable of being appealed to the Tribunal under section 47 of the Act. Accordingly, at a case management conference held on 20 December 2001, the Tribunal directed that the admissibility of Bettercare's appeal should be heard as a preliminary issue.

10. At that case management conference the Tribunal further decided, as it is required to do by Rule 16 of the Tribunal's rules, that these are proceedings before a tribunal in Northern Ireland: see [2001] CAT 6 [2002] Comp AR 9. The principal consequence of this is that any appeal from this judgment on appoint of law under section 49(1)(a) of the Act lies to the Court of Appeal in Northern Ireland, pursuant to section 49(4)(c).

11. At the same case management conference, the Tribunal also admitted the requests to intervene, made by the Registered Homes Confederation of Northern Ireland Limited on 17 December 2001, and the Bedfordshire Care Group on 18 December 2001, respectively. Bettercare and the interveners are all represented by the same solicitors and counsel.

12. The Registered Homes Confederation of Northern Ireland ("the Registered Homes Confederation") represents a substantial number of private nursing and residential home owners in Northern Ireland. Its request to intervene was supported by a witness statement made by its Chairwoman, Janet Montgomery, on 17 December 2001. In that statement Mrs Montgomery complains, notably, that the prices paid by North & West to its own residential

homes are substantially higher than the prices North & West pays members of the Registered Homes Confederation to provide the same services.

13. The Bedfordshire Care Group ("BCG") represents private nursing and residential care owners in Bedfordshire. BCG has made a complaint to the Director about the activities of Bedfordshire County Council in respect of residential homes in that county. The contentions of the BCG are set out in a witness statement of Mr Gordon Ward dated 18 December 2001. BCG's complaint is, in substance, that the prices paid by Bedfordshire County Council are (a) below the economic cost of providing the residential care services in question and (b) lower for some residential homes than for others, without any justification. The Director's response to BCG's complaint, in a letter of 16 January 2001, was virtually identical to the Director's response to Bettercare in his letter of 29 November 2000.

14. Following a hearing in Belfast on 5 February 2002, this Tribunal decided, in a judgment of 26 March 2002, [2002] CAT 6, that the Director's letters of 25 July 2001, 21 September 2001 and 2 November 2001, read with the earlier letter of 29 November 2000, constituted or contained a "decision" by the Director, within the meaning of section 47 of the Act, on the question whether the Chapter II prohibition had been infringed and that, in the circumstances, the appeal was admissible.

15. The question now before the Tribunal is whether the Director was correct, in the correspondence, to reject Bettercare's complaint on the ground that North & West was not acting as an "undertaking" within the meaning of section 18(1) of the Act, with the consequence that he could not investigate the matters complained of.

16. Following further case management directions by the Tribunal, the Director lodged his defence on the "undertaking" issue on 30 April 2002, supported by a witness statement, also dated 30 April 2002, by Mr Brian Barry, who is employed by North & West as the Programme Manager for the Elderly/ Physical Health and Disability Programmes of Care.

17. On 10 May 2002, Bettercare lodged a reply accompanied by a witness statement dated 9 May 2000 from Mr Caldwell, the managing director of Bettercare, and a second witness statement, also dated 9 May 2002, from Janet Montgomery. Attempts to reach agreement on the facts of the case were only partially successful, and skeleton arguments were filed on 17 May 2002. The substantive hearing was held on 23 May 2002 at the Royal Courts of Justice, Belfast. Both parties have also submitted written responses to questions raised by the Tribunal, and we are grateful to both of them for their assistance in this case.

18. Bettercare requests the Tribunal to:

- set aside the contested decision;
- declare that the North & West is an undertaking;
- declare that the activities of the North & West ought to be investigated under section 18 of the Act;
- in the alternative, remit the matter to the Director for further investigation;
- order the Director to pay Bettercare's costs.

19. The Director requests the Tribunal to:

- dismiss Bettercare's appeal;
- order Bettercare to pay his costs.

II THE CONTESTED DECISION

The contested decision

20. In this case the contested decision is to be found in the correspondence, which has to be understood against the background of Bettercare's original complaint.

Bettercare's complaint of 23 November 2000

21. Bettercare's original complaint is contained in a letter of 23 November 2000 from Mr Caldwell to the Office of Fair Trading. Mr Caldwell gave the following background information:

> "North and West is a statutory authority and in the performance of its statutory duty both directly provides and procures nursing and residential care for elderly people assessed as requiring these services within the community.
>
> My enquiry is not in connection with the Trust's statutory duty to provide care it is rather in connection with how this role is discharged when purchasing care from my company.
>
> Bettercare Group have two facilities providing care in the Shankill area of Belfast offering a range of caring services and accommodation for elderly people. These facilities, Glencairn Care Centre and Tennent Street Care Centre, are registered with the Eastern Health and Social Services Board and are located within the area of North & West.
>
> The Eastern Health and Social Services Board, responsible for registering, regulating and inspecting these two centres is also responsible for commissioning health and social care from North and West Belfast H. & SS Trust.
>
> North and West in turn purchase care services and accommodation from the two centres mentioned.

The location of the centres is an area of severe social deprivation and where approximately 99% of all care is provided to means tested, publicly funded individuals assessed as requiring these services. In the case of Tennent Street and Glencairn, North and West Belfast purchase in excess of 90% of all services with the balance being purchased by other public bodies.

This situation has pertained since 1994.

North and West Belfast have a standard contract and a non specific services specification renewable annually, under which individual placements are made within both centres.

22. Mr Caldwell then went on to set out the basis of his concern:

"North and West are in a dominant position in relation to these care centres.

North and West issue an annual contract to Bettercare in respect of these facilities determining both service specification and price.

All requests for negotiation of the elements of this contract have been refused each year since 1994.

Modifications introduced by North and West each year are without consultation.

Proposals to agree a costing of the service required or to obtain an independent assessment of the cost of providing these services have been refused.

External, regulatory and statutory factors influencing the cost structure have been ignored through out the past 6 years and the pricing structure has been increased by below inflation repeatedly over the period.

There are no other potential customers for these services.

There has been significant and fixed investment in these centres.

We believe that the purchasing strategy of North and West is an abuse of their monopoly position and indeed is short sighted in that it is destined to collapse the provision of these services.

I have sought meetings regularly to discuss this issue. The Trust Chief Executive refuses to meet with me and when I have met with those who he has designated they have stated that they are not in a position to negotiate or vary the contract on either price or service.

To date Bettercare have admitted residents funded by North and West and provided services but have not signed a contract. It has become increasingly difficult, to the point of impossible, to provide the services required within the price North and West determine and this is placing Bettercare in the invidious position of either failing to provide services as required or operating at a continuous deficit.

The majority of our cost structure is made up of labour both professional and ancillary. Our biggest competitor for staff is in fact the North and West who pay significantly higher salary packages. (on average in excess of 40% higher than Bettercare's package). In a tight labour market particularly for trained nurses this is an impossible loop.

I am not sure that this constitutes any infringement of the Competition Act but it undoubtedly is totally inequitable. I would appreciate your advice as how to proceed should you consider that there is a basis for a complaint."

The Director's letter of 29 November 2000

23. On 29 November 2000, the Director's officials replied to Bettercare as follows:

> "The Office has received several complaints about local authorities (LAs) and it may be useful to you if I provide you with some background as to the Office's jurisdiction with regards to the activities of LAs.
>
> ...
>
> As you are aware, LAs are obliged, usually by statute, to purchase certain services, for example residential care, B&B accommodation and nursing home care services (collectively 'Social Care') for the disadvantaged in society. The purchase of Social Care is regarded as necessary because the market fails to satisfy the housing needs of the entire population.
>
> LAs are also active in the economic business of supplying Social Care. An LA, then, has two identities in the circumstances described above – as the primary buyer of Social Care and as a supplier of nursing home care services. This would appear to be the case with North and West whom you say also supplies nursing home care services.
>
> It is important to note that the CA98 only applies to agreements between undertakings (Chapter I) or the conduct of the undertakings (Chapter II). The key issue is therefore whether an LA will, in any particular circumstance, be an undertaking for this purpose. Pursuant to section 60 of the CA98, the definition of an undertaking depends on the case law of the European Court of Justice. In *Höfner & Elser*, the European Court of Justice said:
>
> > 'in the context of 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'.
>
> Clearly, an LA can act as an undertaking when it is engaging in economic activity, but, in our view, an LA will probably not be acting as an undertaking when it is exercising its 'public interest-type' functions.
>
> On the basis of the facts set out above, we take the view that LAs are not undertakings for the purposes of the Chapter I and II prohibitions to the extent that they are purchasing Social Care for the disadvantaged in society using monies raised by taxation. We consider that the activities of an LA acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value are not the activities of an undertaking engaging in economic activity. In this context, the role of government is to correct market failure and so, inevitably, LA spending will affect markets and raise competition issues of a general policy nature. However, such spending does not raise legal issues under the CA98 and so the DGFT has no power to intervene.
>
> It seems clear from the information in your letter that the activities that concern you arise from North and West's activities as a purchaser of Social Care (i.e. nursing home care). In our view, for the reasons explained above, these activities do not fall for consideration under competition legislation and the DGFT is therefore unable to intervene.
>
> ..."

L'Estrange & Brett's letter of 21 June 2001

24. On 21 June 2001, L'Estrange and Brett replied on behalf of Bettercare to the Director's letter of 29 November 2000. L'Estrange and Brett set out their description of the constitution, function and powers of the North & West and made submissions to the Director in the light of EC case law. L'Estrange and Brett argued notably that the North & West was an undertaking because:

> "it is evident that this statutory body was established to be an economic entity in that it was empowered to engage in economic activities, enter into contracts, raise finances by trading, albeit efficiently and in a manner which certainly contained a public interest element to it, but trading and carrying on economic activity nevertheless."

and that

> "It is evident from the [EC] decisions above in relation to the activities of a statutory body or corporation that there is as a matter of course a public interest element to its spending and trading activities, however that public interest element does not preclude the contention that undertakings are involved in trade with third parties. North and West is not merely constituted to fulfil an administrative or revenue raising role, rather it is designed and empowered to be an economic entity."

The Director's letter of 25 July 2001

25. The Director's reply of 25 July 2001 is in these terms:

> "We do not dispute that N&W may be engaged in economic activities for certain purposes and therefore may be an undertaking for those purposes. However we do not share your view that N&W is acting as an undertaking for **all** purposes.
>
> As you note in your letter, N&W appears to have two principal activities: as a **purchaser** of social care services for persons in need using monies raised by taxation; and as a **supplier** of local care services in competition with the voluntary and private sector.
>
> The European Courts have held that it is necessary to distinguish between public authorities and public undertakings. (See in particular Case 118/85 *Commission v Italy* [1987] ECR 2599.) This recognises the fact that state entities can act either by exercising public powers or by carrying on economic activities by offering goods and services on the market. In order to determine whether the CA98 applies, it is therefore necessary to consider the precise nature of the activities being exercised in each case rather than the entity's legal form or powers. Merely because an entity carries on some economic activities does not mean it is an undertaking for all purposes. (See also *Höfner & Elser*, to which you refer, where the German Federal Employment Agency had two roles: supplying procurement services in competition with private bodies, which was regarded as an economic activity, and administering unemployment benefits, which would not be.)

> Looking at local authorities, including healthcare trusts such as N&W, our current view is that they can act as an undertaking when they are engaging in economic activities, such as supplying residential accommodation in competition with private sector care homes, but they would not appear to be when they are exercising their "public interest-type" functions. By this we mean functions which are not generally provided on a commercial basis in competition with private sector business and which fulfil an exclusively social function. (See in particular Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 and *Eurocontrol*, to which you refer in your letter.)
>
> The abuse you client is alleging, namely non-cost related low prices offered by N&W for residential and nursing home care services, relates to N&W's activities as a purchaser of social care. The purchasing of such services for the disadvantaged in society using monies raised by taxation would seem to be typically those of the State and would not appear to be of an economic or commercial nature. Therefore, when acting as a purchaser of social care we do not currently consider that N&W is acting as a undertaking for the purposes of the CA98."

L'Estrange & Brett's letter of 31 August 2001

26. L'Estrange & Brett replied to the Director's letter of 25 July 2001 on 31 August 2001. The essence of their argument was as follows:

> "2. ... When a local authority is supplying residential accommodation for residents/patients, it is engaged in non-economic activity and in discharging its statutory duty, it is providing "functions which are typically those of the state". It is not engaged in economic activity and is not in competition with the private sector. In our view residents/patients benefiting from statutory health-care services could not be classified as, or compared to, consumers.
>
> 3. However, local authorities discharging their statutory duty by purchasing said health care services from the private sector are engaged in economic activity. The European Commission has stated that the concept of an undertaking, "covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to earn profits. [Film purchases by German Television Stations [1989] OJ L 284/36]
>
> 4. ... We would contend that state entities, in this case North and West, are also carrying on economic activities, for example, offering goods and services in the market. We would contend that state entities, in this case North and West, are also carrying on economic activities by purchasing services in the market, particularly where it is a monopsonist in that market, and uses that position of dominance to create and determine economic conditions within that market."

The Director's letters of 21 September and 2 November 2001

27. In a further letter of 21 September 2001 the Director replied that nothing in Bettercare's letter of 31 August had caused him to change his opinion given in earlier correspondence.

Following a further letter from Bettercare dated 25 October 2001, the Director wrote finally on 2 November 2001:

> "In the present case, for the reasons set out in our letter of 29 November 2000 and 25 July 2001, we do not believe N&W is an undertaking when purchasing social care … this view is based upon the evidence provided by your clients as to the activities of N&W, in particular as set out in your letters of 23 November 2000, 21 June 2001 and 31 August respectively and in light of EC case law to which we are bound by virtue of section 60 of the Act"

III THE ISSUE BEFORE THE TRIBUNAL

28. The question now before the Tribunal is whether the Director was correct to decide, on the basis of the evidence before him, that for the purposes of the Chapter II prohibition North & West is not "acting as an undertaking when purchasing social care", as the Director put it in his letter of 2 November 2001.

Section 60 of the Act

29. In addressing that question, we must comply with section 60 of the Act, which is in these terms:

> "60.– (1) The purpose of this section is to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The Court must, in addition, have regard to any relevant decision or statement of the Commission.
>
> (4) Subsections (2) and (3) also apply to-
>
> (a) the Director; and
>
> (b) any person acting on behalf of the Director, in connection with any matter arising under this Part.
>
> (5) In subsections (2) and (3), "court" means any court or tribunal.
>
> (6) In subsections (2)(b) and (3), "decision" includes a decision as to-

(a) the interpretation of any provision of Community law;

(b) the civil liability of an undertaking for harm caused by its infringement of Community law."

30. Section 60(1) sets out the purpose of the section, which is to ensure, so far as possible, that questions relating to competition within the United Kingdom *are dealt with in a manner* which is consistent with the treatment of corresponding questions in Community law. Section 60(2) then sets out the specific *duty* which is expressly imposed on the courts of the United Kingdom, including this Tribunal, as well as on the Director. So far as the Tribunal is concerned, that duty is to ensure that there is *no inconsistency* between the principles we apply, and the decisions we reach, and the principles laid down by the Treaty or the European Court, and any relevant decisions of that Court, in determining "any corresponding question arising in Community law". In this context "the European Court" means the Court of Justice and the Court of First Instance of the European Communities: see section 59(1).

31. In our view the question whether a particular body is or is not an "undertaking" for the purpose of the Chapter II prohibition (or indeed the Chapter I prohibition) of the Act is a question which, in a broad sense, "corresponds" to the question of whether a particular body is or is not an undertaking for the purpose of Articles 81 and 82 of the Treaty. However, we are not aware of any decision by the European Court that is particularly close to the facts of the present case. While, as will be seen, it is possible to deduce certain broad principles from the decisions of that Court, the factual circumstances of those decisions are rather far from those of the present case, concerning as they do various regulatory bodies, sickness funds, or the administrators of compulsory pension schemes, which do not necessarily have direct equivalents in the United Kingdom. Equally, phenomena found in the United Kingdom, particularly relating to the now widespread practice of contracting out to the private sector of functions formerly performed wholly by the public sector, are not necessarily particularly well known in most other Member States of the European Community.

32. In those circumstances we conceive it our duty under section 60(1) to approach the "undertaking" issue in the manner in which we think the European Court would approach it, as regards the principles and reasoning likely to be followed by that Court. In addition, under section 60(2) we must seek to arrive at a result which is not inconsistent with Community law.

33. Subject to the overriding requirements of Community law, in our view the result reached should, so far as possible, also be in harmony with the overall structure and purpose of the Act in the particular economic circumstances of the United Kingdom.

34. We also note that Buxton LJ, in *Napp Pharmaceuticals Holdings Limited v Director General of Fair Trading*, [2002] EWCA Civ 796 at paragraph 37, expressly left open the status of an Advocate General's opinion for the purposes of section 60 of the Act. While the opinions of the Advocate General of the European Court of Justice are undoubtedly entitled to the highest respect, we for our part would also prefer to leave open whether the principles set out in the Opinion of an Advocate General are principles "laid down" by the European Court within the meaning of section 60(2)(b), unless adopted expressly, or by necessary implication, in the judgment of the Court. Similarly, whether an opinion of the Advocate General is a "decision of that Court" for the purpose of section 60(2)(b) is also a question that we prefer to leave open.

Powers of the Tribunal

35. The Tribunal's powers in deciding the present appeal are set out in Schedule 8, paragraph 3, of the Act as follows:

> "3.–(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may–
>
> (a) remit the matter to the Director,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
>
> (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
>
> (e) make any other decision which the Director could himself have made.
>
> (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.
>
> (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

IV PRINCIPAL ARGUMENTS OF THE PARTIES

36. The arguments of parties on "the undertaking" issue have developed considerably in the course of this case. We summarise them briefly, concentrating on the main points.

Bettercare's arguments

37. On the question whether North & West is acting as an "undertaking", Bettercare argues that the Director's position, as set out in his letters of 29 November 2000 and 25 July 2001 is not

supported by the decisions of the European Court to which he refers. According to Bettercare, to determine whether or not a state entity is an "undertaking" for the purposes of competition law, it is necessary to consider the precise nature of the activities carried out by that entity. The jurisprudence of the European Court distinguishes between public bodies carrying out regulatory or administrative duties, and public bodies involved in trade. North & West, having elected to purchase services, is trading with Bettercare and, as such, is an "undertaking" for the purpose of the Act. According to Bettercare, a number of decisions of the European Court indicate that public entities involved in social activities or "public interest type functions" may nevertheless be held to be undertakings.

38. Bettercare contends that the concept of an undertaking "covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to earn profits" (see the decision of the European Commission in *Film purchases by German television stations* OJ 1989 L284/36). In this case, the purchase by North & West of Bettercare's services clearly amounts to economic activity. When North & West decided to enter the market, it removed itself from any protection from the Act which may be afforded to it by the notion of "state like functions". Moreover, no exemption for North & West's activities is to be found in Schedule 3 of the Act. While as regards "abuse", North & West could possibly invoke Schedule 3, paragraph 4 of the Act (which provides that the Chapter II prohibition does not apply in so far as it would "obstruct the performance, in law or in fact, of the particular tasks assigned" to "an undertaking entrusted with the operation of services of general economic interest"), the fact remains that North & West is an "undertaking" for the purposes of that provision.

39. In its reply to the Director's detailed submissions in the defence (see paragraphs 50 et seq below), Bettercare stresses that it is the correctness or otherwise of what is set out in the decision in the correspondence with which the Tribunal is concerned. The Director's view was reached without carrying out any factual inquiry. If the outcome of the appeal turns on further facts which have come to light in the course of the proceedings, the original decision cannot stand.

40. According to Bettercare, North & West's activity in purchasing residential care from Bettercare cannot be viewed in isolation from North & West's other activities, which must be considered as part of the overall legal and economic context. As part of the relevant context Bettercare relies notably on the facts that North & West provides residential care in competition with private sector providers like Bettercare; that Bettercare provides nursing and residential care in pursuit of profit; and that the individual resident pays for the services he

receives, whether he is accommodated by Bettercare or North & West itself, albeit that North & West may contribute to the cost whilst recovering a means-tested contribution from the resident concerned.

41. Relying on further witness statements by Mr Caldwell and Mrs Montgomery, both dated 9 May 2002, Bettercare denies North & West's assertion that the rates payable to private sector homes are set by the EHSSB. According to Mr Caldwell and Mrs Montgomery, the EHSSB has always maintained that its role is advisory, the prices actually set being a matter for the Health and Social Services Trust in question.

42. Both Mr Caldwell and Mrs Montgomery in their further evidence also identify a number of ways in which, so they allege, the conditions in which they compete for residents in the residential home sector "are skewed in favour of the statutory homes". They refer in particular to the higher prices paid by North & West to its statutory homes. They also refer to an alleged situation whereby the charges paid by residents in private homes are not always wholly reimbursed by North & West but must be "topped up" by the family of the resident concerned, whereas, so they contend, "topping up" does not apply as regards residents in statutory homes. Mr Caldwell also alleges that he was originally encouraged by North & West to open the Tennent Street care centre in question, but now North & West's policies make it difficult for Bettercare to continue in business.

43. In its oral submissions to the Tribunal, Bettercare emphasises that the cases the Director relies on all involved administrative or regulatory functions or the legality of various kinds of legal monopoly or payments under compulsion. Such factors are not present in this case.

44. Bettercare points out that in his letter of 25 July 2001, which is part of the decision, the Director accepted that local authorities can act as undertakings when they supply residential accommodation in competition with private sector care homes. However, says Bettercare, the Director has disavowed that position before the Tribunal, and on those grounds alone the decision must be withdrawn or set aside.

45. Having correctly identified an economic activity carried on by North & West, viz the provision of residential care services in competition with the private sector, the Director was wrong to draw a distinction between that activity and the purchasing of care services from the private sector. In fact, says Bettercare, the two activities are closely related, being two sides of a single coin.

46. Bettercare accepts that purchase without resale would not by itself amount to an economic activity, but in this case North & West is not simply absorbing the services it purchases. In this case, North & West provides to the residents the services which it purchases from Bettercare. The situation is really one of subcontracting or agency purchasing. The fact that residents' contributions may be made from, or assessed by reference to, state benefits is irrelevant. Those benefits are the resources of the resident. The purchasing activity of the North & West is thus "directed at trade in services" with the meaning of the European Commission's decision on *Film purchases by German studios*, cited above.

47. Although L'Estrange & Brett, in their letter of 31 August 2001, accepted that the provision by North & West of services to residents in its statutory homes would not be the activities of an undertaking, that letter stressed that the position is different once North & West itself has entered the market.

48. Moreover, contrary to the Director's view, the services supplied by North & West to residents are capable of being carried on for profit by private undertakings. Bettercare relies heavily on the judgment of the Court in Case 475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089 ("*Ambulanz Glöckner*") at paragraphs 18 to 22, and the opinion of Mr Jacobs in that case at paragraphs 67 to 81. It is clear from those passages, notably, that whether the activity is profit-making is not part of the test. Applying the criteria set out in *Ambulanz Glöckner*, the "given market" in this case is the provision of nursing and residential care services to elderly persons. The "activity" for the purposes of the present case is "the supply of residential care services", and not, as the Director submits, "the supply of residential care services to those who cannot afford it".

49. The arguments advanced by the Director concerning the social functions of North & West may well be relevant to the question of abuse, or the application of Schedule 3, paragraph 4 of the Act (services of general economic interest), but they are not decisive on the issue of "an undertaking". It is clear from the legislation that the cost of the service is to be recouped from the resident. The Director having conceded that North & West acts as "an undertaking" when it supplies services to a "self-funded" resident, it is artificial to focus narrowly on the particular social characteristics of the Bettercare homes, which are in only one part of North & West's area.

The Director's arguments

50. In his defence, the Director accepts that the concept of an "undertaking" encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way it is financed: see e.g. Cases C-180/98 to C-184/98 *Pavlov* [2000] ECR I-6451 ("*Pavlov*"), at paragraph 75. A given entity may be regarded as an undertaking for one part of its activities, but not for others. For example, while public bodies may be regarded as "undertakings" when engaged in economic activities, they are not undertakings when engaged in the exercise of official authority: Case 118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7. The test for whether there is exercise of official authority is whether the activity in question is connected by its nature, its aims and the rules to which it is subject with the exercise of powers which are typically those of a public authority: *Ambulanz Glöckner*, cited above, at paragraph 76 of Mr Jacob's opinion.

51. To determine whether a given body is an undertaking the Director submits, notably

- — that the basic test for determining whether an entity is "an undertaking" is whether the entity in question is engaged in an activity which consists in offering goods or services on a given market, and which could, at least in principle, be carried on by a private actor in order to make a profit: see the opinion of Mr Jacobs in *Ambulanz Glöckner*, cited above, at paragraph 67.
- — that a public body is not acting as an undertaking when it performs a task in the public interest which forms part of the essential functions of the State: see Case 343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 ("*Diego Cali*"), at paragraphs 22 to 23.
- — that a public body is not acting as an undertaking when it performs an exclusively social function based on the principle of 'solidarity': see Case C-218/00 *Cisal di Battistello Venanzio v Istituto Nazionale per l'assicurazione contro gli infortuni sul lavore (INAIL)*, judgment of 22 January 2002 ("the *Cisal* case"), at paragraphs 38 and 45, and the opinion of Mr Jacobs in *Pavlov*, cited above, at paragraph 176. Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would otherwise be deprived of the necessary social cover: see Cases C-159/91 and C-160/91 *Poucet & Pistre*, [1993] ECR I-637, at paragraphs 10 and 18.
- — that where an entity does not possess the freedom to make independent decisions with respect to the activity in question, it cannot be regarded as an undertaking; *Cisal*, cited above, at paragraph 43; Case C-364/92 *SAT Fluggesellschaft v*

Eurocontrol [1994] ECR I-43 ("the *Eurocontrol* case"), per Advocate General Tesauro at paragraph 14 of his opinion.

52. Against that background, the Director advances two central arguments. First, the Director submits that arranging for the provision of residential and nursing care for people in need who lack means of their own is activity typical of the State. Such an activity is an aspect of the social welfare system, cannot be carried on for profit by a private undertaking, and is based on the principle of "solidarity". Secondly, the Director argues that the North & West is not an undertaking in the present situation as it does not have any freedom to set the rates that are paid to undertakings such as Bettercare. Such rates are set by the Department of Health, Social Services and Public Safety ("DHSSPS" or "the Department") and/or by the EHSSB. North & West is accordingly unable to cause effects which the competition rules seek to prevent.

53. According to the Director, Bettercare's argument that the purchase of services from the private sector by a public body is, in itself, an economic activity is flawed, because purchasing without resale is not an economic activity. A business which bought supplies and never sold anything to customers would not survive, let alone be able to make a profit. In the present case North & West is simply purchasing care services on behalf of disadvantaged members of the public, in order to fulfil an exclusively social statutory function.

54. The Director draws attention to *Case 238/82 Duphar & others v the Netherlands* [1984] ECR 523 ("*Duphar*"), a case about free movement of goods, where the European Court rejected a submission that it was possible to equate the Netherlands state with an "economic operator" when it purchased prescribed medicines under Dutch legislation that prohibited the reimbursement of the cost of certain medicines by the state-funded healthcare system. The Court also noted, at paragraph 16 of that judgment, that Community law did not detract from the powers of member states to organise their social security systems and to adopt provisions intended to promote the financial stability of their health-care insurance schemes. Similarly, in the Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395 ("*Sodemare*"), a case about freedom of establishment, the Court upheld Italian rules which prevented the Lombardy region in Italy from contracting with commercial, as opposed to non-profit making, operators for the supply of residential homes for the elderly. According to the Director, it was never suggested in that case that the actual discriminatory purchasing by the Lombardy region amounted to an "economic activity".

55. The correct approach in the present case, argues the Director, is to consider the nature and aim of the activity, and the rules to which it is subject, in order to determine whether a body is exercising powers which are typically those of the state (see paragraph 76 of Mr Jacobs' Opinion in *Ambulanz Glöckner*).

56. As to the *nature* of the activity, the Director contends that the provision of residential and nursing home care services, based on need, and not an ability to pay in an area of social deprivation, is an activity carried out on the basis of solidarity as set out in the case law of the European Court: see *Poucet & Pistre*, cited above, at paragraphs 10 to 18; the opinion of Mr Jacobs in *Pavlov*, cited above, at paragraph 176; *Cisal*, cited above, at paragraphs 38 and 45 of the judgment; and the opinion of Advocate General Fennelly in *Sodemare*, cited above, at paragraph 31.

57. As to the *aim* of the activity, according to the Director North & West pursues an exclusively social aim when arranging for the provision of necessary care for the local population. In this regard the Director refers to the statutory basis of the North & West's functions, notably Articles 4(b), 15 and 36 of the Health and Social Services (Northern Ireland) Order 1972 as amended ("the 1972 Order"), and in particular Article 4(b) which refers to the duty on the North & West to "promote the social welfare of the people of Northern Ireland." The statutory functions of North & West are confirmed in the witness statement of Mr Barry.

58. As to the *rules* to which the entity is subject, the Director points out that the North & West is an emanation of the state charged with the statutory duty of providing or arranging for the provision of certain essential health and social services. It exercises all its functions on behalf of the EHSSB, and subject to the direction of the EHSSB and DHSSPS, as confirmed in the witness statement of Mr Barry at paragraphs 8 to 20. In addition, the basis upon which North & West purchases care services from independent providers is one that is subject to detailed regulation in the public interest: see in particular the group of rules, guidelines, codes of practice and specifications listed in the "Arrangements for the Delegation of Statutory functions" attached as exhibit BB1 to the witness statement of Mr Barry.

59. Moreover, according to the Director, the rates in question are not determined by North & West, but are fixed by the EHSSB and, in the last resort the DHSSPS. North & West's role is merely to implement rates set by others. The Director relies on the evidence of Mr Barry to that effect and a letter from the EHSSB to North & West dated 28 March 2002. The fact that North & West does not fix the rates is relevant not only to the question of "abuse" but also to the "undertaking" issue, since in order to be categorised as an undertaking, an entity must be

"in a position to generate the effects which the competition rules seek to prevent": see the opinion of Mr Jacobs in *Cisal*, at paragraph 71. In both *Eurocontrol*, cited above, at paragraph 29 of the judgment, and *Cisal*, cited above, at paragraph 43 of the judgment, the Court of Justice took into account, on the undertaking issue, the fact that the fees in question were set by the State.

60. The Director also submits that one only has to think of the consequences of bringing the activities of a body such as North & West within the Act to see that such activities are not suitable for control under competition law. The application of the competition rules would interfere with the distribution by the State of funds between its social welfare priorities. If the competition authorities were to require high rates to be paid to private providers of residential care, the only consequence would be that either there would be fewer residential beds available, or other social welfare programmes would have to suffer. North & West has to operate within the constraints of the limited public funds available.

61. The principal alternative methods by which Bettercare and others such as the Registered Homes Confederation may challenge the State's spending priorities under social welfare legislation, include direct approaches to the responsible Minister. Indeed the DHSSPS has recently announced that additional funds are to be spent on the purchase of care from the independent sector. (Other possibilities elaborated, at the Tribunal's request, in a letter from the Director dated 14 June 2002, include a complaint to the Northern Ireland Commissioner for Complaints, a complaint to the Northern Ireland Audit Office or, possibly, a claim for judicial review.)

62. Bettercare's arguments to the effect that undertakings entrusted with services of "general economic interest" can be caught by the Act, subject to Schedule 3, paragraph 4, or that a body such as the North & West could have been excluded from the provisions of the Act, do not address the logically prior question whether the North & West is an undertaking at all.

63. In further oral submissions, the Director emphasised the need carefully to define the specific activity complained about. In the present case the specific activity is "the purchase from BetterCare of nursing and residential care "beds", for elderly people who lack the means of their own to pay", the only question being whether that activity falls to be classified either as the "exercise of official authority" or an "economic activity": see the Opinion of Mr Jacobs in *Ambulanz Glöckner*, at paragraph 72. In the Director's view, it is plainly the former rather than the latter.

64. The fact that pursuant to legislation North & West is obliged to conduct its functions effectively, efficiently and economically is not sufficient to suggest an "economic" activity: see the opinion of Mr Jacobs in *Cisal*, at paragraphs 50 to 52. In this case there is no way in which a private actor could make a profit from purchasing care on behalf of those without the means to pay themselves. The activity is plainly an aspect of social assistance and not a commercial activity, and must necessarily be carried out by the State. The essential distinction between this case and *Ambulanz Glöckner* is that in *Ambulanz Glöckner* the services in question had previously been carried on for profit by private undertakings, whereas here North & West's purchasing activity could not be carried on for profit by the private sector.

65. According to the Director, it makes no difference to the analysis whether North & West directly provides residential care itself or whether it purchases it from private sector providers. Neither method of meeting these social needs is any more an economic activity than the other. They are merely complementary means of discharging the same primary duty to provide or secure the provision of "personal social services" in Northern Ireland under the 1972 Order. In particular, the direct provision of residential care by North & West is carried out in accordance with the principle of solidarity, in this case between the general population and elderly members of society: see the opinion of Advocate General Fennelly in *Sodemare* at paragraph 31.

66. For an entity to be an undertaking it must function as an undertaking, operating on the same or similar markets and according to similar principles as normal undertakings and must, in theory at least, be able to carry out the activity in question without being dependent on state intervention: see the opinion of Mr Jacobs in Case C-67196 *Albany International* [1999] ECR I-5751 ("*Albany*") at paragraphs 214 and 338, and the illustrations of the same principle to be found in *Pavlov*, cited above, and in Case C-244/94 *Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013 ("the *FFSA* case"), notably the opinion of Advocate General Tesauro at paragraph 8.

67. In fulfilling its primary duty to provide social services North & West is in no sense competing with Bettercare in any economic market or deriving some commercial benefit from the situation. Although the activities of North & West may have an economic effect on Bettercare, there is no market in which they compete and it is therefore a fiction to portray the Trust as an economic operator in this context.

68. In any event, the fact that North & West has no discretion in relation to the prices charged, is confirmed by Mr Barry's evidence, and in addition by a letter from the EHSSB to North & West of 19 June 2001 and paragraph 4.3 of the "Care Homes Directory" of residential and nursing homes in the EHSSB area, produced by North & West in response to questions from the Tribunal.

69. The Director accepts North & West would be an undertaking when providing residential care services to residents who could fund the full cost of their care ("self funders") but not when providing those services to residents who cannot afford them, which is what we are concerned with here. The decisive factor of this case is that in the case of the Bettercare homes North & West is filling a gap in the market caused by severe social deprivation. The activity in this case could not be carried on for profit, but in other cases one would have to look at the matter on a trust by trust basis to see if the activity in question was able to make a profit.

70. According to the Director, Bettercare's real complaint is the lack of resources allocated by Government to the purchase of residential care from the private sector, but that is a political matter which is unaffected by the Act.

V THE RELEVANT LAW

71. Given the diversity of the factual situations which have occurred in the caselaw of the European Court, and since those cases can only be understood in their factual context, we think the most convenient approach is to trace briefly the more important decisions, in chronological order, before attempting the legal analysis in this case.

Commission v Italy (1987)

72. In Case 118/85 *Commission v Italy* [1987] ECR 2599, the EC Commission brought an action before the European Court under Article 226 (ex Article 169) for a declaration that by refusing to supply information concerning the Amministrazione Autonoma dei Monopli di Stato (AAMS), which manufactured and sold tobacco, the Italian Republic had failed to fulfil its obligations under Commission Directive 80/723 on the transparency of financial relations between members states and public undertakings. The object of that Directive is to render transparent the financial relations between national public authorities and public undertakings for the purposes of the Commission's supervision of the state aid rules. In particular the sixth recital states that the purpose of the Directive is to enable a clear distinction to be made between the role of the State as public authority and its role as proprietor. The Italian Republic defended its refusal to supply the relevant information on the basis that AAMS was a

"public authority" rather than a "public undertaking" for the purposes of Article 2 of the Directive and that accordingly the obligation to provide the information did not apply.

73. In its judgment the European Court observed at paragraphs 7 and 8:

> "7. The distinction provided for in the sixth recital flows from the recognition of the fact that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong.
>
> 8. It must be observed that for that purpose, it is of no importance that the state carries out the said economic activities by way of a distinct body over which it may exercise, directly or indirectly, a dominant influence according to the criteria laid down in Article 2 of the Directive or that it carries out the activities directly through a body forming part of the state administration. ... In this case, the fact that the AAMS is integrated into the state administration does not therefore prevent its being regarded as a public undertaking within the meaning of Directive 80/723."

Höfner & Elser (1991)

74. In Case C-41/89 *Höfner and Elser v Macroton* ("*Höfner & Elser*") [1991] ECR I-1979, Mr Höfner and Mr Elser operated as recruitment consultants in Germany. Macroton, one of their clients, refused to pay their fees and in subsequent litigation took the point that the activities of Mr Höfner and Mr Elser were illegal under the German law on the Promotion of Employment, which gave the Bundesanstalt (Federal Employment Office) the exclusive right to conduct employment procurement activities in Germany. That law formed part of the policy of the German Government to achieve and maintain a high level of employment, to improve job distribution and promote economic growth. In a reference under Article 177 (now Article 234) of the Treaty, the German Court asked the European Court to rule on the compatibility of the monopoly of the Bundesanstalt with Articles 86 and 90 (now Articles 82 and 86) of the EC Treaty.

75. It was argued by the German Government and the respondent that the Bundesanstalt was not 'an undertaking'. The Bundesanstalt provided its services free, but was financed by contributions by workers and employers. Apparently the Bundesanstalt also administered unemployment benefits. The European Court held, at paragraphs 21 to 24 of its judgment:

> "21 It must be observed, in the context of competition law, first that 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 and, secondly, that employment procurement is an economic activity.

22 The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

23 It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules.

24 It must be pointed out that a public employment agency which is entrusted, under legislation of a Member State, with the operation of services of general economic interest, such as those envisaged in Article 3 of the AFG, remains subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties (see judgment in Case 155/73 *Sacchi* [1974] ECR 409)."

Bodson (1988)

76. In Case 30/87 *Bodson v Pompes funèbres des régions libérées SA* [1988] ECR 2479 ("the Bodson case") communes in France were responsible for funeral services in their territory. Pompes funèbres had a sole concession for the provision of funeral services in Charlesville-Mézières granted by the commune. When Mme Bodson sought to provide similar services in that area, Pompes funèbres obtained an interim injunction from the French courts preventing her from doing so. The Cour de Cassation referred to the European Court under Article 177 (now Article 234) the question of the compatibility of such a concession with EC law.

77. On the question of the applicability of Article 85 (now Article 81) of the Treaty the European Court held at paragraph 18 of its judgment that:

> "… Article 85 of the Treaty applies, according to its actual wording, to agreements 'between undertakings'. It does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service."

However, the Court also held that the communes in question were precluded by Article 90(1) (now Article 86(1)) of the Treaty from requiring undertakings holding such concessions to charge unfair prices (paragraphs 33 to 34 of the judgment).

Film purchases by German television stations (1989)

78. In *Film purchases by German television stations* (OJ 1989 L 284/36) the European Commission adopted a decision concerning a notification to it by the association of public

broadcasting organisations of the Federal Republic of Germany of agreements involving television rights to certain feature films. In its legal assessment the Commission stated:

> "(38) The functional concept of undertaking in Article 85(1) covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to make profits. Accordingly, the Court of Justice ruled in Case 155/73 Sacchi that public television broadcasting organisations are undertakings within the meaning of Article 85(1) in so far as they exercise activities of an economic nature.
>
> (39) The acquisition of television rights constitutes such an economic activity. What is involved is the acquisition of a good for a consideration, with the broadcasting organisations being in direct competition with other undertakings, in particular private television stations."

Poucet and Pistre (1993)

79. In Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, the applicants were required under French law to make payments to two organisations which managed social security schemes. One such scheme was a compulsory old-age insurance scheme for artisans, while the other was a compulsory sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations. Both the level of contributions and benefits were subject to the control of the public authorities. The applicants challenged the orders that required them to make contributions to those schemes on the basis that they were contrary to the competition rules of the Treaty. The French Court referred to the European Court under Article 177 (now Article 234) the question of whether the bodies managing those schemes should be regarded as undertakings for the purposes of Articles 85 and 86 (now Articles 81 and 82) of the Treaty.

80. The European Court held, at paragraphs 8 to 19 of its judgment:

> "8. Those schemes pursue a social objective and embody the principle of solidarity.
>
> 9. They are intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation.
>
> 10. The principle of solidarity is, in the sickness and maternity scheme, embodied in the fact that the scheme is financed by contributions proportional to the income from the occupation and to the retirement pensions of the persons making them; only recipients of an invalidity pension and retired insured members with very modest resources are exempted from the payment of contributions, whereas the benefits are identical for all those who receive them. Furthermore, persons no longer covered by the scheme retain their entitlement to benefits for a year, free of charge. Solidarity entails the redistribution of income between those who

are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.

11. In the old-age insurance scheme, solidarity is embodied in the fact that the contributions paid by active workers serve to finance pensions of retired workers. It is also reflected by the grant of pension rights where no contributions have been made and of pension rights that are not proportional to the contributions paid.

12. Finally, there is solidarity between the various social security schemes, in that those in surplus contribute to the financing of those with structural financial difficulties.

13. It follows that the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.

14. It is apparent from the documents that the management of the schemes at issue in the main proceedings were entrusted by statute to social security funds whose activities are subject to control by the State, acting through, in particular, the Minister for Social Security, the Minister for the Budget and public bodies such as the Inspectorate General of Finance and the Inspectorate General for Social Security.

15. In the discharge of their duties, the funds apply the law and thus cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. For management of the sickness and maternity scheme, the regional sickness funds may entrust to certain organizations, such as those that are governed in France by the Code de la Mutualité (Code governing mutual societies) or the Code des Assurances (Insurance Code), the task of collecting contributions and paying out benefits. However, it does not appear that those organizations, which, in the performance of that task, act only as agents of the sickness funds, are referred to by judgments of the national court.

16. The foregoing considerations must be taken into account in examining whether the term 'undertaking', within the meaning of Articles 85 and 86 of the Treaty, includes organizations charged with managing a social security scheme of the kind referred to by national court.

17. The Court has held (in particular in Case C-41/90 *Höfner* v *Elser* [1991] ECR I-1979, paragraph 21) that in the context of 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.

18. Sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.

19. Accordingly, that activity is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 85 and 86 of the Treaty."

Eurocontrol (1994)

81. Case C-364/92 *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* [1994] ECR I-43 ("the Eurocontrol case"), concerned the arrangements for international air traffic control made by the European Organisation for the Safety of Air Navigation, which is an international organisation set up and run by 14 contracting States in pursuance of an international Convention. One of Eurocontrol's functions is to establish and collect the charges levied on users of air navigation services. Eurocontrol brought proceedings in Belgium against SAT, an airline company, in respect of its failure to pay the charges it had incurred. In those proceedings SAT sought to justify its refusal to pay on the basis that the setting of charges by Eurocontrol amounted to an abuse of a dominant position contrary to Article 86 (now Article 82) of the Treaty. The Belgian Cour de Cassation made a reference to the European Court under Article 177 (now Article 234) on the question of whether or not Eurocontrol constituted "an undertaking".

82. The European Court held at paragraphs 18 to 31 of its judgment:

> "18 It follows from the case-law of the Court (see especially the judgments in case C41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, at paragraph 21, and in Joined Cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637, at paragraph 17) 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.
>
> 19 In order to determine whether Eurocontrol's activities are those of an undertaking within the meaning of Articles 86 and 90 of the Treaty, it is necessary to establish the nature of those activities.
>
> 20 Under Article 1 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (United Nations Treaty Series, Vol. 15, No. 105): "The Contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory". It is in the exercise of that sovereignty that the states ensure, subject to compliance with the provisions of the applicable international conventions, the supervision of their air space and the provision of air navigation control services.
>
> 21 According to the Convention establishing it, Eurocontrol is a regionally-oriented international organization, whose aim is to strengthen cooperation between the Contracting States in the field of air navigation and develop joint activities in this field, making due allowance for defence needs and providing maximum freedom for all air space users consistent with the required level of safety. The organisation is to act in cooperation with the civil and military authorities of the Contracting States (Article 1 of the amended Convention).
>
> 22 Eurocontrol's tasks, as defined in Article 2 of the amended convention, are concerned in the first place with research, planning, co-ordination of national policies and staff training.

23 Secondly, Eurocontrol is competent to establish and collect the route charges levied on users of air space. Eurocontrol settles, in accordance with the guidelines laid down by the International Civil Aviation organisation, the common formula on the basis of which the route charges are calculated. The formula takes into account the weight of the aircraft and the distance travelled, to which a "rate per unit" is applied. That rate is not fixed by Eurocontrol, but by each of the Contracting states for the use of its airspace. A single charge, making up the sum of the charges payable, is calculated and collected by Eurocontrol for each flight. The charges are collected on behalf of the Contracting States to which they are paid over, after deduction of a proportion of the revenue corresponding to an "administrative rate" intended to cover collection costs.

24 Finally, as the Protocol of 12 February 1981 expressly provides, the operational exercise of air navigation control is limited since Eurocontrol can only carry on that activity at the request of the Contracting States. In that connection, it is common ground that Eurocontrol confines itself to providing air space control for the Benelux countries and the northern part of the Federal Republic of Germany from its Maastricht centre. For the purposes of such control, Eurocontrol is vested with rights and powers of coercion which derogate from ordinary law and which affect users of air space. In exercising those particular powers, it must ensure compliance with International agreements and national rules concerning access, overflying and the territorial security of the Contracting States concerned.

25 So far as the last-mentioned activity is concerned, it may be noted that it has not been disputed that Eurocontrol is required to provide navigation control in that air space for the benefit of any aircraft travelling through it, even where the owner of the aircraft has not paid the route charges owed to Eurocontrol.

26 Finally, Eurocontrol's activities are financed by the contributions of Contracting States.

27 Eurocontrol thus carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety.

28 Contrary to SAT's contentions, Eurocontrol's collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organization'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. As the Court has already held, specifically in connection with the interpretation of the above mentioned Convention of 27 September 1968, Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers (the LTU judgment, cited above, at paragraphs 4 and 5).

29 Eurocontrol acts in that capacity on behalf of the Contracting States without really having any influence over the amount of the route charges.

30 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.

31 Accordingly an international organisation such as Eurocontrol does not constitute an undertaking subject to the provisions of Articles 86 and 90 of the Treaty."

Fédération Française des Sociétés d'Assurance (1995)

83. In Case C-244/94 *Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013 ("the FFSA case"), a number of private insurance companies challenged a French law establishing an optional supplementary old-age insurance scheme for self-employed farmers financed by voluntary contributions known as the Coreva scheme. The scheme was managed by a non-profit making organisation, the Caisse Centrale de la Mutualité Sociale Agricole (CCMSA) which also operated a compulsory scheme. The voluntary scheme operated according to the principle of capitalisation, that is to say the benefits payable under the scheme depended solely on the amount of contributions paid by the members of the scheme and the results of the investments made by the managing organisation, rather than on a redistributive principle. The Conseil d'Etat referred to the European Court under Article 177 (now Article 234) the question of whether or not a body such as the CCMSA which managed a voluntary scheme was an undertaking.

84. The European Court held at paragraphs 14 to 21 of its judgment:

> "14 In the context of competition law, the Court has held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, the judgments in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and *Poucet and Pistre*, cited above, paragraph 17).
>
> 15 In *Poucet and Pistre*, the Court excluded from that concept bodies entrusted with the management of certain compulsory social security schemes based on the principle of solidarity. Under the sickness and maternity insurance scheme there in question, the benefits were identical for all recipients, but contributions were proportionate to income. Under the old-age insurance scheme, retirement pensions were financed by active workers. Further, the pension rights, laid down by legislation, were not proportionate to the contributions paid under the old-age insurance scheme. Finally, schemes which were in surplus helped finance those which had financial difficulties of a structural nature. Such solidarity necessarily required the various schemes to be managed by a single body and membership of those schemes to be compulsory.
>
> 16 It is in the light of those considerations that the Court must consider whether the concept of an undertaking, within the meaning of Article 85 et seq of the Treaty, covers a body such as that at issue in this case.
>
> 17 The first point to note is that membership of the Coreva scheme is optional, that the scheme operates in accordance with the principle of capitalization, and that the benefits to which it confers entitlement depend solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organization. The CCMSA therefore carries on an economic activity in competition with life assurance companies. As the Commission has rightly observed, a farmer wishing to supplement his basic pension will opt, as between the CCMSA and an

insurance company, for the solution which guarantees the better investment.

18 The elements of solidarity forming part of the scheme at issue here, and the other characteristics to which the French Government has referred, cannot alter that conclusion.

19 First, the principle of solidarity is reflected in this case by the fact that contributions are not linked to the risks incurred, by the placing of resources corresponding to the contributions paid at the disposal of the scheme in the event of the premature death of a member, by a mechanism for granting exemption from payment of contributions in the event of illness, and by the temporary suspension of payment of contributions for reasons connected with the economic situation of the holding. Such provisions already exist in certain group life assurance policies, or may be included therein. In any event, the principle of solidarity is extremely limited in scope, which follows from the optional nature of the scheme. In those circumstances, it cannot deprive the activity carried on by the body managing the scheme of its economic character.

20 Secondly, whilst the pursuit of a social purpose, the requirements of solidarity and the other rules mentioned by the French Government – in particular, the rights and obligations of the managing body and the persons insured, the rules of that body and the restrictions to which it is subject in making its investments – may make the service provided by the Coreva scheme less competitive than the comparable service provided by life assurance companies, such limitations do not prevent the activity carried on by the CCMSA from being regarded as an economic activity. A separate question, still to be examined, would be whether those limitations could be relied upon, for example, in order to justify the exclusive right of that body to provide old-age insurance in respect of which contributions are deductible from taxable earnings.

21 Finally, the mere fact that the CCMSA is a non-profit-making body does not deprive the activity which it carries on of its economic character, since, having regard to the features referred to in paragraph 17, that activity may give rise to conduct which the competition rules are intended to penalize."

Diego Cali (1997)

85. In Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547, the Genoa port authority (CAP), a body with administrative and economic functions conferred by legislation, adopted a decree entrusting surveillance and other preventative anti-pollution services at the port to a company, SEPG, in the form of an exclusive concession. The tariffs charged to port users were approved by decree by the President of the CAP. It was not a prerequisite for liability to pay charges for the port user to have actually caused any pollution. In the Italian courts Diego Cali, a port user, challenged a court order requiring payment of invoices in respect of the services provided by SEPG on the grounds that SEPG was abusing a dominant position contrary to Article 86 (now 82) of the Treaty.

86. On a reference under Article 177 (now Article 234) by the Tribunale di Genova the European Court held:

> "16. As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (*Case 118/85 Commission v Italian Republic* [1987] ECR 2599, paragraph 7).
>
> 17. In that connection it is of no importance that the state is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights (*Case 118/85 Commission v Italian Republic* [1987] ECR 2599, paragraph 8).
>
> 18. In order to make the distinction between the two situations referred to in paragraph 16 above, it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the state has conferred special or exclusive rights (*Case 118/85 Commission v Italian Republic* [1987] ECR 2599, paragraph 7).
>
> …
>
> 22. The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas.
>
> 23. Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the treaty rules on competition (*Case C-364/92 SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)* [1994] ECR I-43).
>
> 24. The levying of a charge by SEPG for preventive anti-pollution surveillance is an integral part of its surveillance activity in the maritime area of the port and cannot affect the legal status of that activity (Case C-364/92 *SAT Fluggesellschaft v Eurocontrol*, cited above, paragraph 28). Moreover, as stated in paragraph 8 of this judgment, the tariffs applied by SEPG have been approved by the public authorities.
>
> 25. In the light of the foregoing considerations, the answer to Question 1 must be that Article 86 of the EC Treaty is to be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity."

Sodemare (1997)

87. In Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395, ("the Sodemare case") Italian law provided that if private operators wished to enter into contracts to provide publicly financed social welfare services they must obtain a certificate of suitability. One condition of

the issue of such a certificate was that the body in question must be non-profit making. A company run by Sodemare was refused a certificate of suitability to enter into contracts to provide social welfare services with local health and welfare centres on the ground that it was profit making. The Italian court referred various questions to the European Court under Article 177 (now Article 234) on the Treaty rules governing the freedom of establishment, and the freedom to provide services, and on the question whether the Italian law infringed Articles 85 or 86 (now Articles 81 and 82) read in conjunction with Article 5 (now Article 10) of the Treaty. Article 5 (now Article 10) requires Member States to abstain from introducing or maintaining measures which could jeopardise the attainment of the objectives of the Treaty.

88. On the question whether the relevant Italian legislation infringed Article 5 (now Article 10) read with Articles 85 and 86 (now Articles 81 and 82) the European Court held that the relevant Italian legislation was not itself contrary to Articles 85 or 86 as it did not require or favour the adoption of agreements or conduct prohibited by those Articles (see paragraphs 41 to 47 of the judgment). In his opinion Advocate General Fennelly gave this definition of social solidarity: "Social solidarity envisages the inherently uncommercial act of involuntary subsidisation of one social group by another" (paragraph 29). He also noted at paragraph 30 that

> "the relations of other persons, as providers of goods or services, with such systems of social provision can, none the less, be economic in character. Community law requires that such systems comply with Treaty rules in so far as they affect the economic activities 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 subsidize the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, inter alia, freedom of establishment."

Job Centre (1997)

89. In case C-55/96 *Job Centre* [1997] ECR I-7119, which was not cited to us, the Court confirmed its judgment in *Höfner & Elser*, holding that an Italian public placement office with an exclusive right to procure employment for employees in Italy was an "undertaking". At paragraph 24 the Court said this with respect to its judgement in *Poucet and Pistre*:

> "However, although it is clear from that judgment that administering mandatory social security schemes such as those described in the references for a preliminary ruling in *Poucet and Pistre*, cited above, does not constitute an economic activity, that conclusion, in paragraph 17, was based on the same criteria as had been applied in *Höfner and Elser* when it was concluded that employment procurement must be described as a business activity within the meaning of the Community competition rules."

Albany (1999)

90. In Case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, ("*Albany*") and the parallel Cases C-115, 116 and 117/97 *Brentjens v Stichting Bedrijfspensioenfonds voor di handel in Bouwmaterialen* [1999] ECR I-6025 and Case 219/97 *Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer-en Havenbedrijven* [1999] ECR I-6125, the issue was whether certain sectoral pensions funds in the Netherlands, to which affiliation was compulsory, were undertakings for the purposes of the Community competition rules. Like the pension funds at issue in the *FFSA* case, the funds operated on a capitalisation basis.

91. In his opinion Advocate General Jacobs stated at paragraph 214, in respect of the Court's functional approach to the question of "undertaking":

> "With respect to public bodies the Court examines whether the activity in question is – at least potentially – performed by private entities engaged in the supply of goods or services. (See the judgments in Case C-343/95 *Cali*, cited in note 97, and Case C-41/90 *Höfner*, cited in note 53.) Individuals, too, may be classified as undertakings (see recently, with respect to Italian customs agents, Case C-35/96 *Commission v Italy* [1998] ECR I-3851) if they are independent economic actors on the markets for goods or services. The rationale underlying those cases is that the entities under scrutiny are fulfilling the 'function' of an undertaking. The application of Articles 85 and 86 is justified by the fact that those public bodies or individuals are operating on the same or similar markets and according to similar principles as 'normal' undertakings. (See, for a detailed comparison with 'normal' undertakings, the judgment in *Commission v Italy*, cited above, paragraphs 36 to 38.)"

At paragraph 311 he said:

> "As already stated, the Court has generally adopted a functional approach. The basic test is therefore whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits."

92. Having analysed the characteristics of the various schemes considered in the caselaw, Mr Jacobs said at paragraph 338:

> "I consider that a non-funded pension scheme operating according to the redistribution method where current contributions finance the pensions of the currently retired is necessarily operated directly by the State or indirectly through bodies acting as or in a similar way as agents of the State. I cannot see any – even theoretical – possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle. Nobody would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same."

93. Mr Jacobs' conclusion, on the facts of that case, that the activities of the pension funds concerned were of an economic nature, was followed by the European Court at paragraphs 77 to 86 of its judgment:

> "77 It should be borne in mind that, in the context of competition law, the Court has held that 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 (see, in particular Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; *Poucet and Pistre*, cited above, paragraph 17; and *Fédération Française des Sociétés d'Assurance*, cited above, paragraph 14).
>
> 78 Moreover, in *Poucet and Pistre*, cited above, the Court held that that concept did not encompass organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity. Under the sickness and maternity scheme forming part of the system in question, the benefits were the same for all beneficiaries, even though contributions were proportional to income; under the pension scheme, retirement pensions were funded by workers in employment; furthermore, the statutory pensions entitlements were not proportional to the contributions paid into the pension scheme; finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory.
>
> 79 In contrast, in *Fédération Française des Sociétés d'Assurance*, cited above, the Court held that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 85 et seq of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organisation implied that that organisation carried on an economic activity in competition with life assurance companies. Neither the social objective pursued, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.
>
> 80 The question whether the concept of an undertaking, within the meaning of Article 85 et seq of the Treaty, extends to a body such as the sectoral pension fund at issue in the main proceedings must be considered in the light of those considerations.
>
> 81 The sectoral pension fund itself determines the amount of the contributions and benefits and the Fund operates in accordance with the principle of capitalisation.
>
> 82 Accordingly, by contrast with the benefits provided by organisations charged with the management of compulsory social security schemes of the kind referred to in *Poucet and Pistre*, cited above, the amount of the benefits provided by the Fund depends on the financial results of the

investments made by it, in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

83 In addition, as is apparent from Article 5 of the BPW and Articles 1 and 5 of the Guidelines for exemption from affiliation, a sectoral pension fund is required to grant exemption to an undertaking where the latter has already made available to its workers for at least six months before the request was lodged on the basis of which affiliation to the fund was made compulsory, a pension scheme granting them rights at least equivalent to those which they would acquire if affiliated to the fund. Moreover, under Article 1 of the above-mentioned Guidelines, that fund is also entitled to grant exemption to an undertaking which provides its workers with a pension scheme granting them rights at least equivalent to those deriving from the fund, provided that, in the event of withdrawal from the fund, compensation considered reasonable by the Insurance Board is offered for any damage suffered by the fund, from the actuarial point of view, as a result of the withdrawal.

84 It follows that a sectoral pension fund of the kind at issue in the main proceedings engages in an economic activity in competition with insurance companies.

85 In those circumstances, the fact that the fund is non-profit-making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty.

86 Undoubtedly, the pursuit of a social objective, the above-mentioned manifestations of solidarity and restrictions or controls on investments made by the sectoral pension fund may render the service provided by the fund less competitive than comparable services rendered by insurance companies. Although such constraints do not prevent the activity engaged in by the fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme."

Pavlov (2000)

94. In Cases C-180/98 to C-184/98 *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, the applicants challenged, as contrary to Community law, the rules of the Dutch medical specialists' pension fund which provided that membership of the fund was compulsory for members of that profession. On a reference under Article 177 (now Article 234) the Dutch court sought clarification of whether the pension fund in question constituted an undertaking. The European Court approached that question on the basis of whether the fund was similar in nature to the compulsory social security schemes examined in *Poucet and Pistre*, cited above, or whether the fund was in fact carrying on an economic activity in the way that the various funds in *FFSA* and *Albany* were. The European Court's conclusion was that the fund in issue was an undertaking. The Court held:

"114. The Fund itself determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation. Thus, the level of benefits provided by the fund depends on the performance of the investments which it makes and in respect of which it is subject, like an insurance company, to supervision by the Insurance Board.

115. Those characteristics, together with the fact that medical specialists may opt to purchase their basic pension either form the Fund or from an authorised insurance company and the fact that the Fund has power to grant certain categories of medical specialists exemption from membership as regards the other components of the pension scheme, indicate that the Fund carries on an economic activity in competition with insurance companies.

116. It must therefore be concluded that a body such as the Fund is an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty.

117. The fact that the Fund is non-profit making and the solidarity aspects emphasised by the Fund and the governments which have submitted observations are not sufficient to relieve the Fund of its status as an undertaking within the meaning of the competition rules of the Treaty (see *Albany*, paragraph 85, *Brentjens*, paragraph 85, *Drijvende Bokken*, paragraph 75).

118. It is true that the pursuit of a social objective, the above mentioned solidarity aspects and the restrictions or controls on investments made by the Fund may render the service provided by the Fund less competitive than comparable services provided by insurance companies. Although such constraints do not prevent the activity engaged in by the Fund from being regarded as an economic activity, they might justify the exclusive right of such a body to manage a supplementary pension scheme (see *Albany*, paragraph 86, *Brentjens*, paragraph 86, and *Drijvende Bokken*, paragraph 76)."

Ambulanz Glöckner (2001)

95. In Case C-475/99, *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR 8089 (*Ambulanz Glöckner*), the local health authority refused to renew an authorisation to provide non-emergency ambulance services granted to Ambulanz Glöckner, a private company, which had negotiated an agreement with private health insurers to provide ambulance services at a cost considerably lower than that of the public ambulance service. The decision of the local health authority was based on a German federal law, the RettDG 1991, that permitted the authorisation of private operators to be refused on the grounds that the public ambulance service would be adversely affected. In Germany, the public ambulance service is in most cases entrusted to recognised non-profit making medical aid organisations, such as the German Red Cross, the Workers Samaritan Federation, St John's Accident Assistance and similar bodies. In Trier, the public ambulance service was apparently provided by the local fire brigade. The public ambulance service in Germany is financed partly by the State and partly by user charges paid by public and private health insurers.

96. In opposing Ambulanz Glöckner's request for the renewal of its authorisation, the medical aid organisations argued that the need to operate a 24 hour emergency service meant that they had to maintain sufficient resources and capacity to deal with emergencies and catastrophies. As a result, full utilisation of capacity was not possible. Accordingly to authorise independent operators to provide ambulance services would reduce the utilisation of the public ambulance service and negatively affect its expenditure and revenues. The Oberverwaltungsgericht of Rheinland-Pfalz referred to the European Court under Article 177 (now Article 234) the questions whether the medical aid organisations must be regarded as undertakings that hold exclusive or special rights for the purposes of Article 90 of the Treaty (now Article 86), and whether the creation of a monopoly for the provision of ambulance services over a defined geographical area was compatible with Article 90 (now Article 86) and Articles 85 and 86 (now Articles 81 and 82) of the Treaty.

97. In his opinion Advocate General Jacobs said this at paragraphs 65 to 81:

> "*1. The concept of undertaking*
>
> 65. Ambulanz Glöckner maintains that both the medical aid organisations and the public authorities primarily responsible for the public ambulance service must be regarded as undertakings.
>
> (a) Medical aid organisations as undertakings
>
> 66. As regards, first, the medical aid organisations in issue, none of the parties has argued that they should not be regarded as undertakings for the purposes of competition law. We are informed that
>
> – in the Land concerned there are four recognised medical organisations, of which the DRK (German Red Cross) is apparently the most important one,
>
> – they are organised as non-profit-making associations,
>
> – they are engaged *inter alia* in the provision of both emergency transport and patient transport services,
>
> – in the Land concerned they have been entrusted with the operation of the public ambulance service in almost all operational areas,
>
> – within those operational areas they set up, staff and maintain the central control units and ambulance stations,
>
> – the infrastructure costs of the public ambulance service are financed mainly through direct public funding and the operating costs mainly through user charges,
>
> – under the principle of full cost coverage the user charges must be calculated so as to guarantee that they cover all the costs of the public ambulance service which are not financed through other sources of funding.
>
> 67. It will be recalled that for the purposes of Community competition law the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way it is

financed. The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services on a given market and which could, at least in principle, be carried out by a private actor in order to make profits.

68. In the present case, it is clear from the facts of the main proceedings that non-emergency patient transport has in the past been carried out in Germany by private undertakings with a view to making profits. Moreover, it appears from the file that Ambulanz Glöckner has in the past also provided emergency transport services. Nothing therefore suggests that the nature of either emergency or patient transport is such that those services must *necessarily* be carried out by public entities. Whether emergency or patient transport generates profits will depend exclusively on the remuneration which the operator obtains for his services. Furthermore, the referring court states that under German civil law, too, the relationship between ambulance service provider and patient is viewed as an 'ordinary service contract'. The provision of ambulance services therefore constitutes an economic activity within the meaning of the Court's case-law.

69. That conclusion is not affected by the legal status of the medical aid organisations as non-profit-making associations, the method of financing of their activities, or the fact that they have been entrusted with tasks in the public interest. In connection with the last two points it must be borne in mind that public service obligations may render the services provided by a given operator less competitive than comparable services rendered by other operators and thus justify under certain conditions the grant of special or exclusive rights or of State aid. It follows however from Articles 86(1) and (2) and 87 EC that public service obligations, special or exclusive rights, or State financing cannot prevent an operator's activities from being regarded as economic activities.

70. I conclude therefore that in respect of the provision of ambulance services the medical organisations in issue must be viewed as undertakings within the meaning of Article 86(1).

(b) Public authorities as undertakings

71. Ambulanz Glöckner argues, secondly, that the public authorities at issue and in particular the defendant Landkreis must also be regarded as undertakings. It recalls that the RettDG 1991 entrusts the task of operating the public ambulance service primarily to the authorities. Those authorities must therefore be regarded as potential competitors of independent operators such as Ambulanz Glöckner.

72. I consider that a differentiated approach is necessary. It is settled case-law that public bodies engaging in economic activities may be regarded as undertakings. On the other hand, activities in the exercise of official authority are sheltered from the application of the competition rules. Furthermore, the notion of undertaking is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules.

73. Within the regime established by the RettDG 1991 the public authorities perform three different functions: first, they are the entities primarily responsible for the public ambulance service and on that basis they operate that service themselves in some areas; secondly, in most areas they assign the public ambulance service to medical aid organisations; and finally, they decide on authorisations for independent operators.

74. Where the public authorities operate the public ambulance service themselves (as appears to be the case in the town of Trier) they are engaged in the economic activity provision of ambulance services. In those areas the authorities in question must be viewed as undertakings within the meaning of the competition rules.

75. Where the authorities assign the public ambulance service to the medical aid organisations, it is more difficult to classify the nature of that assignment. It might be argued that the transfer of responsibility for a given economic activity from one (public) entity to another (private) entity must itself also be considered as an economic activity. Conversely it might be argued that in such a situation an authority acts in its capacity as public authority and therefore not as an undertaking within the meaning of Articles 81 EC et seq. Since the present preliminary ruling procedure does not directly concern the assignment of the public ambulance service to the medical aid organisations it is not necessary for me to express a definitive view on that difficult question.

76. As regards the activity at issue in the main proceedings, namely the grant or refusal of authorisations for the provision of independent ambulance services, it will be recalled that an entity acts in the exercise of official authority where the activity in question "is connected by its nature, its aim and the rules to which it is subject with the exercise of powers ... which are typically those of a public authority". A decision to grant or to refuse an authorisation for the provision of ambulance services within the framework of the RettDg 1991 falls in my view clearly within that definition. Before granting the authorisation the authorities examine the safety and efficiency of the operation, the reliability and professional qualifications of the operator and – under the disputed provision – the possible effects of an authorisation on the public ambulance service. The grant or refusal of an authorisation is thus a typical administrative decision taken in the exercise of prerogatives conferred by law which are usually reserved for public authorities. I cannot see how that decision-making activity could be assimilated to the offering of goods or services on given markets.

77. The fact invoked by Ambulanz Glöckner that the public authorities are *potential* competitors on the market for ambulance services is in my view irrelevant for the classification of their decision-making activities.

78. First, I do not think that Article 81 EC *et seq* apply to potential undertakings. Public authorities could theoretically engage in almost any economic activity and would thus permanently fall within the scope of the competition rules.

79. In any event, even where the authorities are *actual* competitors of independent providers (as appears to be the case in Trier), the operation of the ambulance service (economic activity) and the grant or refusal of authorisations for the provision of independent ambulance services (decision-making activity) must be analysed separately. Only with regard to the former activity do the authorities act as undertakings within the meaning of the competition rules.

80. It is true that the Court's case-law requires that a State body with regulatory powers over a given market should be independent from any undertaking operating on that market. That case-law does not however establish that the authorities' regulatory activities must be viewed as economic activities, but concerns only the compatibility with the Treaty of the resulting conflict of interest.

81. I conclude therefore that the authorities cannot be viewed as undertakings where they grant or refuse authorisations for the provision of independent ambulance services."

98. On the "undertaking" issue the European Court held at paragraphs 19 to 22 of its judgment in *Ambulanz Glöckner*:

> "19. … the concept of an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal satus of the entity or the way in which it is financed (*Joined Cases C-180/98 to C-184/98 Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 74). Any activity consisting in offering goods and services on a given market is an economic activity (*Pavlov and Others*, paragraph 75).
>
> 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 service. The provision of such services therefore constitutes an economic activity for the purposes of the application of the competition rules laid down by the Treaty.
>
> 21. Public service obligations may, of course, render the services provided by a given medical aid organisation less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities.
>
> 22. As regards the provision of emergency transport services and patient transport services, entities such as the medical aid organisations must therefore be treated as undertakings within the meaning of the competition rules laid down by the Treaty."

99. The Court then went on to set out the factors that the national court would need to consider in applying Articles 81 and 82, and in deciding whether the German law in question could be justified under Article 86(2) (ex Article 90(2)) of the Treaty. The Court concluded that the RettDG 1991 was justifiable under Article 86(2) (ex Article 90(2)) of the Treaty, provided that it did not prevent the authorisation of private ambulance services in circumstances where the medical aid organisations were manifestly unable to satisfy demand for emergency ambulance and patient transport services (paragraphs 51 to 65 of the judgment).

Cisal (2002)

100. Case C-218/00 *Cisal di Battistello Venanzio & Co v Istituto Nazionale per L'Assicurazione Contro Gli Infortuni Sul Lavoro*, judgment of 22 January 2002, [2002] ECR I-0000, concerned INAIL, the Italian National Institute for Insurance against Accidents at Work. INAIL operates

a national regime of compulsory insurance against accidents at work and occupational diseases. INAIL obtained an order for payment for unpaid insurance contributions against Mr Battistello, the applicant's managing partner. Cisal claimed that Mr Battistello was insured under a private insurance policy and that the Italian law on the basis of which it was obliged to take out insurance against the same risks with INAIL was contrary to Community competition law. The Tribunale di Vicenza referred to the European Court the question of whether or not INAIL constituted an undertaking, and whether the compulsory payment of premiums, even where there was a private insurance policy in force, amounted to an infringement of Articles 86 (ex Article 90) and 82 (ex Article 86) of the Treaty.

101. In his opinion Advocate General Jacobs referred back to the approach he had adopted in previous cases such as *Albany* and *Ambulanz Glöckner*.

102. After pointing out, at paragraph 71, that "the underlying question is whether [the] entity is in a position to generate the effects which the competition rules seek to prevent" (see also *FFSA*, at paragraph 21, cited at paragraph 84 above), Mr Jacobs reached the view that, on the facts of the case, INAIL was not an undertaking, essentially because (i) the statutory framework was closer to "a social security scheme which guarantees basic social protection" rather than to private insurance; and (ii) the level of both benefits and contributions were ultimately determined by the State: see paragraphs 80 to 82 of his opinion,.

103. The European Court in its judgment held at paragraphs 37 to 45:

> "37. However, as is clear from the case law of the Court, the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity (see *Pavlov*, cited above, paragraph [118]).
>
> 38. In the first place, a number of elements tend to demonstrate that the insurance scheme in question in the main proceedings applies the principle of solidarity.
>
> 39. The insurance scheme is financed by contributions the rate of which is not systematically proportionate to the risk insured. For example, it is clear from the case-file that the rate may not exceed a maximum ceiling, even where the activity carried out entails a high risk, the balance of financing being born by all the undertakings in the same category as regards the risk run. Furthermore, contributions are calculated not only on the basis of the risk linked to the activity of the undertaking concerned but also according to the insured persons' earnings.
>
> 40. Second, the amount of benefits paid is not necessarily proportionate to the insured persons' earnings, since, for the calculation of pensions, only salaries situated between a minimum and maximum corresponding to the average nationwide salary, decreased or increased by 30%, may be taken into consideration.

41. In those circumstances, as the Advocate General points out in point 66 of his Opinion, the payment of high contributions may give rise only to the grant of capped benefits, where the salary in question exceeds the maximum laid down by decree and, inversely, relatively low contributions, calculated on the basis of the statutory minimum wage, afford entitlement to benefits calculated according to earnings higher than that threshold, corresponding to the average salary decreased by 30%.

42. The absence of any direct link between the contributions paid and the benefits granted thus entails solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed.

43. In the second place, it is clear from the case-file that the activity of the INAIL, entrusted by law with management of the scheme in question, is subject to supervision by the State and that the amount of benefits and of contributions is, in the last resort, fixed by the State. The amounts of benefits is laid down by law and they may be paid regardless of the contributions paid and the financial results of the investments made by the INAIL. Second, the amount of contributions, upon which INAIL deliberates, must be approved by ministerial decree, the competent minister having the power to reject the scales proposed and to invite the INAIL to submit to him a new proposal taking account of certain information.

44. In summary, it is clear from the foregoing that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them.

45. In conclusion, it may be stated that in participating in this way in the management of one of the traditional branches of social security, in this case insurance against accidents at work and occupational diseases, the INAIL fulfils an exclusively social function. It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty."

VI FACTUAL ELEMENTS

104. Although, strictly speaking, this is an appeal against the Director's decision taken on the basis of the facts known to him at the time, a considerable amount of further background material has, perhaps inevitably, emerged during the course of these proceedings. It seems to us sensible to refer to that new background material in order to put the issue we have to decide into its proper context. We should not, however, be taken to be making findings of fact except on uncontested matters.

THE STATUTORY AND LEGAL FRAMEWORK

Brief history

105. The contested decision did not go into the relevant statutory framework in any detail, but we have had some explanation of that framework in the course of this appeal. Some points, such as the precise legal relationship between the Department, the EHSSB and North & West have not been fully argued and do not seem to us to be wholly clear from the material we have seen.

106. As we understand it, the relevant statutory framework in Northern Ireland has three tiers: the Department of Health, Social Services and Personal Safety ("DHSSPS" or "the Department"); the Health and Social Services Boards ("HSS Boards"); and the Health and Social Services Trusts ("HSS Trusts"). There are four HSS Boards in Northern Ireland, the one concerned in this case being the Eastern Health and Social Services Board ("the EHSSB"). The EHSSB is responsible for four HSS Trusts, including North & West. There are in total 11 HSS Trusts within Northern Ireland.

107. The relevant powers with which we are concerned were originally conferred on the Department, and are to be found in an Order known as the 1972 Order, as amended (see below). The 1972 Order enabled the Department to establish HSS Boards to carry out certain of the Department's functions. As we understand it, the EHSSB was established under the 1972 Order. In 1991, an Order known as the 1991 Order (see below) enabled the establishment of HSS Trusts. As we understand it, the 1991 Order mirrored legislation in Great Britain establishing NHS Trusts under the National Health Service and Community Care Act 1990: see paragraph 121 below. In due course a number of the functions of the HSS Boards, previously transferred from the Department, were transferred to the HSS Trusts. It is common ground that the functions transferred to the HSS Trusts under the 1991 Order include (but of course are not limited to) the function of providing, or securing the provision, of residential and nursing accommodation for the elderly. North & West was established in 1993 and the relevant functions were transferred to it by the EHSSB in 1994.

108. The relevant Northern Ireland legislation is essentially contained in:

- The Health and Personal Social Services (Northern Ireland) Order 1972 SI 1972/1265 (NI 14) as amended ("the 1972 Order");
- The Health and Personal Social Services (Northern Ireland) Order 1991 SI 1991/194 (NI 1), as amended ("the 1991 Order");

- The Registered Homes (NI) Order 1992 SI 1992/3204 (NI 20) as amended ("the 1992 Order");
- The Health and Personal Social Services (Northern Ireland) Order 1994 SI 1994/429 (NI 2) ("the 1994 Order");
- The Health and Personal Social Services Act (Northern Ireland) 2001 ("the 2001 Act").

109. In the following paragraphs we set out what appear to be the relevant provisions of the legislation. For convenience we refer to the relevant legislation in its amended form.

The 1972 Order

— Article 4(b) of the 1972 Order

110. Article 4(b) of the 1972 Order provides:

> "4. It shall be the duty of the Ministry –
>
> (b) to provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland;"

111. "The Ministry" in question is now the DHSSPS, which we also refer to as "the Department". It is common ground that residential care and nursing home services are "personal social services" within the meaning of Article 4(b). These functions are carried out under Articles 15, 36 and 99 of the 1972 Order.

— Article 15 of the 1972 Order

112. Article 15 of the 1972 Order, as amended by Part II of Schedule 5 of the 1991 Order and paragraph 2(2) of Schedule 1 of the 1992 Order, provides:

> "15. (1) In the exercise of its functions under Article 4(b) the Ministry shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.
>
> (1A) Arrangements under paragraph (1) may include arrangements for the provision by any other body or person of any of the personal social services on such terms and conditions as may be agreed between the Department and that other body or person.
>
> ...
>
> (4) The Ministry may recover in respect of any assistance, help or facilities under this Article such charges (if any) as the Ministry considers appropriate.

(5) In so far as it relates to the provision of accommodation, this Article is subject to Articles 36, and 99."

— Article 36 of the 1972 Order

113. Article 36 of the 1972 Order, which was replaced pursuant to Article 25 of the 1991 Order and amended by paragraph 2(3) of the 1992 Order, deals with payments where the Department arranges for accommodation to be provided by a voluntary organisation or other person, which is the situation we are concerned with in this case. Article 36 as amended provides:

"36. (1) ... arrangements made by the Department under Article 15 may include arrangements with –

(a) any voluntary organisation or other person, being an organisation or person who –

(i) manages a residential care home and is registered under Part II of the Registered Homes (Northern Ireland) Order 1992 in respect of a home or is not required to be so registered by virtue of Article 4(4)(a) or (b) of that Order (certain small homes);

...

(3) Any arrangements made by virtue of this Article shall provide for the making by the Department to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements; and, subject to paragraph (7), the Department shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this Article.

(4) Subject to the following provisions of this Article, a person for whom accommodation is provided under any such arrangements shall refund to the Department any payments made in respect of him under paragraph (3).

(5) Where a person for whom accommodation is provided, or proposed to be provided, under any such arrangements satisfies the Department that he is unable to make a refund at the full rate determined under paragraph (3), the Department shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to make a refund.

(6) Regulations may make provision for the assessment, for the purposes of paragraph (5), of a person's ability to pay.

(7) Where accommodation in any home or premises is provided for any person under arrangements made by virtue of this Article and the Department, the person concerned and the voluntary organisation or other person managing the home or premises (in this paragraph referred to as 'the provider') agree that this paragraph shall apply –

(a) so long as the person concerned makes the payments for which he is liable under sub-paragraph (b), he shall not be liable to make any refund under paragraph (4) or (5) and the Department shall not be liable to make any payment under paragraph (3) in respect of the accommodation provided for him;

(b) the person concerned shall be liable to pay to the provider such sums as he would otherwise (under paragraph (4) or (5)) be liable to pay by way of refund to the Department; and

(c) the Department shall be liable to pay to the provider the difference between the sums paid by virtue of sub-paragraph (b) and the payments which, but for sub-paragraph (a), the Department would be liable to pay under paragraph (3).

(8) The Department may, on each occasion when it makes arrangements by virtue of this Article for the provision of accommodation for a person and irrespective of his means, limit to such amount as appears to the Department reasonable for him to pay the refunds required from him for his accommodation during a period commencing when the Department began to make the arrangements for him and ending not more than 8 weeks after that."

— Article 99 of the 1972 Order

114. Article 99 of the 1972 Order (as replaced pursuant to Article 27 of the 1991 Order) deals with the charges to be made by the Department in its own statutory homes. Article 99 as amended provides:

"99. (1) Where a person is provided under Article 15 with accommodation in premises provided by the Department, the Department shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this Article.

(2) Subject to the following provisions of this Article, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate determined by the Department for that accommodation and that standard rate shall represent the full cost to the Department of providing that accommodation.

(3) Subject to paragraph (4), where a person for whom such accommodation is provided, or proposed to be provided, satisfies the Department that he is unable to pay for the accommodation at the standard rate, the Department shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to pay for the accommodation.

(4) The liability of any person to pay for accommodation under this Article may be reduced by reason of any work which he performs and which assists materially in the management of the premises.

(5) Regulations may make provision for the assessment, for the purposes of paragraph (3), of a person's ability to pay.

(6) The Department may, on each occasion when it provides accommodation mentioned in paragraph (1) for any person and irrespective of his means, limit to such amount as appears to the Department reasonable for him to pay the payments required from him for his accommodation during a period commencing when the Department began to provide the accommodation for him and ending not more than 8 weeks after that."

115. Thus under both Article 36(2) and Article 99(4), the principle is that the full cost of providing the accommodation in question is to be recovered from the resident, subject to his/her ability

to pay. The calculation of the contribution which the resident is able to pay is governed by the Assessment of Resources Regulations made under Articles 36(6) and 99(5) of the 1972 Order: see further paragraph 141 below.

The delegation to the EHSSB of the Department's functions under the 1972 Order

116. The Department was given power to establish HSS Boards pursuant to Article 16(1) of the 1972 Order:

> "16. (1) The Ministry shall by order establish bodies to be called Health and Social Security Boards, for such areas as it may by order determine."

117. Power was also given to the Department to delegate certain of its functions to the HSS Boards pursuant to Article 17(1)(a), which states:

> "17. (1) The Health and Social Services Boards shall –
>
> (a) exercise on behalf of the Ministry such functions (including functions imposed under an order of any court) with respect to the administration of such health and personal social services as the Ministry may direct;"

118. The Tribunal does not have the instruments establishing the EHSSB, or the other three HSS Boards in Northern Ireland.

119. The functions of the Department under, among other provisions, Articles 15, 36 and 99 of the 1972 Order were conferred on the HSS Boards by The Functions of Health and Social Services Boards (No 1) Direction (Northern Ireland) 1973 dated 14 September 1973. Paragraph 3 of the 1973 Direction states that:

> "Each Health and Social Services Board shall, as respects its area, subject to and in accordance with this direction and any other direction which may be given or regulations made by the Ministry, exercise on behalf of the Ministry the functions of the Ministry relating to the health and personal social services under (a) the provisions of the Order specified in column (1) hereunder ... unless specifically provided to the contrary in column (2)."

120. The 1973 Direction was amended by The Functions of Health and Social Services Boards (No.1) Direction (Northern Ireland) 1993 dated 23 April 1993 but it is not suggested that anything turns on that amendment.

HSS trusts constituted under the 1991 Order

121. The power to establish HSS Trusts was given to the Department by Article 10 of the 1991 Order, which has since been amended by Article 8 of the 1994 Order and later by sections

43(1) and (2) and 44(1) of the 2001 Act. As we understand it, the HSS trusts in Northern Ireland were set up following the introduction of NHS trusts in Great Britain under the National Health Service and Community Care Act 1990. That legislation was introduced following two White Papers 'Working for Patients: Caring for the 1990s' (Cm 555, HMSO 1989) and 'Caring for People: Community Care in the next decade and beyond' (Cm 849, HMSO 1989). Those reforms then introduced were, broadly speaking, intended to deliver for patients better value for money, in a more competitive environment than had previously been possible under the national health service. One particular feature, among others, was the introduction of an "internal market" in which providers of services within the national health service would compete with each other to supply goods and services on advantageous terms (see paragraph 125 below). A second feature, of particular relevance to this case, was the Government's decision that, as far as residential care is concerned, local authorities and other bodies should so far as possible place those needing care with independent providers, so as to improve choice and, it was hoped, improve the quality and efficiency of service, as the result of competition between providers which the reforms were intended to introduce (see paragraph 158 below). These reforms were introduced in Northern Ireland following a further White Paper "People First: Community Care in Northern Ireland for the 1990s" (HMSO 1989).

— *Article 10 of the 1991 Order*

122. Article 10 of the 1991 Order, as amended, provides:

> "10. (1) Subject to paragraph (2), the Department may by order establish bodies, to be known as Health and Social Services trusts (in this Order referred to as HSS trusts), –
>
> (a) to provide goods and services for the purposes of the health and personal social services; or
>
> (b) to exercise, on behalf of Health and Social Services Boards, such functions as are so exercisable by virtue of authorisations for the time being in operation under Article 3(1) of the Health and Personal Social Services (Northern Ireland) Order 1994.
>
> ...
>
> (4) Every HSS trust –
>
> (a) shall be a body corporate having a board of directors consisting of a chairman appointed by the Department and, subject to paragraph 5(2) of Schedule 3, executive and non-executive directors (that is to say, directors who, subject to paragraph (6), respectively are and are not employees of the trust);
>
> (b) shall have the functions conferred on it by an order under paragraph (1) and by Schedule 3; ...

(5) The functions which may be specified in an order under paragraph (1) include a duty to provide goods or services so specified at or from a hospital or other establishment or facility so specified.

…

(8) A power conferred by paragraphs 14 or 15 in Part II of Schedule 3 may only be exercised –

(a) to the extent that its exercise does not to any significant extent interfere with the performance by the HSS trust of its functions or of its obligations under HSS contracts; and

(b) in circumstances specified in directions under paragraph 6 of that Schedule, with the consent of the Department.

(9) The Department may by order confer on HSS trusts specific powers additional to those contained in paragraphs 10 to 15 of Schedule 3."

123. Articles 11 to 13 of the 1991 Order provide for the transfer of staff and assets to HSS trusts from other relevant bodies, including HSS Boards. Article 14, as amended by the 2001 Act, provides that each HSS trust shall have public dividend capital. The Department may determine the terms on which a dividend may be paid on the public dividend capital.

— Article 15 of the 1991 Order

124. Article 15 of the 1991 Order provides:

"*Financial obligations of HSS trusts*

15.–(1) Every HSS trust shall ensure that its revenue is not less than sufficient, taking one financial year with another, to meet outgoings properly chargeable to revenue account.

(2) It shall be the duty of every HSS trust to achieve such financial objectives as may from time to time be set by the Department with the consent of the Department of Finance and Personnel and as are applicable to it; and any such objectives may be made applicable to HSS trusts generally, or to a particular HSS trust or to HSS trusts of a particular description."

HSS contracts

125. Article 8 of the 1991 Order provides for the entering into of what are called "HSS contracts" between various public bodies providing health and related services (e.g. the HSS Boards, HSS Trusts, various agencies, and the equivalent bodies in Scotland and England and Wales). Such "HSS contracts" are or were, as we understand it, a mechanism of the "internal market" introduced within the public health service, along lines similar to those introduced in Great Britain under the National Health Service and Community Care Act 1990.

126. Under Article 8(4) of the 1991 Order, an HSS contract is not to be treated as giving rise to contractual rights or liabilities, but any dispute arising may be referred to the Department for determination. Article 8(5) provides:

> " (5) If, in the course of negotiations intending to lead to an arrangement which will be an HSS contract, it appears to either of the prospective parties that–
>
> (a) the terms proposed by the other party are unfair by reason that that party is seeking to take advantage of its position as the only, or the only practicable, provider of the goods or services concerned or by reason of any other unequal bargaining position as between the prospective parties to the proposed arrangement; or
>
> (b) for any other reason arising out of the relative bargaining positions of the prospective parties any of the terms of the proposed arrangement cannot be agreed,
>
> that party may refer the terms of the proposed arrangement to the Department for determination under the following provisions of this Article."

Powers of HSS Trusts under Schedule 3 of the 1991 Order

127. The powers of HSS Trusts are set out under Part II of Schedule 3 of the 1991 Order as amended, notably by section 44(2) and (3) of the 2001 Act. The relevant provisions of Schedule 3 of the 1991 Order are as follows:

> "*Specific duties*
>
> 6. (1) An HSS trust shall carry out effectively, efficiently and economically the functions for the time being conferred on it by an order under Article 10(1) and by the provisions of this Schedule.
>
> (2) An HSS trust shall comply with any directions given to it by the Department about the exercise of the trust's functions.
>
> ...
>
> 7.–(1) For each financial year an HSS trust shall prepare and send to the Department an annual report in such form as may be determined by the Department.
>
> (2) At such time or times as may be prescribed, an HSS trust shall hold a public meeting at which its audited accounts and annual report shall be presented.
>
> (3) In such circumstances and at such time or times as may be prescribed, an HSS trust shall hold a public meeting at which such documents as may be prescribed shall be presented.
>
> 8. An HSS trust shall furnish to the Department such reports, returns and other information, including information as to its forward planning, as, and in such form as, the Department may require.
>
> …
>
> *Specific powers*
>
> 10. In addition to carrying out its other functions, an HSS trust may enter into HSS contracts.

11. An HSS trust may undertake and commission research and make available staff and provide facilities for research by other persons.

12. An HSS trust may –

(a) provide training for persons employed or likely to be employed by the trust or otherwise in the provision of services under the [1972] Order; and

(b) make facilities and staff available in connection with training by a university or any other body providing training in connection with the health and personal social services.

13. An HSS trust may enter into arrangements for the carrying out, on such terms as seem to the trust to be appropriate, of any of its functions (other than functions exercisable on behalf of a Health and Social Services Board by virtue of an authorisation for the time being in operation under Article 3(1) of the Health and Personal Social Services (Northern Ireland) Order 1994) jointly with any relevant body, with another HSS trust or with any other body or individual.

14. According to the nature of its functions, an HSS trust may make accommodation or services or both available for persons who give undertakings (or for whom undertakings are given) to pay, in respect of the accommodation or services (or both), such charges as the trust may determine.

15. For the purpose of making additional income available in order better to perform its functions, an HSS trust shall have the powers specified in Article 3(2) of the Health and Medicines (Northern Ireland) Order 1988 (extension of powers of the Department for financing health services).

General powers

16. (1) Subject to Schedule 4, an HSS trust shall have power to do anything which appears to it to be necessary or expedient for the purpose of or in connection with the discharge of its functions, including in particular power –

(a) to acquire and dispose of land and other property;

(b) to enter into such contracts as seem to the trust to be appropriate;

(c) to accept gifts of money, land or other property, including money, land or other property to be held on trust for the general or any specific purposes of the HSS trust (including the purposes of any specific hospital or other establishment or facility at or from which services are provided by the trust).

(2) An HSS trust may employ such staff as it thinks fit.

(3) Subject to any directions given by the Department under paragraph 6, an HSS trust may –

(a) pay its staff such remuneration and allowances; and

(b) employ them on such other terms and conditions,

as it thinks fit."

The establishment of North & West in 1993/94

128. North & West was established with effect from 1 September 1993 by The North & West Belfast Health and Social Services Trust (Establishment) Order (Northern Ireland) 1993 (SR 352/1993) ("the North & West Establishment Order 1993"). That Order was amended by the

North & West Belfast Health and Social Services Trust (Establishment) (Amendment) Order (Northern Ireland) 1994 (SR 112/1994) ("the North & West Establishment Amendment Order 1994"). North & West came into operation on 1 April 1994.

129. Article 3 of the North & West Trust Order as amended, states:

> "3. (1) The trust is established for the purposes specified in Article 10(1) of the [1991] Order.
>
> (2) The trust's functions (which include functions which the Department considers appropriate in relation to the provision of services by the trust for one or more relevant bodies) shall be –
>
> (a) to own and manage hospital accommodation at Muckamore Abbey Hospital, 1 Abbey Road, Muckamore, Antrim BT41 4SH and associated premises;
>
> (b) to manage community-based health and personal social services provided from the North and West Belfast Community Unit, Glendinning House, 6 Murray Street, Belfast BT1 6DP and to own those and any associated premises; and
>
> (c) to exercise, on behalf of Health and Social Services Boards, such relevant functions as are so exercisable by the trust by virtue of authorisations for the time being in operation under Article 3(1) of the [1994 Order]."

130. Article 3(1) of the 1994 Order provides:

> "3. (1) A Health and Social Services Board may, with the approval of the Department, by instrument in writing under seal provide for such relevant functions of the Board as are specified to be exercisable, in relation to the operational area of a specified HSS trust, by that HSS trust on behalf of the Board."

131. The Health and Social Services Trusts (Exercise of Functions) Regulations (Northern Ireland) 1994 (SR 1994/64) ("the Functions Regulations 1994") specify the relevant functions of HSS Boards exercisable by HSS trusts for the purposes of Article 3 of the 1994 Order. Under the Schedule to the Functions Regulations 1994, the functions exercisable by HSS trusts include the functions provided for under Articles 15, 36, and 99 of the 1972 Order.

132. Power for the relevant functions of the HSS Boards, notably those under Articles 15, 36, and 99 of the 1972 Order, to be delegated to North & West within its operational area are set out in the North & West Establishment Amendment Order 1994.

133. The formal delegation of functions from the EHSSB to North & West was made by an Instrument of Authorisation signed and sealed by the EHSSB on 30 March 1994, which provided, *inter alia*:

> "1. The Eastern Health and Social Services Board ("the Board"), in exercise of the powers conferred on it by Article 3(1) and (5) of the [1994 Order], hereby authorises the North and West Belfast Health and Social Services Trust ("the trust") to exercise, on behalf of the Board, those relevant functions of the Board set out in the schedule in relation to the trust's operational area as specified in the North and West Belfast Health and Social Services Trust (Establishment) (Amendment) Order (Northern Ireland) 1994."

134. The functions specified in the schedule to the Instrument of Authorisation are "All relevant functions" under the 1972 Order. The Instrument of Authorisation came into effect on 1 April 1994.

135. In relation to the day to day carrying out of the delegated functions, the EHSSB and North & West have produced a protocol entitled "Arrangements for the Delegation of Statutory Functions" dated April 1994 (exhibit BB1 to Mr Barry's Witness Statement). Section 5 of that document concerns "General Social Welfare Provision for People in Need". It confirms that the exercise of the functions set out in Articles 15, 36, and 99 have been delegated to the North & West and sets out rather broadly expressed general principles about the carrying out of the functions, quality assurance, monitoring and similar matters.

The budgetary arrangements

136. According to Mr Barry, the budgetary arrangements are that the DHSSPS provides a block grant of funds to each HSS Board on an annual basis. The amount of that grant is decided by the DHSSPS and depends on the DHSSPS's own budget, which in turn depends on the allocation to the DHSSPS made by the Northern Ireland Executive, within the overall budget for Northern Ireland set by the Treasury. The Departmental allocations made by the Northern Ireland Executive are voted on by the Northern Ireland Assembly.

137. When its grant from the DHSSPS is known, each HSS Board then grants funds to the HSS Trusts within its area. In the case of the EHSSB this is done, we are told, on the basis of a Service and Budget Agreement with North & West which we have not seen. In 2001/02, the EHSSB granted some £82.5 million to North & West, of which approximately £29 million was accounted for by the Elderly Programme.

138. The parties are in dispute about whether the prices paid by North & West to independent providers of residential or nursing care are decided by North & West or set by the EHSSB. It seems to be accepted that the cost per bed to North & West in running its statutory homes is

well in excess of the amount paid by North & West to the private sector for supplying the same services.

The contractual arrangements between North & West, Bettercare and the residents

139. North & West's dealings with Bettercare are on the basis of a standard form contract, which is annexed to the application, entitled "Contract for the Provision of Residential and Nursing Home Care Services" ("the North & West Contract"). That contract is apparently renewable annually.

140. According to Clause 2.3 of the North & West Contract:

> "The contract provides a framework for the provision of specified residential or nursing home care by the Home to the Trust at an agreed fixed price."

Clause 3.1 provides:

> "The purpose of the contract is to establish a relationship between the Trust and the Home which will facilitate the provision of a comprehensive range of residential and nursing home care with a framework of quality criteria for the resident population of the Trust's area."

According to Clause 4.1:

> "The Trust will enter into a cost per place contract with the Home whereby the Trust will pay for access to defined residential or nursing home care as specified. The Trust will pay for accommodation more expensive than the Trust's usual fee where a third party undertakes to pay the difference. The Trust will recoup the difference from the third party."

Under Clause 8.3:

> "As the choice of home is a matter for the client/patient or their representatives Trust staff will make available to any person assessed as being in need of residential or nursing home care such information relating to relevant registered homes to enable such persons to select the Home of their choice."

Under Clause 13.1.1:

> "The fees per place per week which the Trust agrees to pay to the Home are listed in Appendix 2."

The contract contains a large number of supplementary provisions and a detailed Service Specification.

141. The arrangement reached between North & West and the individual resident is governed by an "Agreement between residents in residential homes and [North & West]" and regulates the fees payable by residents and other matters. As we have understood it, when a resident is

placed in a Bettercare home by North & West, the financial arrangement is still, in principle, between North & West and the resident, rather than between the resident and Bettercare.

142. Residents are means tested under The Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) SR 1993 no. 127, as last amended by the Health and Personal Social Services (Assessment of Resources) (Amendment) Regulations (Northern Ireland) 2001 SR 2001 no. 205 ("the Assessment of Resources Regulations"). Depending on the resident's means, the cost of his or her care is met by funds supplied by North & West, up to certain maxima. If a resident is funded by North & West, as we understand it, the resident will pay over to North & West his/her state benefits. Residents whose state benefits are supplemented by an occupational pension will in addition pay to North & West as much of their occupational pension as they are liable to pay under the Assessment of Resources Regulations. However, the resident is entitled to retain a "personal allowance" which is now £16.05 a week. In some cases the amount paid by the resident may be "topped up" by the family of the resident concerned (see Clauses 4.1 and 13.2.1 of North & West's contract with Bettercare, and paragraph 144 below). Residents who can afford it (known as "self funders") will pay North & West for the entire cost of their care.

THE SUPPLY OF RESIDENTIAL AND NURSING CARE IN NORTHERN IRELAND

143. The Care Homes Directory published by the EHSSB sets out details of the homes in the EHSSB area, covering the four HSS Trusts in question. This Directory is produced for people considering going into a care home. It includes advertisements by private sector homes, by the voluntary sector, and by the four HSS Trusts, and provides general details of the services available. The advertisement for North & West reads:

> "Caring Environment Where People Come First
>
> Residential Accommodation for Elderly People
>
> - North & West Belfast Health & Social Services Trust is a leading provider of residential care. The Trust offers 187 places for older people at five different locations across North and West Belfast.
> - Each residential home offers a warm, caring environment where the interests of the residents come first. A skilled workforce is committed to maintaining the dignity and independence of each resident. The Trust has, as a principle, the aim of enabling people to regain and maintain the optimum level of health and well being. All our homes offer both long term and respite care.
> - The trust facilities at Bruce House and Ballyowen specialise in providing care for people who have Dementia.
> - Prospective residents and their relatives are welcome to visit facilities and to meet the staff prior to a planned admission."

That is followed by a list of names and addresses of the homes in question.

144. Paragraph 4.3 of the Care Homes Directory, under the heading 'Finance', states:

> "It is important to confirm financial arrangements before entering into any agreement with a care home. The care manager will be willing to spend as much time as is needed to explain fully the position.
>
> Individuals who are assessed as needing care will be asked to provide information to enable a financial assessment to be made if they wish the Trust to contribute to the cost. Following the financial assessment, individuals may be entitled to have some or all of their costs met, up to the following standard rates.
>
> These rates change annually on 1 April. The rates shown here were those applying from July 2001.
>
> If a home is chosen which charges more than the standard rates listed below, provided someone else, such as a relative, is willing to pay the difference, it will still be possible for people to have choice. If a relative agrees to "top up" the Trust's payment, they will be required to sign a contract with the Trust to that effect.
>
> **Residential Homes**
>
> | | |
> |---|---|
> | - Elderly People | £230.00 |
> | - People with a mental illness or people with a drug or alcohol dependence | £243.00 |
> | - People in all the above categories who are either registered blind or who have additional care or supervision needs | £266.00 |
> | - People with learning disability | £277.00 |
> | - People, under pension age, with a physical disability | £314.00 |
>
> **Nursing Homes**
>
> | | |
> |---|---|
> | - People with learning disability | £352.00 |
> | - People, under pension age, with a physical disability | £389.00 |
> | - People with a mental illness or people with a drug or alcohol dependence | £346.00 |
> | - Elderly Mentally Infirm | £349.00 |
> | - All other people | £348.00 |
>
> Everyone who applies to the Trust for funding will be required to make available details of their financial circumstances to the Care Manager. Details of what elements are considered income will be explained. Everyone funded by the Trust will be entitled to £14.75 per week which is a personal allowance to be used by the individual as they wish.
>
> People who admit themselves to a care home and subsequently seek funding from the Trust will have to be assessed in the normal way."

145. Under paragraph 5 of the Care Homes Directory, entitled "What should I consider when choosing a home?" it is stated:

"This is an important decision and should not be taken lightly. The following questions are designed as a guide to matters which may be of importance when deciding on a care home.

Do, if possible, look at more than one home with more than one price. Make comparisons. Inspections Reports on each home are held by the Care Manager. You may also ask the home inspector to let you see a copy of the last Inspection Report."

Then there follows a list of questions prospective residents should ask.

146. Paragraph 6.3 of the Directory, under "Common Questions Asked", reads:

"**I have savings of £5,000 and the proceeds of the sale of my house, £35,000. I can therefore pay for my care in a residential home. What happens if my money runs out and I am unable to pay for my care?**

If you enter a home without having an assessment then one will be carried out when you seek help with payments for your care. For the purpose of the financial assessment the first £10,000 of your capital is disregarded. From £10,000 - £16,000 Social Services will make a payment on a sliding scale. If you have capital exceeding £16,000 you would be expected to pay the full cost.

Remember that the amounts shown above relate to the period 1997-98 and may therefore be subject to change over time."

147. The section of the Directory which is devoted to North & West has this introduction:

"North and West Belfast Health and Social Services Trust provides health and personal Social Service to its resident population and to patients at Muckamore Abbey Hospital. The Trust's primary objective is to give people in the community and patients in Muckamore Abbey Hospital, the opportunity to maintain or regain the optimum level of health and well-being.

The area of North and West Belfast is undergoing considerable social and economic upheaval. It is characterised by high unemployment, population shifts, and urban renewal. There is a higher than average prevalence of key deprivation indices and a greater dependency upon health and personal Social Services as a consequence.

The Trust's commitment is to caring in partnership which is evidenced through the delivery of high quality health and social care services that are responsive to local need and within easy access to people.

The Trust facilitates the discharge of patients from both of the acute hospitals located within its geographical boundary, ie, The Royal Group of Hospitals and the Mater Hospital.

The Trust is committed to the development of new activity in partnership with independent providers and in response to the clearly defined needs of its local population."

148. There is then listed the homes available in the North & West area. The number of those homes appear to be as follows:

Residential and Nursing Homes in the North & West area

Private Residential Homes	2	(including Bettercare's Hampton Suite Tennent Street Care Centre)
Voluntary Residential Homes	9	
Statutory Residential homes	8	(of which five are for the elderly)
Total	19	
Private Nursing Homes	15	(including Bettercare's Glencairn Care Centre, and Bettercare's Sandringham Suite and Balmoral Suite in Tennent Street)
Voluntary Nursing Homes (including one hospice)	4	
Total	19	

149. As a matter of impression, it would appear, from the information given in this booklet, that the voluntary sector is well-established in running residential and nursing homes in Northern Ireland, alongside the private and statutory sectors. Documents such as paragraph 5 of the Care Homes Directory, cited above, and Clause 8.3 of the North & West contract with Bettercare, also cited above, emphasise the importance of the resident having a choice of home.

150. In North & West's area as a whole, we are told, there is a total of 1019 residential and nursing beds, of which 189 are managed by North & West in its statutory homes and the other 830 are managed by private or voluntary organisations. Out of those 830 beds, North & West purchases 604. At the end of March 2002 North & West, so we are told, had identified a further 35 elderly people in need of residential or nursing care which it did not have the resources to place.

151. North & West itself runs five homes for the elderly, having closed two since 1994. All nursing (as distinct from purely residential) services previously provided by geriatric hospitals run by the EHSSB are now purchased from the private sector.

152. Bettercare's Tennent Street home provides both nursing and residential care and has 65 beds. Bettercare's Glencairn Road home is a nursing home only and has 72 beds. North & West purchases 63 of the beds at Tennent Street and 60 of the beds at Glencairn Road. According to Mr Caldwell, the unusually high proportion of residents funded by North & West is due to

the social deprivation in the area. Other homes in Northern Ireland will normally have a higher proportion of "self-funded" residents who to some extent cross-subsidise residents funded by the HSS Trusts.

153. Out of the 123 residents placed by North & West in Bettercare's two homes, 100 make a contribution to their care only out of statutory benefits. The contribution made by 22 residents is from a mixture of state benefits and an occupational pension. One resident pays a contribution exclusively from his occupational pension. North & West's evidence is that none of the contributions paid cover the cost of the residential or nursing accommodation in question.

154. According to Mr Caldwell, Bettercare's Tennent Street centre was originally set up in the 1990s following negotiations with North & West, who encouraged Bettercare to establish their home and "agreed a market strategy". The idea was to provide local accommodation for elderly residents who for political and financial reasons were reluctant to travel to other parts of Belfast.

THE SUPPLY OF RESIDENTIAL AND NURSING CARE IN THE UNITED KINGDOM

155. Our knowledge of the situation in the rest of the United Kingdom is extremely sketchy. According to a document produced by Mr Caldwell (exhibit CC4) entitled "The Care Industry – Market size and trends", at April 2001 there were an estimated 525,900 places in residential settings for long-stay care of the elderly and physically disabled people across all sectors (private, public and voluntary) in the United Kingdom. The estimated value of this market is £9.1 billion, of which the private (for profit) sector accounts for £6.0 billion. Based on Table 2.1 of exhibit CC4, it appears that the number of places was as follows in April 2001.

Nursing and residential care in the United Kingdom: number of places, April 2001

	Total places
Private nursing and residential	363,900
Voluntary nursing and residential	73,100
Public Supply (local authority and NHS)	88,900
Total care in residential settings	525,900

156. According to exhibit CC4, the trend in recent years has been markedly away from the public sector to the private sector, as can be seen by comparing the position in 1988 with the position in 2001, based on the information in Tables 2.1 and 2.2 of exhibit CC4:

Nursing and residential care in the United Kingdom: number of places, 1988 and 2001

	Total places	
	1988	2001
Private nursing and residential	196,600	363,900
Voluntary nursing and residential	52,600	73,100
Public supply (local authority and NHS)	216,700	88,900
Totals	465,900	525,900
% public supply	46.5%	16.9%

157. It thus appears that, in recent years the private sector expanded significantly. Despite more recent changes to the system (for example as regards income support), exhibit CC4 mentions (at p 27) "the continued withdrawal of the public sector (both the NHS and local authorities) from the provider function". Our understanding is that a high proportion of residents in private sector homes are funded, at least in part, by local authorities or NHS trusts who have contracted out to the private sector the function of providing resident and nursing care. Instead of providing those services itself, the public sector has relied increasingly on the private sector to do so.

158. That, as we understand it, is due in large part to the reforms introduced in the 1990s. In the White Paper "Caring for People: Community Care in the next decade and beyond" (1989) the Government said this at paragraphs 3.4.1 to 3.4.3:

> "3.4 SECURING THE DELIVERY OF SERVICES
>
> 3.4.1 Once a package of care has been designed, it will be the responsibility of the social services authority to ensure that the agreed services are in place. Health authorities and other agencies will be expected to arrange the delivery of any components of care which they have agreed to provide as part of the package. The Government will expect local authorities to make use wherever possible of services from voluntary, "not for profit" and private providers insofar as this represents a cost effective care choice. Social services authorities will continue to play a valuable role in the provision of services, but in those cases where they are still the main or sole providers of services, they will be expected to take all reasonable steps to secure diversity of provision.
>
> 3.4.2 In particular, it will be essential for local authorities to develop the capacity to purchase places in independently run homes. No local

authority should deprive those people assessed as needing residential care of the opportunity to enter an independently run home meeting the required standards of care.

The Enabling Authority

3.4.3 Stimulating the developments of non-statutory service providers will result in a range of benefits for the consumer, in particular:

- a wider range of choice of services;
- services which meet individual needs in a more flexible and innovative way;
- competition between providers, resulting in better value for money and a more cost-effective service.

The Government envisages, however, that the statutory sector will continue to play an important role in backing up, developing and monitoring private and voluntary care facilities, and providing services where this remains the best way of meeting care needs."

159. Similar principles are to be found in the White Paper "People First: Community Care in Northern Ireland for the 1990s". We think we may reasonably take judicial notice of these documents, by way of general background, even though they were not cited to us.

VII LEGAL ANALYSIS

The Director's essential reasoning

160. In this case the contested decision is to be found in four letters of the Director dated 29 November 2000, 25 July 2001, 21 September 2001 and 2 November 2001, which we refer to collectively as "the contested decision". The Director's essential reasoning is set out in the following two passages from the letters of 29 November 2000 and 25 July 2001:

> "Clearly, an LA can act as an undertaking when it is engaging in economic activity, but, in our view, an LA will probably not be acting as an undertaking when it is exercising its 'public interest-type' functions.
>
> On the basis of the facts set out above, we take the view that LAs are not undertakings for the purposes of the Chapter I and II prohibitions to the extent that they are purchasing Social Care for the disadvantaged in society using monies raised by taxation. We consider that the activities of an LA acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value are not the activities of an undertaking engaging in economic activity. In this context, the role of government is to correct market failure and so, inevitably, LA spending will affect markets and raise competition issues of a general policy nature. However, such spending does not raise legal issues under the CA98 and so the DGFT has no power to intervene.
>
> It seems clear from the information in your letter that the activities that concern you arise from North and West's activities as a purchaser of Social Care (i.e. nursing home care). In our view, for the reasons explained above, these activities

do not fall for consideration under competition legislation and the DGFT is therefore unable to intervene."

(Letter of 29 November 2000)

"Looking at local authorities, including healthcare trusts such as N&W, our current view is that they can act as an undertaking when they are engaging in economic activities, such as supplying residential accommodation in competition with private sector care homes, but they would not appear to be when they are exercising their "public interest-type" functions. By this we mean functions which are not generally provided on a commercial basis in competition with private sector business and which fulfil an exclusively social function. (See in particular Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 and *Eurocontrol*, to which you refer in your letter.)

The abuse you client is alleging, namely non-cost related low prices offered by N&W for residential and nursing home care services, relates to N&W's activities as a purchaser of social care. The purchasing of such services for the disadvantaged in society using monies raised by taxation would seem to be typically those of the State and would not appear to be of an economic or commercial nature. Therefore, when acting as a purchaser of social care we do not currently consider that N&W is acting as a undertaking for the purposes of the CA98."

(Letter of 25 July 2001)

161. The essential basis of the reasoning in the contested decision is, therefore, that North & West is not engaging in any relevant "economic activity" so as to constitute an undertaking. The Director has elaborated on this reasoning in this appeal: see paragraphs 50 et seq above. In his defence, however, the Director has raised a further argument, namely that North & West is not an "undertaking" because it has no freedom to set its purchase prices which are set by the EHSSB: see paragraphs 50, 59 and 68 above.

162. In these circumstances it is convenient to deal with the legal analysis in two stages:

A. Is North & West engaged in any relevant economic activity? and

B. The Director's argument that North & West has no freedom to set prices.

A. IS NORTH & WEST ENGAGED IN ANY RELEVANT ECONOMIC ACTIVITY?

(1) GENERAL

The Director's position of principle

163. We observe, first, that in his letters of 29 November 2000 and 25 July 2001, the Director decided that North & West was not an "undertaking" on the basis of the material in Bettercare's complaint, without apparently investigating the matter any further. In

consequence, the Director never investigated the market circumstances of the supply of residential or nursing care in Northern Ireland or Great Britain, and never considered the question whether North & West was dominant or whether its alleged conduct could be an "abuse" within the meaning of the Chapter II prohibition.

164. The Director adopted a similar approach in his letter of 16 January 2001 when rejecting the separate complaint made by BCG (see paragraph 13 above).

165. It seems to us, therefore, that in the contested decision, and in the parallel rejection of BCG's complaint (which concerned, among other things, an allegation of discriminatory pricing by Bedfordshire County Council as between one independent provider and another) the Director was really deciding, as a matter of principle, that the purchase from the private sector by local authorities, NHS trusts or HSS trusts, of residential and nursing care for those in need, is not an activity to which the Competition Act is capable of applying, on the grounds that those entities are not, in that context, acting as "undertakings". It appears that the position adopted by the Director, if correct, would apply whatever the nature of the "abuse" alleged.

The Höfner & Elser test

166. As to whether the Director's position of principle is correct, the European Court has consistently held that:

> "the concept of an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed."
>
> (*Höfner & Elser*, at paragraph 21, frequently restated, most recently in *Ambulanz Glöckner* at paragraph 19, and *Cisal* at paragraph 22.)

167. In the contested decision, the Director rightly adopted this test as his starting point. However, he went on to decide that North & West was not engaged in any relevant "economic activity" for the purposes of Bettercare's complaint. The question for us, therefore, is whether the Director correctly applied the *Höfner & Elser* test.

The distinction between economic activities and the exercise of official authority

168. In determining whether a particular activity is an "economic" activity, it is common ground that one must identify the particular "activity" in question, since a given entity may be an undertaking for the purposes of some activities but not others. (See the opinion of Advocate General Jacobs in *Ambulanz Glöckner*, at paragraph 72, cited at paragraph 97 above.)

169. In particular, there is a sharp distinction between activities which are to be classified as "economic" in character, and those where the State "acts in the exercise of official authority": see *Diego Cali*, cited at paragraph 86 above, at paragraph 16 of the judgment. The latter activities are outside the scope of the competition rules.

170. This distinction is emphasised in the opinion of Advocate General Jacobs in *Ambulanz Glöckner* at paragraphs 71 to 81, cited above, where he considers whether the refusal by a public authority of a licence to run a public ambulance service is an 'economic activity' or 'the exercise of official authority'. Mr Jacobs concludes that the refusal of such a licence is to be regarded as "a typical administrative decision taken in the exercise of prerogatives conferred by law which are usually reserved for public authorities," and cannot "be assimilated to the offering of goods or services on given markets" (paragraph 76 of his opinion).

171. To give an example in the context of the present case, the refusal by an HSS Board to register a home under the 1992 Order – i.e. The Registered Homes (Northern Ireland) Order 1992 – or the fixing by an HSS Board of the registration fees under that Order, would, it seems to us, be "an exercise of official authority" falling outside the competition rules, rather than an "economic activity".

Eurocontrol and Diego Cali

172. In our view, the two cases principally relied upon by the Director in the contested decision, namely *Eurocontrol* and *Diego Cali*, mentioned in the letter of 25 July 2001, are best understood as concerning "the exercise of official authority". In those cases the competition rules did not apply because the State was, in effect, exercising its sovereign powers in the regulatory and administrative sphere.

173. Thus in *Eurocontrol* (see paragraph 82 above), which concerned air navigation route charges levied by an international body, the European Court emphasised that the States in question had complete and exclusive sovereignty over their airspace; that it was in the exercise of that sovereignty that the States supervised their airspace and provided air navigation control services; that Eurocontrol was an international body set up under an international Convention by the Contracting States to carry out jointly on their behalf "tasks relating to the control and supervision of airspace which are typically those of a public authority"; that the route charges in question were not fixed by Eurocontrol but by the Contracting States; and that the route

charges were intrinsically connected with Eurocontrol's functions as a public authority (see paragraphs 20 to 31 of the judgment).

174. Similarly, in *Diego Cali* (see paragraph 86 above) the port authority was responsible for anti-pollution control in the Port of Genoa. That function, the European Court held, was "typically that of a public authority" and formed part of "the essential functions of the State" in protecting the environment in maritime areas. The charges collected from users of the port for anti-pollution surveillance were fixed by decree. In those circumstances, the levying of the user charges was regarded by the Court as intrinsic to the exercise of official authority, to which the competition rules did not apply.

175. It seems to us that the factual situations which arose in *Eurocontrol* and *Diego Cali* are different from the situation in the present case. In particular, we are not here concerned with regulatory or administrative decisions of the kind normally classified by the European Court as "the exercise of official authority". In those circumstances, we accept Bettercare's submission that the only two cases cited by the Director in the contested decision are distinguishable from the present case.

Our approach to this case

176. Moreover, as far as we can see, none of the further decisions of the European Court to which we have been referred, many of which we have cited above in Section V, have directly addressed the factual circumstances with which we are concerned in this case. In particular, the question whether a public body empowered to provide residential and nursing care engages in "economic" activity when it contracts out the provision of such care to the private sector has not arisen for decision at the level of the European Court.

177. In those circumstances it seems to us somewhat dangerous for us to try to extrapolate too closely from judgments that are essentially dealing with different factual situations.

178. We think that the better approach is, first, to examine North & West's activities in the particular factual circumstances of the present case to see whether, as a matter of the broad principles of European caselaw and the ordinary meaning of words, the relevant activities of North & West can properly be characterised as "economic". We then go on to consider in more detail the specific arguments addressed to us by the Director.

(2) EXAMINATION OF NORTH & WEST'S ACTIVITIES

North & West's constitution and functions

179. Pursuant to the 1991 Order, North & West is a body corporate, with a board of directors consisting of both executive and non-executive directors: Article 8(4) of the 1991 Order. It has a public dividend capital: Article 14 of that Order. Under Article 15(1) of the 1991 Order, North & West must ensure that its revenue is not less than sufficient, taking one financial year with another, to meet outgoings properly chargeable to revenue account. Under Article 15(2) North & West must meet any financial targets set for it by the Department, but we have no information as to what if any targets have been so set. Under paragraph 6(1) of Schedule 3 to the 1991 Order, North & West must carry out "effectively, efficiently and economically" the functions conferred upon it. Under paragraph 6(2), North & West must comply with any directions given to it by the Department but we are not in a position to decide whether any relevant direction has in fact been given.

180. As we understand it, the combined effect of Article 10(1) of the 1991 Order, Article 3(1) of the 1994 Order, the Functions Regulations 1994, the North & West Establishment Order 1993, the North & West Establishment Amendment Order 1994 and the EHSSB's instrument of authorisation dated 30 March 1994, is to empower North & West to exercise on behalf of the EHSSB the functions of the latter in relation, in particular, to providing, or securing the provision of, residential and nursing care under Articles 15, 36 and 99 of the 1972 Order.

181. As already indicated, our broad understanding is that the HSS Trusts in Northern Ireland, like their counterparts, the NHS Trusts, in Great Britain, were established in order to facilitate efficient management and a more market orientated approach. As regards residential care, it was hoped that the system of contracting out would produce a more competitive outcome with a wider choice for patients through competition between providers (see paragraph 158 above).

The relevant activities of North & West

182. As appears from paragraphs 143 et seq above, North & West runs eight residential homes itself, which we are told accommodate some 189 residents.

183. In addition, North & West contracts with independent providers for places (or "beds") in residential and nursing homes run by private (for profit) or voluntary (not for profit) organisations. This "contracting out" by North & West accounts for some 604 residents, from

which we deduce that a substantial majority (about 70 per cent) of persons needing residential care in the North & West area are in fact "contracted out" to independent providers.

184. This applies, in particular, to all the persons in the North & West area needing nursing, as distinct from purely residential, care. In former times, such persons would have been accommodated in the geriatric hospitals run by the EHSSB, but those persons are now "contracted out" to the private and voluntary sectors.

185. The private (for profit) and voluntary (not for profit) sectors in the North & West area appear to maintain between them some 11 residential homes and some 19 nursing homes. We take it that most of these private and voluntary homes have contractual arrangements of one kind or another with North & West.

186. It thus appears that North & West "contracts out" a large proportion of the residential and nursing services in question by purchasing beds from independent providers on a considerable scale. This is done under Articles 15 and 36 of the 1972 Order.

187. In addition, North & West enters into agreements with the residents so 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 the applicable regulations, of the "bed" purchased by North & West from the independent provider in question: see Article 36 of the 1972 Order and the Assessment of Resources Regulations.

188. Where North & West 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: see Article 99 of the 1972 Order and the Assessment of Resources Regulations.

Economic activities

189. According to the caselaw of the European Court, an "economic activity" is one which involves "offering goods or services on the market": *Commission v Italy* (1987) at paragraph 7, cited above at paragraph 73; Case C35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; *Pavlov* at paragraph 75; *Ambulanz Glöckner* at paragraph 19.

190. In *Film Purchases by German television stations*, cited above at paragraph 78, the European Commission advanced a slightly different definition, namely that:

> "The functional concept of undertaking in Article 85(1) covers any activity *directed at* trade in goods or services ..."(our emphasis).

It does not seem to us that either of these definitions is necessarily exhaustive as to what an 'economic' activity might be. A key consideration, as Mr Jacobs says in *Cisal*, at paragraph 71, is whether the undertaking in question "is in a position to generate the effects which the competition rules seeks to prevent".

191. Taking first North & West's activity of "contracting out" to independent providers, it seems to us that, as regards "contracting out", North & West may properly be described as engaging in commercial transactions in services. In effect, the essence of many, if not most, "economic" activities is the making of commercial contracts. North & West appears to be engaged, on a regular basis, in entering into commercial contracts affecting some 30 homes managed by independent providers in North & West's operational area.

192. The independent providers in question are providing services for which North & West has a demand. That demand results from the fact that North & West has decided to fulfil its functions on the basis of commercial transactions. We have no doubt that the contracts between North & West and the independent providers may properly be described as "commercial transactions", since no private sector operator would enter into a contract with North & West which was not a commercial transaction. In making such contracts, it seems to us that North & 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.

193. It does not seem to us to matter that in this particular case North & West is the acquirer, rather than the offeror, of the services in question. It is clear from section 18(2)(a) of the Act that the Chapter II prohibition applies potentially to "unfair purchase prices" or "unfair trading conditions" imposed by a dominant buyer, just as it does to unfair purchase prices imposed by a dominant seller (for an example of such a case which, however, failed on the facts, see Case 298/83 *CICCE v Commission* [1985] ECR 1117, paragraphs 21 et seq).

194. Moreover, section 18(2)(c) of the Act, which refers to "applying dissimilar conditions to equivalent transactions with other trading parties" is not limited to sellers, but may equally apply to buyers. The same is true of section 18(2)(d) of the Act, which refers "to making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations". Indeed, the wording of both sub-sections (c) and (d) of section 18(2) reinforce

our view that the essence of much of the 'economic' activity which the Chapter II prohibition is designed to regulate is indeed the entering into 'transactions', or the 'conclusion of contracts', in a trading context.

195. Moreover, we have no doubt that North & West is active as a player in a market or markets.

196. The first market in which North & West is active, as a contracting out purchaser, is the market for the supply of residential and nursing care services in Northern Ireland. It is apparent that over recent years the public authorities in Northern Ireland and elsewhere in the United Kingdom have progressively withdrawn from, or limited, the extent to which they are able or willing to provide residential or nursing care in their own statutory homes. Instead, those authorities have entered the market themselves to buy the beds they need from independent providers, presumably in pursuit of the objectives of giving greater choice to consumers and stimulating competition among providers (paragraph 158 above). In North & West's area some 80 per cent of the demand for residential and nursing care is now met by independent providers. This trend has apparently expanded the commercial market for the supply of residential and nursing care services, and/or has created a specific sub-sector of that market, namely the supply of residential and nursing care services by independent providers to HSS trusts and similar bodies. The fact that that market or sub-market has been created or expanded by the decision of the public authorities to rely on independent providers, does not alter the fact that there is such a market, and that North & West is an active player in that market.

197. The nature of the market may be illustrated by the admittedly sketchy information which we have about the United Kingdom contained in exhibit CC4 to Mr Caldwell's witness statement: see paragraphs 155 et seq above. That document refers to "The Care Industry – Market size and trends". In document CC4 "The Care Industry" is divided into three sectors, the private (for profit) operators, the voluntary (not for profit) organisations, and the statutory homes provided principally by NHS trusts and local authorities. The total market is said to be worth some £9 billion. The figures in document CC4 again illustrate the progressive withdrawal of the public sector from direct supply in both absolute and percentage terms. The percentage of residents in statutory homes now accounts for only 16.9 per cent of the whole, as against 46.5 per cent in 1988. In absolute terms the number of residents in statutory homes (88,900), is now not much higher than the number of residents in voluntary (not for profit) homes (73,100), and very substantially less than those in the private (for profit) sector (363,900): see paragraphs 156 to 157 above.

198. However, as we understand it, a very substantial proportion of the residents in the private (for profit) sector are provided with beds on the basis of commercial transactions entered into between private homes, on the one hand, and NHS trusts and local authorities, on the other, whereby the latter purchase beds in private homes. From the point of view of the private homes, these are, as we have said, plainly business transactions. Equally, from the point of view of the NHS trusts and local authorities, one would expect those bodies to enter into such transactions on as "business-like" basis as possible, seeking to secure the best terms they can.

199. It seems to us that the supply of residential care or nursing services by what appear to be some thousands of independent providers to NHS trusts and local authorities all over the United Kingdom is in a real sense "big business". That business is apparently worth several billion pounds a year. In those circumstances, transactions in the market for the supply of nursing and residential care services between independent providers on the one hand, and NHS or HSS trusts, or local authorities, on the other, seem to us as a matter of common sense to constitute 'economic activity' or be "directed at" (to use the phrase from *Film Purchases by German Television Stations*) 'economic activity', irrespective of whether that activity is by sellers or purchasers. Indeed, it would be surprising if the Act did not cover such a large sector of economic activity.

200. There is, in addition, a second way in which North & West is active in a market, in that North & West itself runs eight residential homes, of which five are for elderly persons. North & West is thus itself part of "the offer" in the market for residential care services in Northern Ireland. We stress, once again, that we have not gone into the facts of this case, in particular as to exactly how residents are "allocated" as among the different homes available. It does appear, however, from the general rationale of the policy of contracting out (paragraph 158 above), and from such documents as the Care Homes Directory, cited above, and Clause 8.3 of the contract with Bettercare, that residents have a choice of home, and can choose between a private, voluntary or statutory home. While competition between the various homes may perhaps be imperfect in practice, because of the special features of this particular market, we can see no reason to exclude in principle the possibility that all three kinds of home in Northern Ireland are in fact competing for the custom of the potential resident, whether that potential resident is "self funded" or not, at least as regards the services and facilities offered and probably, at least to some extent, on price. The advertisements placed by North & West itself and other HSS Trusts in the Care Homes Directory seem to confirm that these bodies actively seek residents: see paragraphs 143 and 147 above. Again, this direct participation by North & West in the market for residential care services seems to us to be, in principle, an economic activity.

201. Thirdly, it must be borne in mind that North & West does not supply its services gratuitously. Whether in respect of its purchasing activities, or in respect of its own residential homes, North & West seeks to recover as much as possible of the cost for the services it provides from the resident 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.

202. As a 'cross-check' on our approach, we have already noted that the European Court places emphasis on the question whether the entity in question "is in a position to generate the effects which the competition rules seek to prevent": see Mr Jacobs in his opinion in *Cisal*, at paragraph 91, cited at paragraph 102 above; see also paragraph 21 of the *FFSA* case, cited at paragraph 84 above. In this case there are several allegations of anti-competitive conduct by allegedly dominant purchasers of residential or nursing care services which occur in the papers in one form or another (although some of them admittedly do not appear in Bettercare's original complaint). These include allegations that:

(i) North & West pays significantly higher prices to its own statutory homes than it is prepared to pay the members of the Registered Homes Confederation, the difference being between about £40 to £70 a week (North & West) or £70 to £100 per week (Mrs Montgomery);

(ii) the price paid by North & West to acquire residential and nursing services does not cover the cost of providing them by Bettercare. (A similar complaint was made by the Bedfordshire Care Group);

(iii) factors (i) and (ii) make it difficult, if not impossible, for undertakings such as Bettercare and other Members of the Registered Homes Confederation to provide adequate service levels or even remain in business, not least because North & West is able to pay higher salaries to attract trained staff;

(iv) in addition, the arrangements for "topping up" whereby, it is alleged, the families of residents placed by North & West in the private sector homes are expected to contribute some £30 per week to the cost of care, tends to favour North & West's statutory homes;

(v) North & West has refused to negotiate the prices or contractual terms, or take sufficient account of rises in the cost of living, or of the different costs associated with different types of case, or to define or apply proper eligibility criteria for different kinds of patient;

(vi) according to Bedfordshire Care Group, Bedfordshire County Council has sold its statutory homes to a private operator and is now paying that private operator higher prices than it pays to other private operators of residential homes.

203. Taking, for argument's sake, some examples from the above list (merely for illustrative purposes since we are making no findings of fact), Bettercare and the Registered Homes Confederation allege that the pricing policy of North & West is skewed in favour of North & West's statutory homes, notably as a result of the higher prices paid by North & West to its own homes, and its policy on topping up: see (i), (iii) and (iv) in paragraph 202 above.

204. That suggestion amounts to an allegation that North & West applies "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" within section 18(2)(b) of the Act.

205. If an HSS trust, NHS trust, or local authority having a dominant position adopts pricing policies which favour their own homes to the detriment of independent providers, with the result that competition between providers in the market is distorted, we cannot see any reason, in principle, why such allegedly discriminatory conduct should fall outside the ambit of the Chapter II prohibition. That would, however, be the consequence of the Director's argument.

206. Similarly, to take the allegation at (vi) in paragraph 202 above, made by Bedfordshire Care Group, if a local authority sells its statutory homes to a private operator, and then pays that private operator higher prices than it pays other independent providers who are in competition with that private operator, that conduct could also give rise to an allegation that the authority is "applying dissimilar conditions to equivalent transactions with other trading parties placing them at a competitive disadvantage" contrary to section 18(2)(c) of the Act. Again, we cannot see any reason why such allegedly discriminatory conduct should be, in principle, outside the ambit of the Chapter II prohibition. Again, however, the Director's argument necessarily implies that the Act does not apply.

207. Again, if in its purchasing activities an HSS trust or local authority should require independent providers to accept "supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of the contract" within the meaning of section 18(2)(d) – e.g. to obtain particular services exclusively from the trust – in that case too we do not see why such conduct should be outside the Act.

208. As to the basic allegation that the purchase prices paid by North & West are "unfairly low", or "unfairly applied" (allegations (ii) and (v) in paragraph 202 above), an unfairly low price could make it difficult for an independent provider to survive or to compete efficiently with other providers, including the homes run by the dominant purchaser, thus limiting consumer choice. So unfairly low prices raise, potentially, real competition issues.

209. We understand the extra dimension in this case which results from the fact that the financial resources of North & West, reliant as it is on public funds, are necessarily limited. Nonetheless, it seems to us that any complexity there may be on the issue of whether the prices paid to independent providers are an abuse under the Chapter II prohibition cannot, in itself, deprive North & West of its character as "an undertaking" if, on a true analysis, the activities in which it engages are properly to be characterised as "economic activities". As we have said, on the analysis thus far, we think those activities are "economic" in character.

210. In this connection, it is crucially important, in our view, not to confuse the "undertaking" issue, with which at present we are solely concerned, with the quite separate question of whether there is any "abuse" in this case, even on the (as yet unestablished) assumption that North & West has a dominant position in a market for the purposes of section 18(1).

211. Thus, it is well established that conduct is not an abuse if it is capable of objective justification: see e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207, at paragraph 184; Case 311/84 *Télémarketing* [1985] ECR 3261, at paragraphs 26 to 27; *Leyland DAF v Automotive Products* [1994] 1 BCLC 245 (CA). While we should not, at this stage of the case, express any view on the question of "objective justification", we can see that the financial constraints which North & West contends it is under could be relevant to the question whether North & West is offering "abusively" low prices.

212. Similarly, Schedule 3, paragraph 4 of the Act provides:

> "Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest ... in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking."

213. We draw two conclusions from Schedule 3, paragraph 4 of the Act. First, and self evidently, an entity may still be an "undertaking" even if it is charged with specific tasks in the public interest. Secondly, Schedule 3, paragraph 4, directs the attention away from the "undertaking" issue to the question whether the application of the Chapter II prohibition on the facts alleged

"would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking".

214. It has not been suggested – and we see no reason to find – that North & West would fall outside the scope of Schedule 3, paragraph 4. It is premature for us to express any view on how that provision would operate in a case such as the present, save to say that it seems to us to give North & West considerable scope for demonstrating that the adoption of alternative pricing policies would substantially interfere with the performance of its statutory functions.

215. We also note that Schedule 3, paragraphs 5(2) and (3) of the Act provide:

> "(2) The Chapter II prohibition does not apply to conduct to the extent to which it is engaged in an order to comply with a legal requirement.
>
> (3) In this paragraph "legal requirement" means a requirement—
>
> (a) imposed by or under any enactment in force in the United Kingdom; ..."

216. Although this provision is perhaps more relevant to the Director's argument that North & West has no freedom to fix its prices, which we discuss below, it is notable that, under the Act, an entity may be "an undertaking" for the purposes of section 18(1), but yet outside the Chapter II prohibition by virtue of the fact that it was acting subject to a legal requirement within the meaning of Schedule 3, paragraph 5. It may or may not be that, when the facts are established, North & West will be able to avail itself of this provision: see further, section B below.

217. We also observe that paragraphs 7(4) and (5) of Schedule 3 of the Act provide:

> "(4) If the Secretary of State is satisfied that there are exceptional and compelling reasons of public policy why the Chapter II prohibition ought not to apply in particular circumstances, he may by order provide for it not to apply in such circumstances as may be specified.
>
> (5) An order under sub-paragraph (4) may provide that the Chapter II prohibition is to be deemed never to have applied in relation to specified conduct."

No such order has been made in the present case.

218. Indeed, despite the extensive exclusions, in Schedules 1 to 4 of the Act, of a wide range of agreements and conduct from the prohibitions contained in Chapters I and II, there seems to be no exclusion from the Act of HSS trusts, NHS trusts or local authorities, either generally or in respect of the activities here in question. If there is no express statutory exclusion, it seems

to us that the onus must be on the Director to show that the entity in question is outside the ambit of the Act, for example by showing that the relevant activities are not 'economic'.

219. On our analysis thus far, we reach the provisional conclusion that North & West's activities are 'economic' in character, both as regards North & West's purchasing or 'contracting out' activities, and as regards the running of its own statutory homes. Indeed, the relationship between those two activities, and whether in fact the latter are favoured by the policies adopted on the former, is one of the principal complaints of anti-competitive behaviour in this case.

220. We therefore turn to consider whether the conclusion we have reached thus far is sound in the light of the Director's arguments to the effect that North & West's activities are not, in fact, to be considered as 'economic' for the purposes of the Chapter II prohibition.

(3) THE DIRECTOR'S ARGUMENTS ON 'ECONOMIC ACTIVITY'

221. Once again, the essential reasoning contained in the contested decision is:

> "... An LA will probably not be acting as an undertaking when it is exercising its 'public interest-type' functions.
>
> ...
>
> LAs are not undertakings for the purposes of the Chapter I and Chapter II prohibitions to the extent that they are purchasing Social Care for the disadvantaged in society using monies raised by taxation ... the activities of an LA acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value are not the activities of an undertaking engaged in economic activity."
>
> (letter of 29 November 2000)
>
> "[Local authorities are not undertakings] when they are exercising their public interest-type functions. By this we mean functions which are not generally provided on a commercial basis in competition with private sector business and which fulfil an exclusively social function."
>
> (letter of 21 July 2001)

222. The Director has elaborated that position on the basis of a number of arguments summarised at paragraphs 50 et seq above. We deal with the Director's principal arguments in the contested decision and before us under the following headings:

(i) "monies raised by taxation";

(ii) "public interest-type functions";

(iii) "solidarity" and the concept of "an exclusively social function";

(iv) the relevant activity could not be carried on for profit by a private undertaking;

(v) the activities do not impinge on competition with the private sector;

(vi) purchasing without resale is not an economic activity;

(vii) application of the competition rules would interfere with the State's social welfare priorities;

(viii) neither contracting out nor running statutory homes is an economic activity;

(ix) North & West's activities are only 'economic' as regards 'self funders'.

With due deference to other points made, we think these are the matters we should concentrate on.

(i) The argument based on "monies raised by taxation"

223. Both the Director's letters of 29 November 2000 and 25 July 2001 emphasise that North & West's activities are discharged using "monies raised by taxation". However, it is clear that a body is an undertaking if it engages in economic activity, "regardless of the legal status of the entity and the way in which it is financed": see *Höfner & Elser*, at paragraph 21, reiterated subsequently in all relevant judgments of the Court. Thus, contrary to the view expressed in the contested decision, the fact that the activities of North & West are funded by taxation does not assist in determining whether those activities are 'economic' or not.

(ii) The argument based on "public interest-type" functions

224. In both the letters of 29 November 2000 and 25 July 2001 the Director refers to the fact that 'LAs' (local authorities) and North & West are carrying out 'public interest-type functions', or 'activities typically those of the State' (letter of 25 July 2001). However, we have already pointed out that North & West's functions do not in our view fall within the category of regulatory or administrative decisions taken in the exercise of the State's sovereign authority, as was the case in *Eurocontrol* and *Diego Cali* relied on by the Director in the letter of 25 July 2001: see paragraphs 174 to 177 above. (We add that the short judgment in the early case of *Bodson* (paragraph 76 above), not relied on by the Director, seems to us to concern the exercise of "public authority" by the communes in question, and is not helpful in the present context.)

225. More generally, the fact that North & West has been entrusted with tasks in the public interest does not prevent North & West from being an undertaking: see paragraph 69 of Mr Jacobs' opinion in *Ambulanz Glöckner*. Indeed, as Mr Jacobs there points out, it is implicit in Article 86(1) (formerly Article 90(1)) of the Treaty, that an entity may still be an undertaking even though it is entrusted with tasks in the public interest. The same is true under the Act, by

virtue of the provisions of Schedule 3, paragraph 4, as we have already pointed out at paragraphs 212 to 214 above. Thus, as Mr Jacobs emphasises, neither public service obligations nor State financing can prevent an operator's activities from being classified as economic activities (*Ambulanz Glöckner*, paragraph 69).

226. Finally on this point, we do not find the early case of *Duphar* relied on by the Director (see paragraph 54 above) illuminating in the present context. What was at issue in that case was a Dutch ministerial decree which limited the reimbursement payable by the Dutch sickness funds in respect of certain medical preparations. On a challenge by a number of pharmaceutical companies, the Dutch Court referred a number of questions to the European Court under Article 177 (now Article 234) of the Treaty on whether the Dutch decree was contrary to certain aspects of the rules on free movement of goods, and certain Directives, and on whether the decree was prohibited by Articles 85 and 86 (now Articles 81 and 82) read with Article 3(f) (now Article 3(1)(g)), of the Treaty. The judgment deals mainly with free movement of goods and the relevant Directives. On the question whether the Dutch decree was contrary to Articles 85 and 86, read with Article 3(f), the Court merely pointed out, correctly, that Articles 85 and 86 of the Treaty apply to "undertakings" and were therefore not relevant to the assessment of the validity of the Dutch legislation in question (paragraph 30 of the judgment). The reference in paragraph 16 of that judgment, to an argument apparently advanced by the Dutch state in the context of the rules on free movement of goods, does not seem to us to bear on the present issue.

(iii) The argument based on "solidarity" and the concept of "an exclusively social function"

227. The Director argues in the letter of 25 July 2001 that North & West's activities have an "exclusively social function". Before us, the Director has elaborated that contention by arguing, mainly on the basis of *Poucet and Pistre* and *Cisal*, cited above, that North & West's activities are based on the principle of "solidarity" and are thus not "economic".

228. We have already said that we regard the five decisions of the European Court on affiliation to sickness funds, pension schemes and insurance schemes – namely *Poucet and Pistre*, *FFSA*, *Albany*, *Pavlov* and *Cisal* – as rather distant on the facts from the present case. Nonetheless, it seems to us that, in the factual context of those cases, the European Court has said:

(1) where the activity in question is to be characterised as "an exclusively social function" and is "based on the principle of solidarity", undertakings administering such schemes are not considered to be carrying on an "economic" activity: see *Poucet and Pistre*, at

paragraph 18 of the judgment, cited at paragraph 80 above; and *Cisal*, at paragraphs 44 to 45 of the judgment, cited at paragraph 103 above.

(2) The fact that a particular activity pursues a social aim is not in itself sufficient to preclude the activity in question from being classified as an economic activity: see *FFSA* at paragraph 20; *Albany*, at paragraph 86; *Pavlov*, at paragraph 118; and *Cisal*, at paragraph 37.

(3) Similarly, the presence of elements of solidarity are not sufficient to deprive an activity of its economic character if, in substance, the activity is properly to be regarded as economic: see *FFSA*, at paragraphs 17 to 20; *Albany*, at paragraphs 81 to 86; and *Pavlov*, at paragraphs 114 to 118.

Which side of the line a particular activity falls will, it seems, depend on the facts of the case in question.

229. In our view, cases such as *Poucet and Pistre* and *Cisal* do not imply an exception to the general rule, but merely illustrate the application of the principles to which the Court has constantly adhered since *Höfner & Elser*: see *Job Centre*, at paragraph 24 of the judgment, cited at paragraph 89 above. In our view, the underlying purpose of the Court's analysis in the five cases of affiliation to statutory schemes referred to above was to determine the central question of whether the entity concerned "is in a position to generate the effects which the competition rules seek to prevent", as Advocate General Jacobs says in *Cisal* (paragraph 71 of his opinion). That is made explicit in *FFSA*, at paragraph 21, where the Court found that:

> "Finally, the mere fact that the CCMSA is a non-profit-making body does not deprive the activity which it carries on of its economic character, since, having regard to the features referred to in paragraph 17, that activity may give rise to conduct which the competition rules are intended to penalize."

230. Turning now to the facts of the present case, it seems to us that one fundamental feature in this case is that the activities and functions of North & West have two dimensions: one is "the social dimension", the other is "the business dimension".

231. As to the "social dimension", seen from North & West's point of view its activities do indeed have the aim of fulfilling the need for social care of the elderly population. It is true that, under the principle of "full cost recovery" the resident is expected to pay for or at least contribute to the full cost of his care. We also accept Bettercare's submission that, for the purposes of the legal analysis, it is irrelevant whether the resident's contribution comes out of a state pension, other benefits, an occupational pension, or the proceeds of sale of a house.

The money the resident is expected to contribute comes from the resident's own resources, whatever the source of those resources. However, the evidence before us is that many, if not most, of the residents concerned do not in fact have the resources to meet the full cost of their care. If there is no other source available (e.g. the family, charitable bodies, other forms of State assistance) the difference is funded by North & West.

232. We also accept that the funding activities of North & West could not, in any realistic sense, be carried on "for profit". Although under both Article 36 and Article 99 of the 1972 Order, North & West may recover up to (but not more than) the cost of the services provided to the resident, the Director emphasises that the funding activities of North & West are in permanent deficit, because North & West is dealing with disadvantaged elderly members of society whose resources are not sufficient to meet the cost of their care. For the purposes of this case, we assume that, in practice, many of North & West's residents, including, notably, most of those in the Bettercare homes, could not themselves afford the accommodation that is provided for them without funding from North & West, or from some other source.

233. That, says the Director, is the end of this case, since what North & West does is quite simply not a commercial operation, but "an exclusively social function" (letter of 29 July 2001).

234. In our view, in focussing exclusively on the 'social' dimension of North & West's activities, the Director's argument overlooks what we have described above as "the business dimension". Thus, although the *funding* which North & West provides has a social purpose, the way in which North & West carries out or *delivers* its functions is *by using business methods*. Thus, looking at the matter from the point of view of Bettercare and other independent providers dealing with HSS trusts, NHS trusts, and local authorities, the independent providers are entering into commercial transactions. As a matter of policy North & West fulfils its statutory responsibilities through those commercial transactions, and does so on a very wide scale as, we assume, do similar bodies in Northern Ireland and elsewhere in the United Kingdom. The purpose of this system is, as we understand it, to widen choice, obtain improved and more cost-effective services, and encourage competition between providers (see paragraph 158 above). In our view the contracts in question take place within a business setting and are as much commercial transactions from North & West's point of view as they are from the point of view of the independent providers.

235. We have already said that in our view the entering into of such commercial transactions is an economic activity, whether by the supplier (Bettercare) or the purchaser (North & West). Similarly we have already said that, in our view, North & West is an active player in the

market, both as a purchaser of residential and nursing care and as a supplier of residential care itself (see paragraphs 191 to 200 above). In those circumstances while we accept that North & West's activities have a social aim, we do not accept that the activities here in question are *exclusively* social in character.

236. That seems to be recognised by North & West in the Care Homes Directory (paragraph 147 above) where it describes its activities as including "the development of new activity *in partnership with independent providers*" (our emphasis). The fact that North & West's "partnership" with the commercial sector has a social purpose is not sufficient to deprive the activities of that "partnership" of the quality of "economic activities".

237. Nor do we think that the non-application of the Act in this case can be justified by reference to the principle of "solidarity" referred to in the caselaw of the European Court.

238. In our view, the "solidarity" which was under consideration in cases such as *Poucet and Pistre* and *Cisal* was a kind of 'internal' solidarity *within* the scheme in question and *between the members* of the scheme. Such solidarity is not, in our view, to be imposed *externally* on external trading parties such as independent providers.

239. Thus in *Poucet and Pistre* (paragraphs 82 to 83 above) all participants received identical benefits under the sickness and maternity scheme, but the contributions made, fixed by the State, were proportional to income. There was thus some redistribution of income between those participants who were better off and those who were not. In the old age insurance scheme the contributions paid by active workers served to finance the pensions of retired workers, which were not proportional to the contributions paid. The various social security schemes which were in surplus contributed to financing those that were in deficit. These schemes seem to us to have features similar to those of the systems of National Insurance in the United Kingdom. Unsurprisingly, in our view, the Court decided that the bodies administering the schemes in question were not "undertakings".

240. Similarly, in *Cisal* (see paragraphs 100 to 103 above), which appears to have been somewhat of a borderline case since the Italian competition authority had apparently taken the opposite view (see paragraph 78 of Mr Jacobs' opinion), the Court found that compulsory affiliation to the Italian national scheme of insurance against accidents at work was essential to the financial balance of that scheme. In particular, better-paid workers paid higher contributions, but the benefits paid out were not proportionate to the contributions paid in. There was thus 'solidarity' between better-paid workers and those who were worse off. Again, the Italian

system seems to us to have features also found in the United Kingdom system of National Insurance. In the factual circumstances of the case the Court held that the body that administered that scheme, INAIL, was not to be classed as an "undertaking", particularly since the rates of contributions and benefits were ultimately fixed by the State.

241. In the present case, there is no 'scheme' of the kind in issue in the above cases nor "solidarity" between the members of "a scheme". As we see it, "solidarity" in the present case exists only in the very general sense that public funds are available to support elderly persons in need of care.

242. We do not, however, see why this element of 'solidarity', whereby tax payers contribute to the support of elderly persons, should deprive the contracts which North & West makes with independent providers of their character of "commercial" transactions. Any 'solidarity' in the sense indicated by the European Court which exists in the present case is at most between the residents and the generality of taxpayers who fund them, and not between North & West and its independent providers.

243. The independent providers are in business in the normal way to make commercial transactions and profits. The Director's argument implies, however, that the 'solidarity' which exists between residents and taxpayers should also be imposed on the independent providers so as to deprive them of the protection of the Act. We do not think that can be right: such solidarity as there is in this case cannot in our view be 'exported' so as to affect North & West's transactions with external commercial providers.

(iv) The argument that the relevant activity could not be carried on for profit by a private undertaking

244. The Director's argument – and in many ways his principal argument in this case – is that the activity of North & West in issue is that of purchasing social care for persons in need who cannot afford it. By definition no commercial operation could provide services to those who cannot afford to buy them. Hence, so the argument runs, North & West's activities cannot be regarded as economic or commercial in character.

245. In support of this argument the Director relies heavily on the view of Advocate General Jacobs at paragraph 67 of his opinion in *Ambulanz Glöckner*, cited at paragraph 97 above:

> "The basic test is whether the entity in question is engaged in an activity which consists in offering goods and services in a given market and which could, at

least in principle, be carried out by a private sector undertaking in order to make profits."

246. Advocate General Jacobs advanced the same test at paragraph 311 of his opinion in *Albany*, and in paragraph 38 of his opinion in *Cisal*. At paragraph 214 of his opinion in *Albany* cited at paragraph 91 above, Mr Jacobs said:

> "With respect to public bodies, the Court examines whether the activity in question is – at least potentially – performed by private entities engaged in the supply of goods or services ... The underlying rationale of [*Diego Cali*, *Höfner & Elser*, and other cases] is that the entities under scrutiny are fulfilling the 'function' of an undertaking. The application of Articles 85 and 86 is justified by the fact that those public bodies ... are operating on the same or similar principles as 'normal' undertakings."

247. At paragraph 338 of that opinion Mr Jacobs held that the body in question was not an undertaking since

> "I cannot see any – even theoretical – possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle."

(See paragraph 92 above).

248. We accept that in both *Höfner & Elser* (at paragraph 22) and *Ambulanz Glöckner* (at paragraph 20) the Court took into account the fact that the activities in question – placing in employment and public ambulance services respectively – were capable of being carried out by entities other than by the public authorities. However, we consider the Director's argument to be misconceived, for the following reasons.

249. First, although in *Ambulanz Glöckner* at paragraph 67, and in his other opinions Advocate General Jacobs has asked himself whether the activity could be carried on by a private sector undertaking with a view to "making profits", it is clear from the judgments of the Court and decisions of the European Commission that neither the aim of "making profits", nor the achievement of that aim, is an essential ingredient to the concept of "an undertaking": see e.g. *Film Purchases by German television stations*, cited at paragraph 78 above; *FFSA*, cited at paragraphs 84 and 229 above, at paragraph 21 of the judgment; and *Pavlov*, cited at paragraph 94 above, at paragraph 117 of the judgment. In addition, in *Höfner & Elser*, the Bundesanstalt, which was held to be an undertaking, did not make profits, and provided its services for free. In *Ambulanz Glöckner*, medical aid organisations, such as the German Red Cross, which ran the public ambulance service, were non-profit making, but were nonetheless held to be undertakings. In our view the central point is again to be found at paragraph 21 of

the judgment in *FFSA*, cited at paragraphs 84 and 229 above, namely that if the activities in question are capable of generating the effects which the competition rules are designed to prevent, the fact that the activities are not profit making is neither here nor there.

250. Secondly, although, as Advocate General Jacobs points out in *Albany*, at paragraph 91, "the Court examines whether the activity in question is – at least potentially – performed by private entities engaged in the supply of goods or services" we have seen nothing in Community law to suggest that that is the *only* legal test for determining whether a given activity is "economic" in character. While such a test is no doubt useful and appropriate when considering a "supply side" situation, North & West's contracting out activities are essentially on the "demand side". Since the issue of 'contracting out' by a body such as North & West has not arisen in the cases cited to us, we are not persuaded that a test developed for different factual situations can simply be transposed formulaically to the present case.

251. Thirdly, and more fundamentally, the test as formulated by the Director simply begs the question as to how one should define "the activities" that can potentially be performed by private entities for the purpose of the test. In this case we think a relevant activity, or one of them, is "the supply of residential or nursing accommodation". Such an activity is pursued by numerous private sector undertakings. Thus, it seems to us that, in running their own homes, North & West and similar bodies are pursuing an 'economic' activity, in that they are, in principle – at least potentially – competing with private sector providers for the business of the residents concerned. As we have already seen, the fact that North & West's homes are funded by the State through taxation does not detract from the economic nature of the 'offer' which North & West makes on the market.

252. In our view the same is true in principle of North & West's contracting out activities. The entering into commercial transactions – i.e. trading – with about 30 independent providers in North & West's area and possibly elsewhere in Northern Ireland, with a view to providing residential and nursing accommodation, recovering at least some of the cost from the residents, is in our view intrinsically an activity of an economic character. The Director's contrary view, it seems to us, confuses *the source of the funding* with the *nature of the activities* under discussion. If the activities are economic in character, the source of the financing of those activities is irrelevant, as the Court has consistently held since *Höfner & Elser.*

253. For example, in *Sodemare* (paragraph 87 above) which is relied on by the Director, but in our view does not support his argument, the non-profit making operators who ran homes for the

elderly in Italy were funded by the public authorities. Neither Advocate General Fennelly nor the Court suggested that such operators were not 'undertakings': indeed paragraphs 41 to 49 of the judgment indicate that such bodies are undertakings. Similarly the non-profit making organisations in *Ambulanz Glöckner* were funded to a large extent by the State but that did not prevent their activities being those of undertakings. Bettercare itself, in this case, provides accommodation for those who would not otherwise afford it, but the fact that the funds for that activity come indirectly from the State does not prevent Bettercare from being an 'undertaking'.

254. Again it seems to us that the Director's argument, by dwelling on the source of North & West's State funding and its social aim, neglects the important business dimension of North & West's activities. Like a business, North & West has customers and potential customers – the residents – by whom it will be remunerated for its services. A principal purpose of the system of 'contracting out' is to enable North & West to negotiate with independent service providers to secure the best value for money and the most competitive deal for its customers, the residents. In addition, in running its own statutory homes, for which it also recovers remuneration from the residents, North & West is providing services of an 'economic' character. Those are in our view intrinsically 'business-like' activities, typical of the 'function' of an undertaking, to use Mr Jacobs' phrase in *Albany*, cited at paragraph 246 above.

255. In addition, in our view the Director's argument makes a significant factual assumption which we would be reluctant to accept without evidence at this stage of the case. That assumption is that if North & West did not exist, the private and voluntary sectors could not – even in theory, as Mr Jacobs points out in *Cisal* – provide residential care for those "who cannot afford it". First, that argument begs the question of what is meant by "cannot afford it". Secondly, the argument presupposes that private residential care could not be provided – even in theory – from the resources of a resident with only a state pension, perhaps with further support from the family concerned or charitable bodies. That is a factual assumption that we find difficult to make on the material before us, especially bearing in mind the existence in Northern Ireland and elsewhere of the voluntary (not for profit) sector. For example, such care could in theory be provided by a private or voluntary operator with the cost being partly met by the resident, by his/her family, some cross subsidy from "self funders" or charitable sources. If any remaining deficit were to be met, for example, by a direct grant from the Government, the operator concerned would not cease to be an undertaking simply because it was in receipt of direct Government funds.

256. Finally, the Director's argument takes no account of the underlying purpose of posing the question whether a given activity is 'economic'. As we have already said, (paragraph 229 above) the underlying purpose behind the European Court's approach is to determine whether the activity with which it is confronted is one to which the competition rules of the Treaty could and should be applied. As we have already said, at paragraphs 202 to 209 above, we cannot see any good reason for wholly excluding the competition rules in the circumstances of the present case, notwithstanding that North & West pursues a social aim.

257. Indeed, it seems to us that, once the decision has been taken to rely on private sector transactions for the "delivery" of the services in question, it is logical to expect the rules applicable to private sector transactions to come into play. Those rules include, notably, the Competition Act 1998.

258. In that connection, it is common ground that, when entering into commercial transactions with HSS trusts and similar bodies the independent providers concerned are 'undertakings' and thus subject to the Chapter I and Chapter II prohibitions. Those independent providers are expected to compete with each other, and with statutory providers, not to make restrictive agreements, and not abuse any dominant position. It does not seem to us a symmetrical result if one party (the supplier) to the same commercial transaction is subject to the Act, but the other party (the purchaser) is not. The Director's argument implies that the independent providers are subject to all the burdens of the Act, but unable to invoke the protections that it offers, for example where a trust seeks to take abusive advantage of its position as a monopoly buyer in a particular locality. We doubt very much whether Parliament could have intended that result.

259. We have already expressed the view that in the absence of any statutory exclusion, the presumption must be that the Act is intended to apply, the onus being on the Director to demonstrate the contrary (paragraph 218 above). We note in this connection that Advocate General Fennelly said in his opinion in *Sodemare* at paragraph 30:

> "the relations of other persons, as providers of goods or services, with such systems of social provision can, none the less, be economic in character. Community law requires that such systems comply with Treaty rules in so far as they affect the economic activities 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 subsidize the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, inter alia, freedom of establishment."

260. Although Advocate General Fennelly is there referring to the rules on freedom of establishment, and his opinion was not followed as to the result reached in that case, we think the reasoning he sets out at paragraph 30 of his opinion is reasonably transposable to the competition provisions of the Act. In the present case, where private operators "have been co-opted into the social security system", and the provision of social care has been "contracted out", to use Mr Fennelly's phrase, it seems to us reasonable to presume that the Act applies unless the contrary has been shown.

261. If the Act does not apply, and a trust or local authority were to impose unfair terms on an independent provider, it seems to us very doubtful, despite the further information supplied to us by the Director on 14 June 2002, whether the independent provider would have any other adequate legal remedy. The largely unexplored area of judicial review of what would be an essentially private law transaction does not appear to us to be particularly promising (see e.g. *R v LCD ex p. Hibbit & Sanders* [1993] COD 326).

262. We note in passing that in the context of the 'internal market' within the health service envisaged for "HSS Contracts" (see paragraph 125 above), Article 8(5) of the 1991 Order provides a procedure for resolving disputes if one party to such a contract seeks to impose unfair terms by reason of monopoly or unequal bargaining power, thus recognising the need for such a mechanism: see paragraph 126 above. In our view it would be paradoxical if the equivalent provisions of the Act had no application where the conduct concerned affected external, rather than internal, providers.

(v) The argument that the activities do not impinge on competition with the private sector

263. Nor do we accept, at this stage, the Director's argument that North & West does not compete with independent providers such as Bettercare. As we have already indicated, we see no reason, subject to further investigation of the facts, to rule out, on principle, the contention of Mr Caldwell and Mrs Montgomery that Bettercare and other independent providers compete with the statutory homes run by the HSS trusts in Northern Ireland. In any event, for the Chapter II prohibition to apply, it is unnecessary that the alleged abuse should affect competition between the dominant purchaser and his supplier. In many cases purchaser and supplier (or supplier and purchaser) will be in a vertical rather than a horizontal relationship and may not be directly competing at all. It is enough under the Chapter II prohibition that the conduct complained of by the dominant supplier or purchaser affects competition between the alleged victim and third parties. Here Mr Caldwell alleges, among other things, that North & West's conduct makes it difficult for Bettercare to remain in business, and adversely affects

Bettercare as compared with other independent providers who have a higher proportion of "self funders" (Mr Caldwell's witness statement at paragraph 18). Those are allegations which we have not examined, but they fall in our view properly within the ambit of the Act. Indeed at this point the policy behind 'contracting out', namely the promotion of competition between independent providers so as to improve the service to the elderly, and the policy behind the Chapter II prohibition, namely to protect the competitive process by preventing abuse of dominance, appear to coincide.

(vi) The argument that purchasing without resale is not an economic activity

264. We do not accept the Director's argument that North & West is not an undertaking because the simple act of purchasing without resale is not an 'economic' activity. We are not concerned in this case with, for example, a simple purchase for household needs by a consumer, or with the purchase of a new computer by a Government Department. In the first place, we are concerned here with the widespread making of commercial contracts in the context of a policy of contracting out pursued by North & West. In that context it seems to us that North & West can fairly be said to be "trading" in a competitive market for the purposes of the application of the Act. In the second place, the legal analysis in this case is that North & West, having purchased the "bed" in question, then "re-supplies" that bed by means of a further contract with the resident who is liable to pay North & West the cost of his accommodation, up to his available means. Here again, it seems to us that that is activity of an 'economic' character, albeit in a social context. Thirdly, North & West is not simply engaging in the activity of purchasing and re-supplying beds, but it is also running its own statutory homes as one of the offerors in the market for residential care services in Northern Ireland, and seeking remuneration from the residents.

(vii) The argument that application of the competition rules would interfere with the State's social priorities

265. As to the Director's argument that, if competition law were to apply in the present context, the competition authorities would find themselves interfering with what are really policy choices regarding public funding in a sensitive area of social policy, we can up to a point understand the Director's caution in a case such as this. However, in our view, for the reasons we have given, it is not appropriate to find an "escape route" via the particular concept of "undertaking" adopted by the Director.

266. As we have already said (paragraphs 202 et seq above) we can think of many circumstances in which a trust, acting commercially, might adopt discriminatory, exclusionary or other unfair

trading practices in its purchasing activities. Each of those actions may disadvantage the independent providers in competition terms, either as regards competition between independent providers and statutory homes, or as between the independent providers themselves. On the material before us it does not seem to us correct that the rights of private parties to contest allegations of that kind under the Act – which, we assume, include the right to take civil proceedings as well as the right to complain to the Director – should be excluded at the threshold stage of the "undertaking" issue.

267. As to the more complex question of the effect of the Chapter II prohibition as regards the level of the purchase prices offered, again we think that that issue is capable of being tackled, perfectly sensibly, in the context of an examination of the alleged "abuse", having regard to the doctrine of objective justification and also to Schedule 3, paragraph 4 of the Act (see paragraphs 210 to 214 above). That issue is, however, for another day.

(viii) The argument that neither contracting out nor running statutory homes is an economic activity

268. In the correspondence between Bettercare's advisors and the Director, Bettercare seemingly suggested that North & West's activities as regards its statutory homes might not be an economic activity. The Director's officials, on the other hand, suggested that a local authority running residential accommodation in the private sector was engaging in economic activity, but that purchasing such care from the private sector was not an economic activity (see the Director's letter of 25 July 2001, at paragraph 25 above). On the hearing of the appeal, counsel for the Director perceived, in our view quite correctly, that the logic of the Director's argument applied to *both* activities, with the consequence that neither the running of North & West's statutory homes, nor contracting out, was an economic activity, according to the Director. Counsel for Bettercare, also correctly perceiving the logic of *his* position, advanced the opposite contention, namely that *both* activities were economic in character.

269. We agree with the Director that his argument logically applies whether one is considering North & West's own statutory homes or its contracting out activities. However, the fact that the logic of the argument drives one to that conclusion seems to us to reinforce our view that the argument is fallacious.

270. We have difficulty with the Director's argument that North & West, and similar bodies, are not engaging in economic activity when running their own statutory homes. As we have already indicated, North & West advertises those homes in competition with the homes run by private and voluntary providers. The potential resident can choose between the services, the

facilities and the financial arrangements offered. Once the resident is in occupation, North & West supplies services to him and recovers a contribution from the resident's own resources up to the full cost. We have difficulty in accepting that such activities are not 'economic activities' for the purposes of the Act, even if the resident cannot meet the full cost. Any other conclusion would mean that North & West's own activities would be wholly outside the Act, however much those activities distorted the competition which in our view exists or potentially exists between the statutory homes and the independent providers.

271. Once again, it seems to us the fallacy of the argument is to assume that North & West's activities in running its statutory homes are not 'economic' activities in the sense of Community law because they are dependent on monies provided by the State. However, as already seen, the source of North & West's funding is irrelevant to the analysis. Indeed, in reality all the activities under discussion in this case, whether those of Bettercare or North & West, are funded by the State. Bettercare does not, however, cease to be an undertaking because its activities are ultimately dependent on State funding and nor, in our view, does North & West with regard to its own statutory homes.

272. We do, however, agree with the Director that it is difficult to escape the logic that either *both* the ways in which North & West provides accommodation for residents are economic activities, or *neither* of them are. It is in our view illogical to say that when North & West satisfies the needs of elderly persons needing care by running its own statutory homes that is an 'economic' transaction, but it is not an 'economic' transaction when North & West satisfies the same needs by contracting out under a commercial contract with an independent provider. In our view, both kinds of transaction are "economic" activities.

273. The contested decision in this case did not follow the above logic, nor the logic of the Director's arguments before us. The contested decision, notably in the letters of 29 November 2000 and 25 July 2001, drew a distinction between North & West's running of its own statutory homes (economic activities) and its purchasing activities (non economic activities). In our view that distinction cannot stand, as a matter of both law and logic. For that further reason, the contested decision appears to us to be based on an incorrect legal analysis.

(ix) The argument that North & West's activities are only economic activities as regards self funders

274. The Director concedes that North & West's activities are economic activities so far as 'self funding' residents are concerned. Again, we can see that, on the Director's argument, that

concession is logically made. It does, however, lead on to a legal tangle of considerable proportions.

275. In the first place, once again the Director's approach in our view confuses the nature of the activity in question with the source of the funding. In our view, providing residential care in North & West's statutory homes in competition with independent providers remains an activity that is 'economic' in nature under Community law, irrespective of whether a particular resident is wholly 'self funded', substantially self funded, or partially self funded. Secondly, the Director's test introduces difficult questions of degree: does North & West's activity cease to be an economic activity where the resident pays 95 per cent of the cost himself, 75 per cent, or 50 per cent? Thirdly, and more fundamentally, we see nothing in the caselaw of the European Court which suggests that the matter should be approached on a "resident by resident" basis, rather than on the basis of a broad appreciation of the nature of the overall activity in question. Fourthly, such an approach is likely to lead to all kinds of factual difficulties, in ascertaining which services to which residents qualify as "economic activities", dealing with changes as residents come and go and so on. Fifthly, it seems to be suggested that a trust or local authority with a high proportion of "self funders" might be an undertaking, whereas a trust dealing with an area of social deprivation with hardly any "self funders", would not. We do not think such a distinction would be workable in practice, nor do we think that the legal status of a particular body as an undertaking can or should depend on whether it happens to be situated in an area that is prosperous, poor or somewhere in between.

276. In our view, the approach of looking at the matter on a "resident by resident" basis suggested by the Director's argument is not supported by Community law. It is an approach which we would be extremely reluctant to take, because of the obvious legal and practical difficulties that would result in determining whether or to what extent a given trust was an undertaking or not. The fact that the Director's argument leads to such difficulties is in our view further confirmation that the basic argument is unsound.

Conclusion

277. Having considered the Director's arguments we therefore arrive back, after a somewhat lengthy journey, to our point of departure. In our view, for the reasons we have given, the contracting out activities of North & West are in principle to be regarded as "economic activities" for the purposes of the Chapter II prohibition, as are North & West's activities in running its own statutory homes.

B. THE DIRECTOR'S ARGUMENT THAT NORTH & WEST HAS NO FREEDOM TO SET THE PRICES IN QUESTION

278. The Director, supported by the evidence of Mr Barry, further contends that the prices that Bettercare complains about are not set freely by North & West but are set by the EHSSB and in the last resort by the Department. Thus, says the Director, North & West is not an undertaking because it does not have any choice in the matter. Bettercare, supported by the witness statements of Mr Caldwell and Mrs Montgomery, denies that that is the case.

279. For four reasons, we do not think we are able, in this appeal, to find in the Director's favour on the basis of this argument.

280. First, this argument was not put forward in the contested decision, and thus forms no part of the reasoning which the Director relied on when rejecting Bettercare's complaint.

281. Although the Tribunal has wide powers under Schedule 3, paragraph 2 of the Act, and has no doubt a certain leeway to take into account facts and matters which emerge during an appeal in amplification of the original decision, in general we think we should be slow to decide the case on the basis of wholly new factual elements produced by the Director at the stage of the defence, unless those new facts are either agreed, or clearly established, and are virtually conclusive, one way or the other, of the point at issue.

282. Secondly, in our view we do not have sufficient material to be able to make definite findings as to whether or to what extent North & West has autonomy to negotiate or set the prices or contractual terms that North & West offers to Bettercare. We have seen letters dated 19 June 2001 and 28 March 2002 from the EHSSB to North & West which tend to suggest that it is the former which has a decisive influence over the level of prices set and we have Mr Barry's evidence, notably at paragraph 30 of his witness statement. On the other hand the evidence of Mr Caldwell at paragraph 11 of his witness statement, and Mrs Montgomery at paragraph 6 of her second witness statement, is to the effect that the role of the EHSSB is advisory, and that as far as they are concerned it is North & West that sets the prices. We do not have any evidence from the EHSSB itself, on this or any other issue, and the relationship between the EHSSB and North & West has not been explored in the course of this appeal, not least because it is not a matter raised in the contested decision.

283. It seems to us that, in order to make proper findings of fact on this point, it would be necessary to have further evidence, including perhaps discovery of the documents passing between North & West and the EHSSB, and possibly between both of those bodies and the

Department, relevant to the fixing of prices and terms on which residential and nursing care was to be supplied by the private sector to North & West. It might also be necessary to hear oral evidence in order to understand the differing points of view of Bettercare, the Registered Homes Confederation, and North & West on this issue. It could well be necessary to consider also whether, under the terms of the relevant legislation and the Instrument of Authorisation dated 30 March 1994, the function of agreeing those prices and terms with independent providers had been attributed to North & West, or to the EHSSB, and what, if any, is the legal significance of the fact that under the legislation North & West's functions are performed "on behalf of" the EHSSB. It would also be necessary to consider whether the EHSSB and/or the Department are in fact exercising a power of direction under that legislation, and if so what power. None of these points has been gone into in the argument before us, and we are not at the moment clear whether it is said that the prices to be paid under contracts with independent providers are set as a matter of formal direction, by whom that direction has been given, and what the legal basis of the direction might be. Nor have we considered the question whether the EHSSB itself is or is not "an undertaking" for present purposes.

284. Thirdly, the matters of fact that would in our view need further explanation are likely to be of some legal significance in the analysis of this case. It seems to appear, from the caselaw of the European Court, that the question whether the amounts in question are "fixed by the State" is a relevant issue when considering whether one is concerned with the activities of "an undertaking" for the purposes of the competition rules. Thus in *Cisal*, the amount of benefits paid was fixed by law, and the amount of contributions payable had to be approved by a Ministerial decree (paragraph 43 of that judgment). The same was true in *Poucet and Pistre*, as appears from paragraphs 14 to 15 of the judgment. In *Eurocontrol*, the rates in question were not fixed by Eurocontrol itself, but by the Contracting States: see paragraphs 23 and 29 of the judgment; and in *Diego Cali* the company SEPG was collecting charges according to a tariff fixed by decree by the public authorities (paragraph 24 of the judgment). In all those cases, the fact that prices were "fixed by the State" was taken into account by the Court as one (but not the only) factor in deciding that the entity in question was not "an undertaking".

285. To our mind, however, at least two questions arise, which would require further exploration. First, does "fixed by the State" mean fixed by the person or body with ultimate authority in the matter, which in this case might mean the Department or the Minister, or can it merely mean fixed at the next level up the chain, i.e. in this case the EHSSB? The Director's argument at the moment begs the question whether for these purposes the EHSSB is "the State", or another "undertaking", or whether North & West and the EHSSB together form a single economic entity to be characterised as "an undertaking".

286. More fundamentally, we have already referred to Schedule 3, paragraph 5(2) of the Act which provides:

> "(2) The Chapter II prohibition does not apply to conduct to the extent to which it is engaged in an order to comply with a legal requirement."

287. The Director's argument that North & West has no latitude in the matter of agreeing the prices concerned with independent providers could therefore give rise to two different legal conclusions. One possibility is that North & West is not an "undertaking", as the Director submits. The other possibility is that North & West is still an "undertaking", but is acting subject to a "legal requirement" within the meaning of paragraph 5 of Schedule 3, with the consequence that the Chapter II prohibition does not apply.

288. We are not able to express a view on this point until the facts have been further established. Since, so far as we are aware, paragraph 5 of Schedule 3 has no direct counterpart under Community legislation, we also leave open at this stage whether on this point there is a "relevant difference" between the provisions concerned, for the purpose of applying section 60(1) and (2) of the Act.

289. Fourthly, and finally, we are not able to say, at this stage of the case, whether, even if there is validly in force a legal requirement in Northern Ireland as to the prices to be offered by North & West for the services Bettercare contracts to provide, such a requirement would be a complete answer to each and every matter raised by Bettercare in its original complaint.

VIII CONCLUSION AND ORDERS MADE

290. We therefore unanimously find, on the material available to us, that North & West's activities in running its statutory residential homes and engaging in the contracting out of social care to independent providers are for the purposes of the Competition Act 1998 to be regarded as economic activities for the purpose of deciding whether North & West is an undertaking within the meaning of section 18(1) of the Act.

291. In those circumstances, the Director's original decision cannot stand. The same is true of the Director's refusal to vary that original decision under section 47(4) of the Act: see our judgment of 26 March 2002, [2002] CAT 6. In the circumstances, we set aside both those decisions under Schedule 8, paragraph 3(2) of the Act.

292. The result is that Bettercare's complaint is still pending with the Director, and it is now for him to decide how to proceed. In those circumstances, and subject to any observations the parties may make, we think the appropriate course is simply to remit the matter to the Director without any consequential directions. We will hear argument on any further applications the parties wish to make.

293. On those grounds the Tribunal

1. Sets aside the decisions of the Director contained in or comprised by the Director's letters of 29 November 2000, 25 July 2001, 21 September 2001 and 2 November 2001 whereby the Director decided that he had no power to investigate the complaint made to him by Bettercare Group Limited, and subsequently refused to vary that decision.
2. Remits to the Director the matter of Bettercare's complaint.

Christopher Bellamy Michael Davey David Summers

Charles Dhanowa
Registrar Delivered in open court 1 August 2002