Appeal No. UKEAT/0003/18/RN
UKEAT/0004/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 & 24 May 2018
Judgment handed down on 23 August 2018

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

UKEAT/0003/18/RN

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(1) MRS S NICHOLLS ("the BMA Appellants") APPELLANTS
(2) MS E SCHWARTZ

(1) LONDON BOROUGH OF CROYDON
(2) MS J HACKER & OTHERS RESPONDENTS

UKEAT/0004/18/RN

MS J HACKER & OTHERS ("the Unite Appellants") APPELLANTS

(1) LONDON BOROUGH OF CROYDON
(2) MRS S NICHOLLS
(3) MS E SCHWARTZ RESPONDENTS

Transcript of Proceedings

JUDGMENT

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SUMMARY

TRANSFER OF UNDERTAKINGS - Acquired rights directive

TRANSFER OF UNDERTAKINGS - Transfer

The Employment Tribunal decided that there was no relevant transfer for the purposes of the **TUPE Regulations** because the case fell within regulation 3(5). The Tribunal rightly rejected arguments that: (a) the transferred public health team's activity of purchasing or commissioning health services was in itself an economic activity for the purposes of regulation 3(2); and (b) regulation 3(5), if otherwise applicable, did not apply because the transferring entity, a Primary Care Trust, carried on some economic activities.

However, the Employment Tribunal found that all, or almost all, of the work done by the public health team could be, and in fact was, offered by non-state actors operating in the same market. That was a strong indication that the public health team was carrying on an economic activity.

Having made that finding, the Employment Tribunal either failed to give adequate reasons for its conclusion or was wrong, if and insofar it concluded that it was a sufficient reason for reaching that conclusion that the public health team did not bid for contracts and was not trying to obtain business.

The Employment Tribunal was also wrong to conclude that, if there was a relevant transfer, the Claimants' employment was not transferred pursuant to regulation 4(1) of the **TUPE Regulations** and they were not entitled to rely on regulation 4(4).

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THE HONOURABLE MR JUSTICE LAVENDER

(1) Introduction

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1. These two appeals are brought by a total of 14 individuals. I will call them the Claimants. They appeal against the decision on two preliminary issues of an Employment Tribunal consisting of Employment Judge Hall-Smith sitting alone. His decision was set out in a Judgment which was sent to the parties on 31 July 2017, following a five-day hearing held between 13 and 17 March 2017.

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2. The Claimants' employment transferred on 1 April 2013 from the Croydon Primary Care Trust ("the Trust") to the London Borough of Croydon ("the Council"). In connection with the transfer, the Secretary of State made The Health and Social Care Act 2012 (Croydon Primary Care Trust) Staff Transfer Scheme 2013 ("the Staff Transfer Scheme"). He did so in exercise of the powers conferred by section 300 of the **Health and Social Care Act 2012**.

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3. The Claimants remained with the Council for over two years. In 2015 the Council wanted to change the Claimants' terms and conditions of employment. Initially, it invited the Claimants to agree to vary their terms and conditions. This offer was not accepted by any of the Claimants. Four of the Claimants resigned and claimed that they had been constructively dismissed. Then in August 2015 the Council dismissed the remaining ten Claimants and offered to re-engage them on new terms. Six of the Claimants accepted re-engagement. Four did not. The Claimants have brought claims for unfair dismissal. Their claims have not been fully quantified, but are expected to exceed £1million in aggregate.

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4. The preliminary issues were:

(1) Whether there was a "relevant transfer" for the purposes of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("the TUPE Regulations")?

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(2) If there was a relevant transfer, whether each of the Claimants' employment with the Trust was transferred pursuant to the operation of regulation 4 of the **TUPE Regulations**?

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5. In short, the Tribunal answered "No" to each of these questions.

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<u>(2) The TUPE Regulations, the Directive and the Staff Transfer Scheme</u>

(2)(a) Regulation 7(1)

6. The Claimants allege, inter alia, that their dismissal was unfair pursuant to regulation 7(1) of the **TUPE Regulations**, which provided as follows:

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> **"(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is -**
>
> **(a) the transfer itself; or**
>
> **(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce."**

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(Sub-paragraph 7(1)(b) was deleted by an amendment which took effect on 31 January 2014, but the unamended regulation applies in relation to transfers which took place before that date.)

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7. The Staff Transfer Scheme contains, in paragraph 4(1), a provision which is equivalent to regulation 7(1), but which, unlike regulation 7(1), is subject to a time limit. Paragraph 4(1) of the Staff Transfer Scheme provides as follows:

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> **“(1) Subject to sub-paragraph (6), where a person whose contract of employment is transferred by paragraph 3 is dismissed by the transferee during the period starting on the transfer date and ending on 31st March 2015, that person is to be treated, for the purposes of Part 10 of the 1996 Act (unfair dismissal), as having been unfairly dismissed if the sole or principal reason for the dismissal is -**
>
> > **(a) the transfer itself, or**
> >
> > **(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.”**

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8. Since they were dismissed after 31 March 2015, the Claimants could not rely on paragraph 4(1) of the Staff Transfer Scheme. Hence their claim that they could rely on regulation 7(1) of the **TUPE Regulations**. This claim gave rise to the first preliminary issue, i.e. whether there was a “relevant transfer” for the purpose of the **TUPE Regulations**, since regulation 7(1) only applies where there has been a relevant transfer.

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(2)(b) Relevant Transfer: Regulation 3

9. Regulation 2(1) provides, insofar as is material, as follows:

> **“ “relevant transfer” means a transfer … to which these Regulations apply in accordance with regulation 3 and “transferor” and “transferee” shall be construed accordingly …”**

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10. The Claimants contend that there was a transfer to which regulation 3(1)(a) applied:

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(1) Regulation 3(1)(a) provides as follows:

> **“(1) These Regulations apply to -**
>
> > **(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; …”**

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(2) Regulation 3(1)(a) gives effect to article 1(1)(a) of EU Council Directive No. 2001/23 (“the Acquired Rights Directive”), which provides as follows:

> **“This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.”**

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11. The Claimants also rely on paragraphs (2) and (4)(a) of regulation 3:

(1) Regulation 3(2) provides as follows:

> **"(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."**

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(2) Regulation 3(2) gives effect to article 1(1)(b) of the **Acquired Rights Directive**, which provides as follows:

> **"Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."**

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(3) Regulation 3(4)(a) provides as follows:

> **"(4) Subject to paragraph (1), these Regulations apply to -**
>
> > **(a) public and private undertakings engaged in economic activities whether or not they are operating for gain; …"**

D

(4) Regulation 3(4)(a) gives effect to the first sentence of article 1(1)(c) of the **Acquired Rights Directive**, which provides as follows:

> **"This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. …"**

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12. The Council accepted that there had been a transfer, and that the transferred entity retained its identity, but contended that what happened on 1 April 2013 was not a relevant transfer because what was transferred was not an "undertaking" or "economic entity" and that this was a case to which regulation 3(5) applied:

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(1) Regulation 3(5) provides as follows:

> **"An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer."**

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(2) Regulation 3(5) gives effect to the second sentence of article 1(1)(c) of the **Acquired Rights Directive**, which provides as follows:

> **"… An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive."**

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(3) The second sentence of article 1(1)(c) follows the wording of paragraph 14 of the judgment of the Court of Justice in **Henke v Gemeinde Schierke and Another** (Case C-298/94) [1996] ECR I-4989; [1997] ICR 746 ("Henke"), which was a decision on the interpretation of the predecessor of the **Acquired Rights Directive**, EU Council Directive No. 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses ("the 1977 Directive").

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(2)(c) Regulation 4

13. Sub-paragraphs 3(1) to (3) of the Staff Transfer Scheme provide as follows:

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> **"(1) This paragraph applies to any person who, immediately before the transfer date, was an employee of the transferor and -**
>
> **(a) is identified in Columns 1 to 3 of a table in the Schedule; or**
>
> **(b) has, on or after 1st March 2013 but before the transfer date, been notified in writing by the transferor or transferee that they are to be transferred to the transferee on that date.**
>
> **(2) Subject to sub-paragraph (5), any person to whom this paragraph applies is, on the transfer date, to be transferred to the employment of the transferee.**
>
> **(3) Subject to sub-paragraph (5), the contract of a person to whom this paragraph applies -**
>
> **(a) is not terminated by the transfer; and**
>
> **(b) has effect on and after the transfer date as if originally made between that person and the transferee."**

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14. These provisions reflect regulations 4(1) and (2) of the **TUPE Regulations**, which provide as follows:

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> **"(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer -**
>
> **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**

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(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."

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15. Regulations 4(1) and (2) of the **TUPE Regulations** give effect to article 3(1) of the **Acquired Rights Directive**, which provides, inter alia, as follows:

> **"The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee."**

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16. It follows that, if there was no relevant transfer for the purposes of the **TUPE Regulations**, sub-paragraphs 3(1) to (3) of the Staff Transfer Scheme gave the transferred employees rights which are equivalent to those conferred by regulations 4(1) and (2) of **the TUPE Regulations**. Moreover, subparagraphs 3(5) to (10) of the Staff Transfer Scheme conferred rights which are largely equivalent to those provided for by regulations 4(7) to (11) of the **TUPE Regulations**. Curiously, however, there is no provision of the Staff Transfer Scheme which confers rights equivalent to regulation 4(4) of the **TUPE Regulations**, which provides as follows:

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> **"(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer."**

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17. There is no express provision of the **Acquired Rights Directive** which corresponds to regulation 4(4). Instead, regulation 4(4) gives effect to an obligation which the Court of Justice held to be implicit in article 3(1) of the **1977 Directive**, which was the predecessor of article 3(1) of the **Acquired Rights Directive**: see **Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S** (Case C-324/86) [1988] ECR 739; [1989] 2 CMLR 517; [1988] IRLR 315.

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18. The Claimants contend that the Council's attempts to change their terms and conditions were contrary to regulation 4(4). They can only rely on regulation 4(4) if there was a relevant transfer. But the Council contended that, even if there was a relevant transfer:

(1) the Claimants (or at least the ten Claimants who did not resign) had continuity of employment pursuant to sub-paragraphs 3(1) to (3) of the Staff Transfer Scheme; and, consequently

(2) regulation 4(1) of the **TUPE Regulations** did not apply to them because, thanks to the Staff Transfer Scheme, theirs were not employment contracts "which would otherwise be terminated by the transfer".

19. This contention by the Council gave rise to the second preliminary issue, as to which the Claimants point to the fact that the words "which would otherwise be terminated by the transfer" in regulation 4(1) of the **TUPE Regulations** do not correspond to anything in article 3(1) of the **Acquired Rights Directive**. The Claimants submit that those words and the Staff Transfer Scheme should not be used to deprive them of a right conferred by the **Acquired Rights Directive**.

(3) Decided Cases on Undertakings

20. I turn now to consider the law concerning what is, and is not, an undertaking for the purposes of regulation 3(1) of the **TUPE Regulations** and what is, and is not, covered by regulation 3(5). It is helpful to begin with some uncontroversial propositions:

(1) First, the **TUPE Regulations** exist to give effect in domestic law to the **Acquired Rights Directive**, just as the predecessor to the **TUPE Regulations**, i.e. the **Transfer of Undertakings (Protection of Employment) Regulations 1981** ("the 1981 Regulations"), existed to give effect to the **1977 Directive**.

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(2) Secondly, it follows that the **TUPE Regulations** are to be interpreted, so far as possible, in accordance with the **Acquired Rights Directive**.

(3) Thirdly, when considering what constitutes an "undertaking", it is relevant to look at EU competition law, which uses the same term with the same definition.

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(4) Fourthly, as I have already mentioned, regulation 3(5) of the **TUPE Regulations** gives effect to article 1(c) of the **Acquired Rights Directive** which, in turn, was introduced to reflect the decision of the Court of Justice in **Henke**, a decision made when the **1977 Directive** was in force.

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(5) Fifthly, the **1977 Directive** (and the **1981 Regulations**) contained no equivalent to article 1(c) of the **Acquired Rights Directive** (or regulation 3(5) of the **TUPE Regulations**). It follows that regulation 3(5) is merely identifying something which would not be a relevant transfer in any event, even if regulation 3(5) were not there.

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21. I am grateful to all counsel for their assistance in identifying and interpreting the relevant decisions of both the Court of Justice and domestic courts. Two approaches were adopted at the hearing. One was to focus on what entities have, or have not, been held to be undertakings. The other was to look for statements of principle which assist in deciding where the line is to be drawn between, on the one hand, a transfer of an undertaking and, on the other hand, an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities.

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(3)(a) Examples from the Decided Cases

22. I start with the concrete examples provided by the decided cases of entities which were not undertakings:

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(1) **SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation Control** (Case C-364/92) [1994] ECR I-43; [1994] 5 CMLR 208, CJEU ("Eurocontrol": a competition case): an international organisation co-ordinating air navigation control throughout the air space of the States party to the international convention under which it was established.

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(2) **Henke**: a German municipality transferring all of its functions to an "administrative collectivity" formed with other municipalities. The municipality carried out public functions (e.g. the grant of planning permission) and also some economic activities (e.g. promoting tourism and providing services for consideration, such as day nurseries, cultural offerings, the operation of car parks and local public transport).

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(3) **Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG)** (Case C-343/95) [1997] ECR I-1547; [1997] CMLR 484, CJEU ("Diego Cali": a competition case): a limited company, set up by the port authority, providing compulsory anti-pollution surveillance at the petroleum products terminal of the port of Genoa and collecting charges (fixed by decree) from port users.

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(4) **ICA v Commissioners for Customs & Excise** [1999] 1 WLR 701, HL ("ICA": a VAT case): a licensing body for accountants, which performed a regulatory function.

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(5) **Adult Learning Inspectorate v Beloff** [2008] UKEAT/0238/07/RN, EAT ("ALI"): a public inspectorate, which enjoyed rights to enter premises and seize documents.

(6) **Law Society of England and Wales v Secretary of State for Justice** [2010] IRLR 407, Akenhead J ("Law Society"): a complaints body which heard complaints against solicitors and had the power to award compensation.

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23. On the other hand, there are the following examples of entities which have been held to be undertakings:

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(1) **Klaus Höfner and Fritz Elser v Macrotron GmbH** (Case C-41/90) [1991] ECR I-1979; [1993] 4 CMLR 306 ("Klaus Höfner"): a public employment agency which: (a) brought prospective employees into contact with employers; (b) offered its services free of charge; (c) was established pursuant to the German state's obligations under the International Labour Organisation's Employment Service Convention; and (d) enjoyed a monopoly under German law.

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(2) **Dr Sophie Redmond Stichting v Hendrikus Bartol and Others** (Case C-29/91) [1992] ECR I-3189 ("Redmond Foundation"): the provision of assistance to drug addicts free of charge by a foundation whose sole source of income was a subsidy from a municipality.

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(3) **Sánchez Hidalgo v Asociación de Services ASER and Sociedad Cooperative Minerva** and **Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst** (Cases C-173/96 and C-247/96) [1998] ECR I-8237; [2002] ICR 73, CJEU ("Sanchez Hidalgo" and "Ziemann"): (a) a company providing a home help service for persons in need, which had been contracted out from a local government municipality; and (b) a company providing contracted-out surveillance at a German army depot.

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(4) **Governing Body of Clifton Middle School v Askew** [1997] ICR 808, EAT; teachers employed by a state-funded mainstream school.

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(5) **Highland Council v Walker** [1997] EAT/817/97: a dog warden service which had been contracted out by a local authority and which was taken back in-house by a successor authority.

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(6) **Dundee City Council v Arshad** [1999] EAT/1204/98: the operation of a residential care home for young people with learning and physical difficulties, which had been carried on by a charity, then transferred to a local authority, and then transferred to a successor authority.

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(7) **Collino and Another v Telecom Italia SpA** (Case C-343/98) [2000] ECR I-6659; [2002] 3 CMLR 35, CJEU ("Collino"): a state-owned company acting pursuant to a state concession, managing public telecommunications equipment and placing that equipment at the disposal of users on payment of a fee.

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(8) **Mayeur v Association Promotion de l'Information Messine (APIM)** (Case C-175/99) [2000] ECR I-7755; [2002] 3 CMLR 22, CJEU ("Mayeur"): a non-profit-making organisation governed by private law, but set up by the French municipality of Metz, which publicised the opportunities offered in Metz, for example to those seeking to set up businesses in the area.

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(9) **Ambulanz Glöckner v Landkreis Südwestpfalz** (Case C-474/99) [2001] ECR I-8089; [2002] 4 CMLR 21, CJEU ("Ambulanz Glöckner": a competition case): a public ambulance service, which was largely carried on by medical aid organisations, and which enjoyed a monopoly under German law.

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(10) **Scattolon v Ministero Dell'Istruzione, Dell'Università E Della Ricerca** [2012] 1 CMLR 17; [2012] ICR 740 ("Scattolon"): a service for cleaning and maintaining state schools, which was transferred from local authorities to a ministry of the national government.

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(11) **Piscarreta Ricardo v Portimão Urbis EM SA and others** (Case C-416/16) [2017] ICR 1451 ("Portimão"): a municipal undertaking which managed the local transport system, economic development facilities, street trading, markets and fairs,

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advertising, use of the public highway, car parking, a theatre, a farm, a museum and community centres.

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(3)(b) Dicta from the Decided Cases

24. For ease of reference, I set out in the Annex to this Judgment various dicta from the decided cases to which I was referred. In each case, the underlining indicates my emphasis.

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25. I refer here, however, to a case which was not directly cited before me, but which was cited in several of the cases which were. This is the decision of the Court of Justice in **Commission v Italy** (Case 118/85) [1987] ECR 2599; [1988] 3 CMLR 255, a competition case.

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In paragraph 7 of its judgment, the Court said:

> **"The distinction provided for in the sixth recital [*to Directive 80/723 on the transparency of financial relations between member-States and public undertakings*] 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."**

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26. This paragraph encapsulates two points which are central to the present case. It is necessary:

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(1) to consider the activities exercised by the state in the particular case; and

(2) to determine whether those activities belong to the category of:

(a) "exercising public powers"; or

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(b) carrying on an economic activity by offering goods and services on the market.

27. The many dicta to which I was referred can be seen as examples of the working out of these central points in the circumstances of particular cases.

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(3)(c) Bettercare and FENIN

28. The Claimants placed particular reliance on the decision of the Competition Commission Appeal Tribunal ("the CCAT") in **Bettercare Group Limited v The Director General of Fair Trading (3)** [2003] ECC 40 ("Bettercare"). It is necessary, therefore, to say a little more about that case, and also about the Court of Justice's subsequent decision in **Federacion Espanola de Empresas de Tecnologia Sanitaria (FENIN) v Commission of the European Communities** (C-205/03 P) [2006] ECR I-6295; [2006] 5 CMLR 7 ("FENIN"). Those cases are of particular relevance to the present case because they concern the activity of purchasing services (**Bettercare**) or goods (**FENIN**).

(3)(c)(i) Bettercare

29. **Bettercare** was an appeal to the CCAT against the decision of the Director General of Fair Trading that The North and West Belfast Health and Social Services Trust ("North & West") was not an undertaking for the purposes of Chapter II of the **Competition Act 1998** in relation to its activity of entering into contracts with the operators of nursing and residential care homes ("care homes").

30. The CCAT explained (in paragraphs 112, 119, 131 to 133 and 180 of its judgment) that there had been delegated to North & West the duty under article 15(1) of the **Health and Personal Social Services (Northern Ireland) Order 1972** to:

> **"provide or secure the provision of such facilities (including the provision or arranging for the provision of residential of other accommodation, …) as it considers suitable and adequate."**

31. North & West operated eight care homes itself, providing 189 beds. It also contracted with independent care home providers for the provision of a further 604 beds in care homes: see paragraphs 182-3 of the judgment. North & West entered into agreements with both the residents

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of its care homes and the residents of the independent care homes who were there pursuant to contracts entered into by North & West. North & West's agreements with the residents were the same in each case: see paragraph 141 of the judgment. The agreements with the residents covered the fees payable by the residents. As provided for in articles 36(2) and 99(4) of the **1972 Order**, the fees paid by each resident to North & West depended on the resident's means: see paragraphs 113 to 115, 142, 187 and 188 of the judgment. Understandably, the CCAT regarded the residents of both types of care home as North & West's customers: see paragraph 254 of the judgment.

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32. The CCAT was obliged by section 60 of the **Competition Act 1998** to act with a view to ensuring that there was no inconsistency between: (1) the principles it applied and the decisions it reached; and (2) the principles laid down by the Treaty on European Union and the Court of Justice and any relevant decisions of the Court of Justice. The CCAT referred (in paragraph 189) to the definition of an economic activity as one which involved offering goods and services on the market. But it did not regard this (or a different formulation, namely "any activity directed at trade in goods and services") as "necessarily exhaustive" as to what an economic activity might be, especially having regard to what it called a "key consideration" (raised by Advocate General Jacobs in paragraph 71 of his opinion in **Cisal di Battistello Venanzio & Co Sas v Istituto Nazionale Per L'Assicurazione Contro Gli Infortuni Sul Lavoro (INAIL)** (Case C-218/00) [2002] ECR I-691; [2002] 4 CMLR 24), namely whether the undertaking in question "is in a position to generate the effects which the competition rules seek to prevent." (See also paragraphs 249 and 250 of the CCAT's judgment.)

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33. In paragraphs 191 to 201 of its judgment, the CCAT gave several different reasons for concluding that North & West was an undertaking carrying on an economic activity. It carried

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A out a "cross-check" on its approach in paragraphs 202 to 220. It then went on in paragraphs 221 to 289 to consider, and reject, various arguments to the contrary advanced by the Director.

B 34. One of the reasons given by the CCAT for holding that North & West was carrying on an economic activity was that it was offering services to care home residents for a fee: see, in particular, paragraphs 201, 254, 264 and 274-5. This is perhaps most clearly expressed in C paragraph 264:

> **"… 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. …"**

D 35. This analysis seems to me to be entirely consistent with the definition of an economic activity as one which involves offering goods and services on a market. However, the other reasons given by the CCAT for its conclusions are more difficult to square with that definition and, as will appear, are inconsistent with the Court of Justice's decision in **FENIN**. In particular:

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(1) The CCAT expressed, or appeared to express, the view that it was an economic activity in itself for North & West to enter into commercial contracts with care home operators: see, in particular, paragraphs 191 to 194 and 195 to 199 of its judgment. F This is inconsistent with the decision in **FENIN**.

(2) The CCAT also relied on the fact that North & West itself operated eight care homes: see paragraph 200 of its judgment. This lent support to the conclusion that North & G West provided services to the residents of independent care homes, but would perhaps not be a sufficient reason in itself for concluding that North & West was providing services to those residents and so carrying on an economic activity in connection with which it entered into contracts with the care home operators.

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36. Finally, in relation to **Bettercare**, I should mention the CCAT's consideration of the potential application of the **Henke** exception: see paragraphs 81, 82, 85, 86, 172 to 175 and 224 to 226 of its judgment. **Eurocontrol** and **Diego Cali** were cited, but seemingly not **Henke** itself. The CCAT's conclusion (in paragraph 175) was that:

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> **"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". …"**

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(3)(c)(ii) FENIN

37. **FENIN** concerned the purchase of medical goods and equipment for use in the Spanish national health service ("the SNS"). The suppliers of such goods alleged that the bodies managing the SNS were abusing their dominant position in the relevant market. This gave rise to an issue whether the SNS managing bodies were carrying on an economic activity when they bought medical goods and equipment for use in the SNS.

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38. The decision of the Court of First Instance (which is reported at [2003] ECR II-357; [2003] 5 CMLR 1) was summarised as follows by Advocate General Polares Maduro in paragraph 7 of his opinion:

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> **"In the judgment under appeal, the Court of First Instance dismissed the action brought by FENIN and held that the Commission had correctly applied the concept of an undertaking within the meaning of Arts 82 and 86 EC. That Court adopted a three-stage approach in reaching that conclusion. First, in para. [36] of the judgment, it distinguished between purchasing and supplying activities, stating that:**
>
> > **"[i]t is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity …, not the business of purchasing, as such".**
>
> **The Court of First Instance went on to hold that:**
>
> > **"[i]t would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put".**
>
> **It is therefore necessary to consider whether or not the use of the purchased goods amounts to an economic activity. The Court of First Instance based its analysis on *Poucet and Pistre* and *FFSA*, in order to hold, in para. [39] of the judgment under appeal, that:**

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> **“[t]he SNS, managed by the ministries and other organisations cited in the applicant’s complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other state funding and in that it provides services free of charge to its members on the basis of universal cover”.**

> **Accordingly, the purchasing activities linked to an activity which was not of an economic nature were classified in the same way. The organisations covered by FENIN’s complaint were accordingly not undertakings for the purposes of Arts 82 and 86 EC.”**

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39. There were two grounds of appeal to the Court of Justice (described as two parts of a single plea). The second ground was that the Court of First Instance should have held that the purchasing activity was economic in nature because the provision of medical treatment by the SNS was economic in nature. The Court of Justice held that this ground was inadmissible, because this issue was not raised before the Court of First Instance. The first ground of appeal was that the purchasing activity was in itself an economic activity.

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40. Advocate General Polares Maduro considered **Bettercare** (in paragraph 24 of his opinion), but went on to say as follows in paragraphs 65 and 66 of his opinion, in terms which were inconsistent with the wider interpretation of “economic activity” adopted in **Bettercare**:

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> **“65. The appellant claims that, in determining whether the purchasing activity of the SNS was economic in nature, the Court of First Instance should have considered whether it was liable to have anti-competitive effects in order not to create “unjustified areas of immunity”. However, such a criterion cannot be accepted, since it would amount to subjecting every purchase by the state, by a state entity or by consumers to the rules of competition law. On the contrary, as the judgment under appeal rightly pointed out, a purchase falls within the scope of competition law only in so far as it forms part of the exercise of an economic activity. Moreover, if the appellant’s argument were to be adopted, the effectiveness of the rules relating to public procurement would be reduced. The link established between the conduct complained of by the complainants and the non-economic activity of the organisation referred to was also at the heart of the reasoning applied in *Eurocontrol* in order to hold that competition law did not apply. It was held that the receipt of a payment by *Eurocontrol* was not economic in nature, since it was made in the course of carrying out a non-economic activity.**

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> **66. *Ambulanz Glöckner*, which was cited by the appellant in support of its position, confirms on the contrary the approach taken by the Court of First Instance, since the Court of Justice did not accept in that case that the refusal of a public authority to grant an authorisation to a carrier should be considered under Art. 81 EC, as that decision did not represent the exercise of an economic activity, but, on the contrary, sought to regulate and circumscribe it. Thus, where a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law. That conclusion is consistent with the economic theory according to which the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market. There is therefore no reason to set aside the judgment under appeal on the ground that it incorrectly interpreted the case law relating to whether or not a purchase is an economic activity.”**

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41. The Court of Justice agreed, saying as follows in paragraphs 25 to 27 of its judgment:

> **"25. The Court of First Instance rightly held, in para. [35] of the judgment under appeal, that in Community competition law the definition of an "undertaking" covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed (*Höfner and Elser* (C-41/90): [1991] ECR I-1979; [1993] 4 CMLR 306 at [21]; and *AOK-Bundesverband* (C 264, 306, 354 & 355/01): [2004] ECR I-2493; [2004] 4 CMLR 22 at [46]). In accordance with the case law of the Court of Justice, the Court of First Instance also stated, in para. [36] of the judgment under appeal, that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (*Commission v Italy* (C-35/96): [1998] ECR I-3851; [1998] 5 CMLR 889 at [36]).**
>
> **26. The Court of First Instance rightly deduced, in para. [36] of the judgment under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.**
>
> **27. It follows that the first part of the single plea raised by FENIN in support of its appeal, that the purchasing activity of the SNS management bodies constitutes an economic activity in itself, dissociable from the service subsequently provided and which, as such, should have been examined separately by the Court of First Instance, must be dismissed as unfounded."**

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42. It follows that:

(1) the purchasing or commissioning of goods or services cannot in itself constitute an economic activity; but

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(2) a body which supplies goods or services on a market is carrying on an economic activity, both in supplying those goods or services and in purchasing goods or services for the purpose of that supply.

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43. Before leaving **FENI*N***, it is helpful to note what Advocate General Polares Maduro said in paragraph 26 of his opinion, which, although expressly directed to competition law, is surely equally applicable to the present context:

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> **"26. In seeking to determine whether an activity carried on by the state or a state entity is of an economic nature, the court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the Common Market and respect for the powers of the Member States. The power of the state which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the state is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases. It is therefore essential to establish a clear criterion for determining the point at which competition law becomes applicable. In principle, the rules of competition law apply only to economic operators who participate on a market and not to states, save where they pay aid to undertakings (Arts 88 to 92 EC). However, the need for consistency means that if a state ratifies decisions taken by undertakings or if it conducts itself in practice as an economic operator, Arts 81 to 86 EC may apply to it. …"**

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(3)(d) Summary

44. I now try to pull together some of the threads from the authorities.

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(3)(d)(i) The Two Mutually Exclusive Alternatives

45. In a case such as the present, it is necessary for a court or tribunal to consider the particular activities exercised by the entity being transferred. This has been referred to as a functional approach. The court or tribunal then has to determine whether those activities fall into one or

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other of two mutually-exclusive categories. EU competition law and the **Acquired Rights Directive** (and therefore the **TUPE Regulations**):

(1) apply where the activities constitute an economic activity; but

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(2) do not apply where the activities fall within the less clearly defined category referred to in **Commission v Italy** as "exercising public powers".

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46. In drawing this distinction, a court is deciding whether a particular state activity does or does not fall within the scope of EU competition and employment protection law. This is a fundamental distinction (and "dangerous territory", in the words of Advocate General Polares Maduro in **FENIN**). Despite Mr Hutcheon's submissions, which were made with reference to

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paragraph 58 of the judgment in **Scattalon**, I am not persuaded that is helpful to see article 1(1)(c) of the **Acquired Rights Directive** (and regulation 3(5) of the **TUPE Regulations**) as an exception which is to be strictly construed. The underlying issue is more fundamental than that.

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However, it is certainly right to say that the category recognised by article 1(1)(c) and regulation 3(5) must be kept within its proper bounds.

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(3)(d)(ii) Economic Activity

47. The definition of "economic activity" is settled. It can be traced back to **Commission v Italy**, if not earlier. It was reaffirmed in the present context by the Court of Justice in **Ambulanz**

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Glöckner (at paragraph 19) and subsequent cases:

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

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48. It is clearly relevant for these purposes for the court to consider:

(1) whether the activity consists in the provision of goods and services (as opposed, for example, to the mere acquisition of goods or services: see **FENIN**); and

(2) whether there is a market for the relevant goods or services.

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49. If there is such a market, the provision of goods and services on that market is an economic activity, even if the goods or services in question are provided free of charge and/or without a

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view to making a profit: see **Klaus Höfner**; **Redmond Foundation**; and **Scattolon**, at paragraph 44. What is relevant is whether the activity is "capable of being carried on, at least in principle, by a private undertaking with a view to profit" (**Eurocontrol**, at paragraph 9 of the Advocate General's opinion; and see also **Diego Cali**, at paragraph 42 of the Advocate General's opinion;

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and **Ambulanz Glöckner**, at paragraph 67 of the Advocate General's opinion).

50. I note also that there can be such a market even if:

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(1) the goods or services are being provided to the state or a state-authorised entity (see **Ziemann**: contracted-out surveillance at a German army depot); or

(2) the goods or services are being provided by one state body to another (see **Scattolon**: a state-run service for cleaning and maintaining state schools).

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51. Given this definition of economic activity, an entity whose activities fulfil this definition will be an undertaking even if:

(1) it is a public law entity (see, e.g.: **Collino**, at paragraph 49 of the Advocate General's opinion; **Scattolon**; and **Bettercare**);

(2) it is publicly funded (see, e.g.: **Scattolon**; and **Bettercare**);

(3) it acts in the public interest (see, e.g.: **Mayeur**, at paragraphs 55 to 58 of the Advocate General's Opinion; and **Scattolon**, at paragraph 44); or

(4) it acts pursuant to statutory functions (see, e.g.: **Bettercare**).

(3)(d)(iii) The Exercise of Public Authority

52. As to whether a transferred activity is not an economic activity, but one to which regulation 3(5) of the **TUPE Regulations** applies, the cases have, as I have highlighted in the Annex, used many expressions. However, the central concept remains that expressed by the Court of Justice in **Commission v Italy**: what it called "exercising public powers" is not an economic activity. The Court of Justice has used similar expressions in subsequent cases: "the exercise of public authority" (**Henke**, at paragraph 17; **Sánchez Hidalgo**, at paragraph 24: **Collino**, at paragraph 60); "the exercise of official authority" (**Diego Cali**, at paragraph 16); and "the exercise of public powers" (**Scattolon**, at paragraphs 44 and 54; and **Portimão**, at paragraph 34). I do not detect any difference in meaning between these slightly different phrases. Following **Henke**, I will use the expression "the exercise of public authority".

53. I agree with Advocate General Lenz in **Henke** that it can be difficult to determine whether a particular activity does, or does not, constitute the exercise of public authority. But that is the task of the court or tribunal determining a particular case.

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54. One thing is clear: "the exercise of public authority" does not include everything which a public authority does. The various decisions and dicta to which I have referred help to illustrate where the line should be drawn, and/or what factors may be relevant in considering a particular case, but I do not consider that any of them can be seen as laying down a single, definitive test.

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55. So it is relevant for a court or tribunal to ask:

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(1) whether the activity is necessarily carried out by public entities (**Klaus Höfner**, at paragraph 22; **Ambulanz Glöckner**, at paragraph 20; and at paragraph 68 of the Advocate General's opinion) or is an essential function of the state (**Diego Cali**, at paragraph 22; and at paragraph 47 of the Advocate General's opinion);

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(2) whether the activity is a core state activity (**Diego Cali**, at paragraph 47 of the Advocate General's opinion);

(3) whether the activity has always been carried out by public entities (**Klaus Höfner**, at paragraph 22; **Ambulanz Glöckner**, at paragraph 20; and at paragraph 68 of the Advocate General's opinion);

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(4) whether the activity involves the exercise of "prerogatives outside the general law" or "privileges of official power" (**Eurocontrol**, at paragraph 9 of the Advocate General's opinion);

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(5) whether the activity involves the exercise of rights and powers of coercion (**Eurocontrol**, at paragraph 24; and at paragraph 9 of the Advocate General's opinion; **ALI**; and **Law Society**);

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(6) whether the activity is "a public service to which any idea of commercial exploitation with a view to profit is alien" (**Eurocontrol**, at paragraph 9 of the Advocate General's opinion) or one which "cannot conceivably be carried out within a competitive system" (**Diego Cali**, at paragraph 49 of the Advocate General's opinion);

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(7) whether the activity has "an exclusively social function" (**Diego Cali**, at paragraph 41 of the Advocate General's opinion);

(8) whether the activity is typically that of a public authority (**Eurocontrol**, at paragraph 30; **Diego Cali**, at paragraph 23; and at paragraph 41 of the Advocate General's opinion);

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(9) whether the activity is carried out in the public interest (**Eurocontrol**, at paragraph 27) or a service provided for the benefit of the whole community (**Diego Cali**, at paragraph 49 of the Advocate General's opinion) or intended to safeguard the general interests of the state or other public bodies (**Mayeur**, at paragraph 61 of the Advocate General's opinion); and

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(10) whether the activity involves providing services in competition with those offered by operators pursuing a profit motive (**Scattolon**, at paragraph 44; and **Portimão**, at paragraph 34).

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56. These are all relevant considerations, whose importance may vary from case to case. None of them is a definitive statement of the necessary and sufficient conditions for finding that an activity involves the exercise of public authority.

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57. The Claimants submitted that one can derive from the authorities a three-pronged test of whether a transferred entity's activities fall within the scope of regulation 3(5) of the **TUPE Regulations**. Their proposed test was whether the activities:

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(1) involve the exercise of public authority;

(2) form part of the essential functions of the state and involve activities that are necessarily carried on by the state; and

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(3) involve the performance of activities specifically centred on political or judicial power, e.g. prerogatives conferred by law, regulatory powers, powers of coercion, powers to restrict liberty or other public powers typical of a public authority.

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58. I do not accept this submission. The second and third limbs of the Claimants' proposed test merely involve cherry-picking some of the dicta from the decided cases.

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59. The cases provide some examples of areas of activity which may well fall within the scope of the exercise of public authority:

(1) "general and fiscal administration, justice, security and national defence" (**Eurocontrol**, at paragraph 9 of the Advocate General's opinion);

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(2) regulatory functions (**ICA** and **Law Society**);

(3) "posts which contribute to particular tasks of the public administration - for example, national defence, internal security, public finances, the judicial system and home affairs, posts in ministries and central banks - provided that the activities in question are specifically centred on a political or judicial power" (**Mayeur**, at paragraph 61 of the Advocate General's opinion).

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60. I note, however, that:

(1) These lists of examples do not purport to be exhaustive.

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(2) Not every activity which falls within these broad headings involves the exercise of public authority. National defence involves the exercise of public authority, but **Zeimann** shows that the provision of contracted-out surveillance services at army depots does not.

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(3) Some activities which fall within these broad headings and which may well involve the exercise of public authority may not involve the use of coercive powers. This may be the case, for example, in relation to senior civil servants (or occupants of "posts in ministries").

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(3)(d)(iv) Regulation 3(5) and Public Administrative Authorities

61. A discrete argument advanced by the Claimants was that regulation 3(5) of the **TUPE**

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Regulations could not apply in the present case because the Trust was not a "public administrative authority" if one had regard to the whole of the Trust's activities, and not merely the activities of the public health team. In other words, the Claimants submit that, even if all of

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the activities of the public health team involved the exercise of public authority, there was a relevant transfer because (so they say) the Trust's other activities consisted in large part of economic activities.

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62. I do not accept this argument. It seems to me to be inconsistent with the function-based approach which is to be adopted in cases of this nature. If the function-based approach leads to the conclusion that the activities of the transferred entity involve the exercise of public authority,

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then what has been transferred is not carrying on an economic activity and is not an undertaking to which the **TUPE Regulations** apply, whatever the other activities of the transferring body may be. As Advocate General Alber said in paragraph 49 of his opinion in **Collino**, it is not the nature

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of the transferor which is decisive, but the nature of the activity carried on.

63. **Law Society** is an example of a case where the transferring body may well have carried on economic activities, but the transferred entity did not. Akenhead J would, if necessary, have

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held that regulation 3(5) applied.

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(3)(d)(v) Mixed Cases

64. Finally, I need to consider the case of a transferred entity which has some activities of an economic nature and some which involve the exercise of public authority. On its face, regulation 3(2) suggests that such an entity should be treated as an undertaking and its transfer as a relevant transfer. On the other hand, the Court of Justice said in paragraph 17 of its judgment in **Henke** that the transfer in that case related only to activities involving the exercise of public authority and that:

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> **"Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary."**

65. The Court of Justice thus considered that a transferred entity which carried on activities involving the exercise of public authority would not be treated as an economic entity merely because it carried on some ancillary activities of an economic nature. However, there is an apparent tension between this decision and regulation 3(2), which states as follows:

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> **"In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."**

66. I accept Mr Cavanagh's submission that the solution to this apparent tension is to be found in the opening words of article 1(1)(b) of the **Acquired Rights Directive**. Article 1(1)(b) (which had no predecessor in the **1977 Directive**) provides as follows:

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> **"Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."**

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67. Regulation 3(2) is intended to give effect to article 1(1)(b), and so should be read in a manner which is consistent with it. That includes reading regulation 3(2) as subject to regulation 3(5), since regulation 3(5) gives effect to article 1(1)(c), which is one of the "following provisions of this article" to which article 1(1)(b) is subject. And in deciding whether regulation 3(5) applies,

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it is obviously appropriate to have regard to the judgment in **Henke**, which regulation 3(5) is intended to implement.

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68. For those reasons, I consider that a transferred entity which carried on activities involving the exercise of public authority would not be treated as an economic entity merely because it carried on some ancillary activities of an economic nature.

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(4) The Statutory Duties of the Trust and the Council

69. The Claimants worked in the Trust's public health team, which:

(1) was responsible for the provision of public health functions in the Croydon area and, to a lesser extent, other parts of South West London where relevant agreements were in place; and

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(2) had a discrete departmental structure, headed by the Director of Public Health.

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70. The **Health and Social Care Act 2012** introduced national changes to the health and social care system. Primary Care Trusts, including the Trust in the present case, were abolished with effect from 1 April 2013 and their public health functions were largely transferred to local authorities, with the remainder being transferred to other public bodies, including NHS England and Public Health England. In Croydon, various public health functions were transferred from the Trust to the Council on 1 April 2013.

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71. In paragraphs 15 to 28 of its Judgment, the Tribunal set out relevant aspects of the statutory background. In particular, both the Trust's public health team and the Council's public health team were acting pursuant to duties imposed by statute to promote public health.

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72. Thus, until 1 April 2013 it was the Trust's duty under section 23A of the **National Health Service Act 2006** ("the NHS Act 2006") to "make arrangements to secure continuous improvement in the quality of health care provided by it and by other persons pursuant to arrangements made by it". Health care in this context included "the promotion and protection of public health." In addition:

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(1) The Trust had a duty under section 23 of the **NHS Act 2006** to make arrangements with a view to securing that it received advice "from persons with professional expertise relating to the physical or mental health of individuals" which was appropriate for enabling it effectively to exercise its functions.

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(2) The Trust had a duty under section 24 of the **NHS Act 2006** to prepare, at such times as the Secretary of State may direct, a plan which set out a strategy for improving:

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(a) the health of the people for whom it was responsible; and

(b) the provision of health care to such people, which included the promotion and protection of public health.

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73. From 1 April 2013, it was the Council's duty, under subsection 2B(1) of the **NHS Act 2006** (which was inserted by section 12 of the **Health and Social Care Act 2012**) to "take such steps as it considers appropriate for improving the health of the people in its area." Subsection 2B(3) provided that the steps which may be taken under subsection (1) included:

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> **"(a) providing information and advice;**
>
> **(b) providing services or facilities designed to promote healthy living (whether by helping individuals to address behaviour that is detrimental to health or in any other way);**
>
> **(c) providing services or facilities for the prevention, diagnosis or treatment of illness;**
>
> **(d) providing financial incentives to encourage individuals to adopt healthier lifestyles;**
>
> **(e) providing assistance (including financial assistance) to help individuals to minimise any risks to health arising from their accommodation or environment;**
>
> **(f) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement;**

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(g) making available the services of any person or any facilities."

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74. More specific duties were imposed on the Council by regulations 3, 4, 6, 7 and 8 of the **Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013** to:

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(1) provide for the weighing and measuring of children (regulation 3);

(2) provide, or make arrangements to secure the provision of:

(a) health checks to be offered to eligible persons in its area (regulation 4);

(b) open access sexual health services in its area (regulation 6);

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(c) a public health advice service to any clinical commissioning group whose area falls wholly or partly within the Council's area (regulation 7); and

(3) provide information and advice to specified persons and bodies with a view to promoting the preparation of appropriate local health protection arrangements (regulation 8),

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with power to make and recover charges for: (a) providing information and advice; (b) providing services or facilities designed to promote healthy living; (c) providing or participating in the provision of training for persons working or seeking to work in the field of health improvement; or (d) making available the services of any person or any facilities.

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75. The **Health and Social Care Act 2012** was preceded by a government white paper entitled "Healthy Lives, Healthy People: Our strategy for Public Health". The Tribunal quoted in its Judgment several passages from this white paper, including the following:

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"DsPH will be employed by local government and jointly appointed by the relevant local authority and Public Health England. They will be the strategic leaders for public health in local communities, working to achieve the best possible public health and wellbeing outcomes across the whole local population, in accordance with locally agreed priorities. They will be professionally accountable to the Chief Medical Officer (CMO) and part of the Public Health England professional network.

…

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To be the most effective leaders possible of public health in their areas, DsPH will have a number of critical tasks, set out in more detail in the Annex, including:

- **promoting health and wellbeing within local government;**
- **providing and using evidence relating to health and wellbeing;**
- **advising and supporting GP consortia on the population aspects of NHS services;**
- **developing an approach to improving health and wellbeing locally, including promoting equality and tackling health inequalities;**
- **working closely with Public Health England health protection units (HPUs) to provide health protection as directed by the Secretary of State for Health; and**
- **collaborating with local partners on improving health and wellbeing, including GP consortia, other local DsPH, local businesses and others."**

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76. It was not suggested that the relevant statutes gave the Trust or the Council any coercive powers or any "prerogatives outside the general law" or "privileges of official power" which were exercised by the public health team.

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(5) The Tribunal's Findings of Fact

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77. As I have said, there was a five-day hearing before the Tribunal. This took place between 13 and 17 March 2017. At the hearing in March 2017, as on this appeal, two Claimants, Dr Schwartz and Dr Nicholls, were separately represented from the other twelve. Dr Schwartz and Dr Nicholls were referred to as the BMA Claimants and were represented by Ms Melanie Tether. The remaining Claimants were known as the Unite Claimants and were represented by Mr Darryl Hutcheon. Mr Cavanagh and Mr Forshaw represented the Council.

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78. There was an agreed statement of facts. In addition, three of the Claimants gave evidence, as did Mr Stephen Morton, the Council's Head of Health and Wellbeing. I am told that the cross-examination of these witnesses occupied two days of the hearing, albeit not necessarily full days.

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79. This was not an easy or clear-cut case. In particular:

(1) As I have said, it was not suggested that the public health team was exercising any coercive powers.

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(2) On the other hand, one can see how it could be argued that at least some, if not all, of the activities of the public health team constituted the sort of activities which are normally carried out by civil servants of one kind or another.

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(3) One of the public health team's activities was commissioning the provision by third parties of services to members of the public. The Claimants placed considerable emphasis on this. However:

(a) this was not in itself an economic activity (see **FENIN**); and

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(b) unlike North & West in **Bettercare**, the public health team did not have a contractual relationship with the recipients of those services.

(4) The Claimants also contended, in effect, that most, if not all, of the public heath team's activities were capable of being outsourced.

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80. These factors underlined the need for the Tribunal to pay close attention to the evidence of what the public health team actually did.

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(5)(a) The Agreed Statement of Facts

81. The Tribunal set out the terms of the agreed statement of facts. This covered the basic facts of the transfer to the Council's employment with effect from 1 April 2013 of the majority

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of the employees working in the Trust's public health team, who were about 40 in number, and who included all of the Claimants. The Claimants held the following roles within that team, both before and after the transfer:

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(1) Consultants in Public Health: Bernadette Alves, Sara Corben de Romero, Jenny Hacker, Sarah Nicholls and Ellen Corine Schwartz.

(2) Effective Commissioning Initiative Lead, and subsequently Public Health Project Manager: Marion Abbott.

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(3) Public Health Strategic Lead: Young People: Kate Naish.

(4) Sexual Health Promotion Lead: Fred Semugera.

(5) Evidence Based Practice Lead: Tracy Steadman.

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(6) Health Improvement Commissioner: Addictive Behaviour: Jimmy Burke.

(7) Health and Wellbeing Programme Manager: Anna Kitt.

(8) Smoking Cessation Network Manager: Beata Tuskiewicz-Piecarski.

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(9) Senior Assistant Knowledge Officer: Linden Hunt.

(10) Assistant Knowledge Officer: Barbara Whittlesea.

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(5)(b) The "Key Factual Questions"

82. In paragraphs 8 to 12 of its Judgment, the Tribunal set out some of the relevant provisions of the **TUPE Regulations** and of the **Acquired Rights Directive** and summarised the parties' positions in relation to the two preliminary issues. Then the Tribunal said as follows in paragraphs 13 and 14 of its Judgment:

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> **"13. A significant part of the evidence before me was directed to the issue of identifying a public administrative authority and whether the activities of the Public Health Team were economic activities, and whether the Public Health Team constituted an economic entity within the meaning of Regulation 3(1) TUPE. It was the Respondent's contention that the team had been carrying out administrative functions within the meaning of Regulation 3(5) when it transferred.**

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> **14. The skeleton argument on behalf of the Unite Claimants helpfully posed two key factual questions namely**
>
> > **a. What were the teams functions/activities [*sic*] (specifically, or at least most importantly at the time of and immediately before and after the transfer)?**
> >
> > **b. Were those activities inherently and unnecessarily [*sic*] state administrative activities; or were they "economic" such that they could equally be carried out by non-Governmental organisations (in the private and third sectors)?"**

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83. It is the Claimants' contention that the Tribunal did not in fact answer either of these key factual questions.

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84. Having dealt in paragraphs 15 to 28 of its Judgment with the statutory duties of the Trust and the Council, the Tribunal said as follows in paragraph 29 of its Judgment:

> **"29. There was very little conflict of evidence between the witnesses. The fundamental issue before me appeared to determine whether on the agreed facts and evidence, against the background of the statutory framework and the relevant authorities, the various public health functions which were transferred from the PCT to the London Borough of Croydon on 1 April 2013 constituted a relevant transfer, namely whether the team which transferred from the PCT to the Respondent constituted an economic entity."**

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85. Again, it is the Claimants' contention that the Tribunal did not answer this fundamental issue.

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(5)(c) The Tribunal's Principal Findings of Fact

86. In paragraphs 30 to 36 of its Judgment, the Tribunal referred to several of the principal relevant authorities. It then came to consider the evidence, and said as follows in paragraphs 37 to 41 of its Judgment:

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> **"37. In her evidence to the Tribunal Dr Schwartz agreed that most public health functions of the Primary Care Trust transferred to Croydon Council and that local Public Health functions were there to improve the health of the public. Dr Schwartz also agreed that there were three domains namely health protection, health improvement and health services and that the role of the Council was a collaborative working with different players.**
>
> **38. A significant focus of the evidence was on the commissioning role of the Council for services such as, sexual health services, weight management, healthy living, and smoking cessation. In his evidence to the Tribunal Mr Morton, Head of Health and Wellbeing at Croydon stated that after the transition the available budget rose to £22 million. The Council was responsible for procuring functions and public health has an involvement in procuring such services as advised by the Public Health Team.**
>
> **39. In cross examination Mr Morton agreed that the Public Health Team had been involved [to] a significant extent [in] the commissioning of sexual health services. After the transfer or transition the Council's legal team were involved in the commission process and the Council tightened up the way in which the services were commissioned.**
>
> **40. The handover certificate from Croydon PCT to Croydon Counsel [sic], page 1846 to 1847, relating to adult weight management service was stated by Mr Morton in his evidence as representing the bulk of commissioning, together with smoking cessation, page 1841. In her witness statement Dr Schwartz said that in her experience the PCT had been primarily a commissioning body and that only a few small functions were provided in-house.**

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> **41. In cross examination Dr Schwartz was asked how much of her working week were spent on procurement. Dr Schwartz stated that she led what her team did but a very little of her own time was spent on procurement which she put at 2%. In relation to documentation Dr Schwartz stated she had to see the documents to make sure that they were fit for the purpose namely embodying Public Health Principles. When asked whether Public Health was a Governmental function Dr Schwartz replied "yes ultimately it is. Strategic objective is given by local officers." When asked about her role as a public health professional Dr Schwartz replied that her role was different from a public health professional in a pharmaceutical company."**

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87. This is the nearest one finds in the Judgment to a set of findings of fact. It is worth emphasising what was said about commissioning. As Dr Schwartz said, the Trust had been primarily a commissioning body, with only a few small functions provided in-house. This no doubt explains why a significant focus of the evidence was on the commissioning role of the Council. As to that, the Claimants submitted that:

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> **"… The commissioning of services which are economic activities is necessarily, in itself, an economic activity - see *Bettercare*." (Ms Tether's Opening Note, paragraph 22.3; and see also paragraph 29 of Mr Hutcheon's Opening Note.)**

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88. I have already explained why this submission was wrong.

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(5)(d) The Tribunal's Additional Findings of Fact

89. The remainder of the Tribunal's Judgment (paragraphs 42 to 75) consists of:

(1) a summary of the submissions made by Ms Tether (paragraphs 42 to 46), Mr Hutcheon (paragraphs 47 to 52) and Mr Cavanagh (paragraphs 53 to 60); and

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(2) the Tribunal's conclusions on the first preliminary issue (paragraphs 60 to 71) and on the second (paragraphs 72 to 74).

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90. These latter parts of the Judgment included some findings of fact, although there was disagreement as to what constituted a factual finding and what was merely a summary of one party's submissions. For example, Mr Cavanagh accepted that the underlined passages in the following paragraphs constituted findings of fact, but not the remainder:

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> **"43. Public Health activities were not fundamentally different in kind from other health care services and that health protection was only a small part of the Public Health Team. Health prevention was no different in kind from the treatment of those injured or unwell and that the activity involved in such could be carried out both in the public and private sector. There was a large market for health promotion.**
>
> **…**
>
> **47. Mr Hutcheon on behalf of the Unite Claimants submitted that the Tribunal should focus on what the activities of the team actually were. The activities involved commissioning, research, ie needs assessment, training, maintenance of public health library which were all services offered on a market. The functions of the Public Health Team could be contracted out."**

91. The following were also acknowledged to constitute findings of fact:

> **"48. Mr Hutcheon pointed out that Mr Morton had accepted that a very significant part of teams activities [*sic*] and that prior to the transfer commissioning had accounted for half of the team's budget. Immediately on transfer the team had a budget of £22m a significant proportion of which was spent on commissioning of sexual health services. …**
>
> **49. … Mr Morton had accepted the proposition that "all or almost of the work done by the Public Health Team can be, and in fact is, offered by non-state actors operating in the same market". Pages 1348 and 1349 had contained proposals about what should happen to the Public Health Team following transition. …"**

92. Mr Morton's evidence, quoted in paragraph 49, went to support a submission made by the Claimants. As put by Ms Tether in paragraphs 19 and 20 of her opening note:

> **"19. … As Dr Schwartz points out in § 40 of her witness statement, the work that the PH team performed before and after the transfer could just as easily have been commissioned and carried out in the private sector. …**
>
> **20. Moreover there are, as Dr Schwartz explains at §§ 50 and 51 of her witness statement, private sector companies which specialise in the provision of public health services of the kind provided by the PH team, and in fact provide such services to bodies in the public sector. See also Dr Nicholls' statement, at §§ 25 and 26. …"**

(See also: paragraphs 44 to 47 of Ms Tether's closing submissions; paragraphs 29 and 32d of Mr Hutcheon's opening note; and paragraphs 31 to 38 of Mr Hutcheon's closing submissions.)

93. The document at pages 1348 and 1349 was a document to which the Claimants attached considerable importance. This was a document dating from 4 February 2011 which was entitled, "*Pubic health transition project: Business case document defining the rationale behind initiating the above project/programme*". This document identified five options for the Trust's public

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health team in preparing for the transfer. Option 5 was "Establish the department as a social enterprise providing public health support for the council, GP consortia and other funding bodies". This option was not the recommended option and was not taken up. It was the subject of cross-examination. According to paragraph 47 of Ms Tether's closing submissions, Mr Morton said that one of the reasons why this option was not ultimately pursued was due to concern that the proposed social enterprise would not be able to compete with companies (such as a company called PHAST) which were already established in the field. The Tribunal did not refer to this evidence in its Judgment.

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94. Finally, the Tribunal's conclusions included the following factual findings, in paragraph 70 of its Judgment:

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> **"70. Dr Schwartz's evidence reinforced the public health role of the team by stating that it was its role to undertake strategic assessment of needs. Dr Schwartz stated that the role of the team was to identify vulnerable groups and to ensure that services were applied appropriately. The team conducts research to enable informed decisions to be made and to inform commissioning. Mr Morton said that the team had responsibility for both pandemic flu preparedness and seasonal flu preparedness and to ensure plans were in place for immunisation and screening."**

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(6) The Tribunal's Conclusions on the First Preliminary Issue

95. As I have said, the Tribunal set out its conclusions on the first preliminary issue in paragraphs 61 to 71 of its Judgment. It is necessary to look at those paragraphs in some detail, but bearing in mind the many warnings in decided cases against adopting an unduly critical analysis: see **Hollister v National Farmers' Union** [1979] ICR 542, CA at 553A-B; **ASLEF v Brady** [2006] IRLR 576, at paragraph 55; **Brent LBC v Fuller** [2011] ICR 806, CA at paragraph 30; **Shamoon v Chief Constable of the RUC** [2003] ICR 337, HL at paragraph 59; **Piglowska v Piglowski** [1999] 1 WLR 1360, HL at 1372D.

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96. It is also appropriate to note that, earlier in its Judgment, the Tribunal had:

(1) set out the terms of regulation 3(1)(a) and 3(5) (paragraph 8);

(2) set out the decision in **Henke** (paragraphs 30 and 31); and

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(3) correctly identified the definition of economic activity (paragraph 35).

97. First, in paragraphs 61 to 64 of its Judgment, the Tribunal said as follows:

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> **"61. In my Judgment, the background to this case is the role of government in the protection and improving the health of the public. Dr Schwartz agreed that Public Health was ultimately a governmental function. In order to undertake its role in public health protection, Government operates through the agency of bodies or organisations such as PCT's and local authorities.**
>
> **62. I considered that there was significant force in the Respondent's submission that the function of maintaining public health is quintessentially governmental which involves the provision of healthcare services with the aim or intention of improving the health of the population.**
>
> **63. I bore in mind the fact that the National Health Service Act 2006 established PCT's and provided that healthcare included the promotion and protection of public health. The Health and Social Care Act 2012 provided that each local authority must take such steps as it considers appropriate for improving the health of the people in its area. Both PCT's and local authorities were and are responsible for activities involved in the promotion of and the provision of public health functions.**
>
> **64. The statutory framework reflects the involvement of government and its responsibility for the provision of public health."**

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98. It was relevant for the Tribunal to consider the statutory framework for the public health team's activities, although the mere fact that the team was operating pursuant to a statutory framework did not mean that it was exercising public authority. The Tribunal saw force in the submission that the function of maintaining public health is quintessentially governmental. That too was a relevant consideration, as it was relevant for the Tribunal to ask whether the public health team's activity was a "core state activity".

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99. Then in paragraphs 65 and 66 of its Judgment, the Tribunal said as follows:

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> **"65. The *Henke* exception reflected in Article 1(c) of the Acquired Rights Directive 2001/23/EEC and incorporated into UK domestic law by regulation 3 of TUPE 2006 expressly provides an exception to the general provision of the protection of employees' rights on transfer.**
>
> **66. The cases I have been referred to such as *Scattolon*, and *Bettercare*, where the *Henke* exception did not apply, involved the transfer of a particular activity, namely the transfer of**

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school cleaners in *Scattolon* and the provision of retirement homes for the elderly in *Bettercare* involved economic activities. They involved particular activities being transferred which were in themselves economic activities, the transfers did not involve the contracting out of the public health responsibilities. The present case was triggered by the proposed changes to the terms and conditions of the Claimants, not by the transfer itself of a particular aspect of the responsibilities of the team from the PCT to the Respondent."

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100. The Tribunal was right to say that **Scattolon** and **Bettercare** were cases of the transfer of economic activities. The Tribunal contrasted that with the commissioning in the present case, referred to as "the contracting out of the public health responsibilities." With the greatest respect to the Tribunal, the third sentence of paragraph 66 is rather unclear:

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(1) The nature of the "trigger" for the present case was an irrelevant consideration when considering whether there was a relevant transfer on 1 April 2013 and when considering whether the present case can be distinguished from other decided cases.

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(2) The responsibilities of the public health team were transferred from the Trust to the Council.

(3) What the Tribunal seems to have been saying is that this was not a case of the transfer of, say, a particular service provided by the public health team. For example, if the public health team had itself operated, say, a drug clinic, and that clinic had been transferred to the Council, then the provision of that clinic's services might have been an economic activity, as in **Redmond Foundation**.

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101. In paragraphs 67 and 68 of its Judgment, the Tribunal said as follows:

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"67. In *FENIN* the Advocate-General considered that that [*sic*] the issue was whether the function involved was economic or the exercise of public authority, and that if the function was pursuant to the exercise of public authority, it was not converted into an economic activity, even if it was contracted out. The Advocate-General in *FENIN* stated (AG 66):

> **Thus, where a purchase is linked to the performance of non-economic functions, it may fall outside the scope of competition law.**

68. Paragraph 21 of the judgment in *FENIN* held,

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> **… that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to**

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whether or not the subsequent use of the purchased goods amounts to an economic activity."

102. In these paragraphs, the Tribunal correctly identified the central finding in **FENIN**, which provided an answer to one of the Claimants' central submissions to the Tribunal, based on **Bettercare**, i.e. that the public health team's activities in commissioning third parties to provide services was in itself an economic activity.

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103. In paragraph 69 of its Judgment, the Tribunal said as follows:

> **"69. In the particular circumstances of this case, I consider that the overarching role of both the PCT and subsequently the local authority involved the responsibility of the state through the public health team in the provision of the state's responsibility for public health. The case of *Diego Cali* is clear authority for the contention that the activity contracted out, namely the contracting out of anti pollution activities involved a governmental activity, namely the protection of the environment. In the closing submissions on behalf of the Respondent, it was noted that the public health team does not bid for contracts and that unlike the position of private health providers; the team is not trying to obtain business. I am not persuaded that the involvement of private providers through the process of commissioning undermines the ultimate responsibility of the Respondent for public health."**

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104. The first sentence of this paragraph is, in effect, a finding that the public health team's activities involved the exercise of public authority. The Tribunal's reason for referring to **Diego Cali** in the second sentence is not entirely clear, but the third sentence is clearly relevant to the question whether the public health team was providing services on a market. The fourth sentence is, in effect, a rejection of the Claimants' submissions that the public health team was carrying on an economic activity because it was commissioning third parties to provide services.

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(7) Grounds of Appeal

105. The Claimants stressed that they were not contending that the Tribunal's decision was perverse. The two sets of Claimants expressed their grounds of appeal differently, but they were making the same points. For the sake of convenience, I will refer to the six grounds of appeal as formulated by the BMA Claimants:

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(1) The Tribunal misunderstood the distinction between public administrative functions and economic activities.

(2) The Tribunal misunderstood the test of an economic activity.

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(3) The Tribunal misunderstood the meaning of public administrative functions.

(4) The Tribunal misunderstood the meaning of public administrative authority.

(5) The Tribunal failed to make essential findings of fact as to the activities of the public health team.

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(6) The Tribunal failed to decide whether the activities of the public health team were economic activities.

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106. I have already dealt with ground 4 in section (3)(d)(iv) of this Judgment.

107. Before turning to grounds 5 and 6, it is appropriate to recall the well-known words of Bingham LJ in **Meek v City of Birmingham District Council** [1987] IRLR 250, CA:

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> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.**

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> **9. Nothing that I have just said is, as I believe, in any way inconsistent with previous authority on this subject. In *UCATT v Brain* [1981] ICR 542, Lord Justice Donaldson (as he then was) said at page 551:**
>
> > **"Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … The reasons are then recorded and no doubt tidied up for differences between spoken English and written English. But their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."**

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> **10. A further statement was made by my Lord in *Alexander Machinery (Dudley) Ltd v Crabtree* [1974] ICR 120, and these observations are cited by Lord Justice Eveleigh in *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683:**
>
> > **"It is impossible for us to lay down any precise guidelines. The overriding test must always be: is the Tribunal providing both parties with the materials which will enable**

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> **them to know that the Tribunal has made no error of law in reaching its findings of fact? We do not think that the brief reasons set out here suffice for that purpose."**

Lord Justice Eveleigh adds the comment at page 694G:

> **"He is not, as I read that judgment, saying that in every case all these points to which I refer must be adhered to, otherwise there will be an error of law in the decision of the Tribunal."**

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11. Lastly, in *Martin v Glynwed Distribution Ltd* [1983] ICR 511 at page 520F, my Lord said:

> **"The duty of an Industrial Tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the Industrial Tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the Industrial Tribunal." "**

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108. The Tribunal's findings of fact could have been fuller and more systematic, especially in analysing the activities of the public health team and considering whether each activity could or could not be "contracted out" or could or could not be said to involve exercising public authority. The fact that some findings of fact were mixed in with the Tribunal's recital of the parties' submissions was not entirely satisfactory. Those matters would not give rise to a ground of appeal in themselves, but they form the context in which one has to consider the reasons which the Tribunal gave for its decision.

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109. It seems to me that there is a significant and unexplained gap in the Tribunal's reasoning. The finding in paragraph 49 of the Judgment that "all or almost of the work done by the Public Health Team can be, and in fact is, offered by non-state actors operating in the same market" was on its face a strong indication that the public health team was carrying on an economic activity, especially in the context of the submissions made on this issue and on the related issue of the consideration given to the option of establishing the public health team as a social enterprise.

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110. Having made that finding, it was incumbent on the Tribunal to explain its reasons for not drawing from that finding the conclusion that the team was carrying on an economic activity.

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Otherwise, the Claimants have not been told why they have lost and this Tribunal cannot see whether the Employment Tribunal has or has not made an error of law in its reasoning. That is the essence of grounds 5 and 6.

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111. The Tribunal's conclusions do not refer to this finding of fact and do not, in my judgment, explain why the Tribunal reached the conclusion which it did despite that finding. The nearest the Tribunal came to addressing this point was in the third sentence of paragraph 69 of the Judgment, where the Tribunal noted that the public health team did not bid for contracts and was not trying to obtain business. But that was not a sufficient reason for concluding that an entity which was providing services which "can be, and in fact [are], offered by non-state actors operating in the same market" was not carrying on an economic activity. For example, it was not suggested that the cleaners in **Scattolon** were bidding for contracts or trying to obtain business, but they were carrying on an economic activity.

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112. It follows that either:

(1) the Tribunal has failed to give adequate reasons for its conclusions, given its findings of fact; or

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(2) if the reasons given in paragraph 69 were the Tribunal's reasons for not concluding from its finding of fact in paragraph 49 that the public health team was carrying on an economic activity, the Tribunal made an error of law.

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113. Accordingly, I consider that this appeal should be allowed in relation to the first preliminary issue.

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114. I do not consider that grounds 1 to 3 give rise to any additional grounds for allowing the appeal. Although the Tribunal's conclusions were not a model of clarity, viewed as a whole they constituted a finding that the public health team's activities involved the exercise of public authority. Save in the respect which I have already identified, I am not persuaded that the reasons which the Tribunal gave for its decision show either:

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(1) that the Tribunal made an error of law in directing itself as to the distinction to be drawn between an economic activity and the exercise of public authority; or

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(2) that this a case where the Tribunal, having directed itself correctly, can be seen to have departed from that direction when applying the law to the facts.

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<u>(8) The Second Preliminary Issue</u>

115. The second preliminary issue is as follows:

> **"If there was a relevant transfer, whether each of the Claimants' employment with the Trust was transferred pursuant to the operation of Regulation 4 of the TUPE Regulations?"**

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(8)(a) Why does the Second Preliminary Issue Matter?

116. It is not for me to seek to go behind the decision that the second preliminary issue should be decided as a preliminary issue, but it was apparent from the Tribunal's Judgment and from the parties' submissions that more thought needed to be given to the question of what turned on the second preliminary issue. At my invitation, Mr Hutcheon set out the position of the Unite Claimants as follows:

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(1) Those Claimants who were constructively dismissed rely on repudiatory breaches of contract which include the Council's attempts to pressure them to accept inferior terms and conditions of employment, and in this respect the Claimants rely specifically on the allegation that the Council's proposed changes to terms and conditions would have been void under regulation 4(4) of the **TUPE Regulations**.

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(2) All of the Claimants bring freestanding breach of contract claims based on the same allegation.

(3) All of the Claimants bring ordinary unfair dismissal claims in the alternative and, in support of their contention that the dismissals were unfair (even if for a potentially fair reason), they rely on the submission that the alternative terms and conditions offered to them in the course of the dismissal process would have been void pursuant to regulation 4(4).

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117. The Claimants' focus is therefore on regulation 4(4), which, as I pointed out in section (2)(c) of this Judgment, only applies to a contract of employment which is, or will be, transferred by regulation 4(1). Hence the need to decide whether the Claimants' employment was (or would have been) transferred by regulation 4(1).

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118. The Council accepted that the second preliminary issue was relevant because of the Claimants' reliance on regulation 4(4). But the Council also introduced an argument in relation to regulation 7(1). The starting point here is that, as Mr Cavanagh accepted, regulation 7(1) applies to an employee whether or not his contract of employment has been transferred by regulation 4(1). But the Council submitted as follows:

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> **"Accordingly, in due course the ET will have to determine whether and to what extent a reason for the Claimants' dismissal was a TUPE transfer or a reason connected with such a transfer. However, if the Claimants were not transferred into the employment of the Respondent by Regulation 4 TUPE 2006, then the [Council] will contend that any dismissal could not be by reason of or for a reason connected with any relevant transfer (so as to be contrary to Regulation 7 TUPE 2006). If a "relevant transfer" had not caused the pay disparity between the Claimants and the [Council's] other employees, it could not be the cause of the need to harmonise terms and conditions of employment."**

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119. This strikes me as unreal, since the premise for the second preliminary issue is that there has been a relevant transfer. However, given my conclusion on the second preliminary issue, I need say no more about it.

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(8)(b) The Tribunal's Conclusions

120. The Tribunal's conclusions on the second preliminary issue were as follows:

> **"72. Turning to the issue of 'ouster', the Respondent contended that in the event that there was a relevant transfer it would not and could not have operated so as to terminate the contracts of employment of any of the Claimants, namely to operate to terminate their contracts of employment with the transferor because their employments had been preserved by the provisions of the Health and Social Care Act 2012 (Croydon Primary Care Trust) Staff Transfer Scheme 2013.**
>
> **73. The Claimants contended that Regulation 4 of TUPE should be construed by disapplying the words "which would otherwise be terminated by the transfer". Alternatively it was submitted that the Tribunal should disapply the Transfer Scheme on the ground that it was incompatible with the Claimant's rights under the Directive. Disapplying the scheme would have the same effect as a purposive construction of regulation 4 TUPE and would accordingly give proper effect to the Claimant's [*sic*] rights under the Directive.**
>
> **74. I am not persuaded that this is a case where the Tribunal should disapply the operation of the Transfer Scheme. The provisions of TUPE already provide an exception to the general rule of protection for the rights of employees by the operation of regulation 3(5), which gives effect to the *Henke* exception. The reference to a 'relevant transfer' in regulation 4 of TUPE does, in my judgment, envisage circumstances where the protection afforded by TUPE to contacts of employment does not apply, and regulation 3(5) expressly provides that an administrative reorganisation or the transfer of administrative functions between public administrative authorities is not a 'relevant transfer'."**

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121. With all due respect to the Tribunal, paragraph 74 is rather confused and does not address the Claimants' arguments.

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(8)(c) The Answer to the Second Preliminary Issue

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122. The United Kingdom has an obligation to give effect to the **Acquired Rights Directive**. The **TUPE Regulations** must be interpreted in a way which gives effect to the **Directive**. Regulation 4(4) of the **TUPE Regulations** is intended to give effect to a right arising out of article 3(1) of the **Acquired Rights Directive**. That right arises where article 3(1) applies. Article 3(1) does not contain a limitation on its application equivalent to the words "which would otherwise

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be terminated by the transfer" in regulation 4(1). If there has been a relevant transfer, then article 3(1) applies to the transfer of the Claimants' employment contracts in the present case.

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123. It follows that it would be inconsistent with the **Directive**, and with the United Kingdom's obligation to give effect to the **Directive**, if, as the Council contends, the combination of the words "which would otherwise be terminated by the transfer" in regulation 4(1) and of the terms of the Staff Transfer Scheme meant that the Claimants could not rely on regulation 4(4).

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124. Consequently, the words "which would otherwise be terminated by the transfer" should not be read as preventing regulation 4(1) from applying in the present case. The answer to the second preliminary issue is "Yes".

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(9) Disposal

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125. Accordingly, I allow the appeal in respect of the first and secondary preliminary issues. Since the Employment Judge has retired, it was agreed that the appropriate course if I allowed the appeal in respect of the first preliminary issue would be to remit the case to a differently constituted Tribunal, and that is what I do. No remission is necessary in respect of the second preliminary issue.

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ANNEX

B

(A1) *Klaus Höfner*

126. In **Klaus Höfner** the Court of Justice said as follows in paragraphs 21 and 22 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.**
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> **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. …"**

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(A2) *Redmond Foundation*

127. In **Redmond Foundation**, the Court of Justice said as follows in paragraph 18 of its judgment:

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> **"18. Secondly, as the Commission emphasises in its observations, moreover, the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the directive. The directive, as has already been stated, is designed to ensure that employees' rights are safeguarded, and covers all employees who enjoy some, albeit limited, protection against dismissal under national law: Case 105/84, *Foreningen AF Arbejdsledere I Danmark v Danmols Inventar*, and Case 237/84, *EC Commission v Belgium*. According to the order for reference, the employees concerned are subject to the Dutch Civil Code."**

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(A3) *Eurocontrol*

128. In **Eurocontrol**, Advocate General Tesauro said as follows in paragraph 9 of his opinion:

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> **"9. If we now turn to the examination of the substance of the question submitted to the Court, on the basis of the aforesaid considerations concerning the possibility of subjecting Eurocontrol to the Community rules on competition, it is apparent that the essential factor in classifying a body as an undertaking is the pursuit of an economic activity capable of being carried on, at least in principle, by a private undertaking with a view to profit.**
>
> **The pursuit of an activity that involves the exercise of official powers is, on the other hand, incompatible with that classification, with the result that a body acting as a public authority is not subject to the Treaty rules on competition. In that connection it must be observed that, whilst the Court has preferred not to define that concept in abstract terms, the judgments that refer to it, in the various areas of Community law in which that concept is relevant, follow the path marked out by Mayras AG in his opinion in *Reyners*, according to whom "official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens".**

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The activities and duties concerned here include without doubt those relating to the fundamental powers of a public authority in areas such as general and fiscal administration, justice, security and national defence. On the other hand, although some of the tasks connected with the pursuit of an activity by a public authority in that capacity may be separated from the range of activities carried on by a particular body, the Treaty provisions on competition remain applicable to them."

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129. And in paragraph 13 of his opinion the Advocate General said, inter alia:

"This leads me to the conclusion that air control constitutes a natural monopoly in the air space where it is carried out, and in that respect, competition between two bodies not only is not desirable but would not even be possible in practice. In the final analysis it is a public service to which any idea of commercial exploitation with a view to profit is alien: which may not be incompatible, where appropriate and given equal efficiency, with economic management of the activity in question."

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130. The Court of Justice said, inter alia, as follows in paragraphs 24, 27 and 30 of its judgment:

"24. … 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. …

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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.

…

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."

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(A4) *Henke*

131. As for **Henke** itself, the core of the Court of Justice's reasoning is set out in paragraphs

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13 and 14 of its judgment, which are in the following terms:

"13. As appears from the preamble to the Directive, in particular the first recital, the Directive sets out to protect workers against the potentially unfavourable consequences for them of changes in the structure of undertakings resulting from economic trends at national and Community level, through, inter alia, transfers of undertakings, businesses or parts of businesses to other employers as a result of transfers or mergers.

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14. Consequently, the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a "transfer of an undertaking" within the meaning of the Directive."

132. There is some force in Mr Hutcheon's submission that the brevity of the Court's reasons

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in that case means that it is of limited guidance in the interpretation of what has become known

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as "the **<u>Henke</u>** exception". However, it is relevant to note paragraph 17 of the Court's judgment, which was in the following terms:

> **"17. It appears that, in the circumstances to which the main proceedings relate, the transfer carried out between the municipality and the administrative collectivity related only to activities involving <u>the exercise of public authority</u>. <u>Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary</u>."**

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133. I have addressed in section (3)(d)(v) of this Judgment the relationship between the second sentence of this paragraph and regulation 3(2) of the **TUPE Regulations**. I note that the expression "activities involving the exercise of public authority" echoes the expression "exercising public powers" used in **<u>Commission v Italy</u>**. The concept underlying the **<u>Henke</u>** exception is the dichotomy identified in **<u>Commission v Italy</u>**.

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134. Moreover, the Court of Justice rejected the opinion of Advocate General Lenz, who had advocated a different approach to determining the scope of the **1977 Directive**, in part because of the practical difficulties in determining whether a particular activity is, or is not, an exercise of public powers. As to that, Advocate General Lenz said (in paragraph 29 of his opinion) that:

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> **"… Apart from the classic area of municipal undertakings and the sphere of functions involving only the exercise of public powers, it seems to me that in particular <u>it will be difficult and not always possible to draw the distinction in a particular case</u>. Even in the area of activities involving the exercise of public powers, there has been a huge change in recent years. Activities which a few years ago were still regarded as purely for the public authorities are now being carried out by private undertakings. … This means that <u>the criterion of activity in the exercise of public powers is very difficult to pin down, since it is subject to constant change.</u> What is today regarded as purely public may, in even only a few years, be carried out by a private undertaking with a view to profit. It also cannot be ruled out that functions carried out by a private undertaking will not be regarded after a time as being again functions of the public authorities. …"**

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135. As I have said, the present case is an illustration of the fact that it can be difficult to distinguish between economic activities on the one hand and activities in the exercise of public powers on the other hand.

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(A5) ***Diego Cali***

136. In **Diego Cali** Advocate General Cosmas reviewed the authorities and said as follows in paragraphs 41 and 42 of his opinion:

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> **"41. It is clear from the case law of the Court of Justice, and more especially the judgments in *Sat Fluggesellschaft* and *Poucet*, that certain bodies that are the instruments of a policy in the (general) public interest and enjoy prerogatives of the public authority, that is to say bodies that exercise an activity typical of a public authority or have an exclusively social function, do not constitute undertakings and are not therefore subject to the Community rules on competition.**
>
> **42. In reaching those conclusions, the Court of Justice has focused on the nature of the activity exercised, that is to say whether or not it is of an economic nature and whether it could, in principle, be performed by a private profit-making undertaking. It has also considered the aim of the activity and the rules to which it is subject. In addition, the Court has looked at a number, or bundle, of indicators that on their own are not sufficient to rule out that an activity is of an economic nature and establish that it falls outside the scope of competition law. Basically, the Court has assessed the extent to which the entity whose activities are under review operates in compliance with the rules laid down by the administrative authorities and whether, more particularly, it has the power to influence the level of the consideration demanded in return for the services provided to users, and the extent to which it is profit-making."**

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137. He also said as follows in paragraphs 47 to 49 of his opinion:

> **"47. The anti-pollution surveillance carried out by SEPG at the Porto Petroli meets the fundamental need to ensure the safety of both users of the Porto Petroli and the inhabitants of the surrounding area. As well as being geared to protection of the environment, an aspect that I shall consider below, that activity is directly linked, if not equivalent, to the function of policing the maritime area of the port, and that, in my view, is a function that may be exercised by a public authority, regardless of the legal form adopted for its organisation and administration. Consequently, a legal body assigned the above responsibilities may not be deemed to be an undertaking within the meaning of Article 86, and it is therefore unnecessary to consider whether it constitutes an undertaking entrusted with the operation of services of general economic interest, within the meaning of Article 90(2) of the Treaty.**
>
> **48. Furthermore, it seems to me that the performance of the abovementioned tasks, that is to say SEPG's anti-pollution activities, ought specifically to be recognised by the Court as constituting an essential function of the State. In other words, an activity that consists in anti-pollution surveillance of the maritime environment, that is to say in protecting the environment, cannot constitute the activity of an undertaking but falls into the category of a core State activity.**
>
> **49. In the light of the above analysis, I consider that in so far as it involves anti-pollution surveillance of the Porto Petroli, the activity of SEPG cannot conceivably be carried out within a competitive system, since that would jeopardise, if not destroy, the effectiveness of the system of safeguards as regards both the port environment and the safety of port users and inhabitants of the surrounding areas. It is therefore a public service unrelated to commercial profit-making activity. Furthermore, that this service is provided for the benefit of the whole of the community is also apparent from the fact that the surveillance has to be exercised regardless whether the fees owed by any particular vessel have been paid."**

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138. The Court of Justice said as follows in paragraphs 16 and 22 to 24 of its judgment in **Diego Cali**:

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> **"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**

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> **where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (Case 118/85, *EC Commission v Italy*).**
>
> **…**
>
> **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 protection of the environment in maritime areas.**

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> **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 v Eurocontrol*).**
>
> **24. The levying of a charge by SEPG for preventative 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. Moreover, as stated in paragraph 8 of this judgment, the tariffs applied by SEPG have been approved by the public authorities."**

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(A6) *ICA*

139. ICA was a VAT case, in which the relevant issue was whether the ICA was carrying out

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an economic activity when it performed its statutory regulatory functions. Since the public health team in the present case was not carrying out any regulatory functions, it is of little assistance.

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(A7) *Sánchez Hidalgo*

140. In **Sánchez Hidalgo**, which concerned contracted-out activities, the Court of Justice said as follows in paragraph 24 of its judgment:

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> **"24. Similarly, the fact that the service or contract in question has been contracted out or awarded by a public body cannot exclude application of Directive 77/187 if neither the activity of providing a home-help service to persons in need nor the activity of providing surveillance involves the exercise of public authority: see, to that effect, *Henke v Gemeinde Schierke* (Case C-298/94) [1997] ICR 746. Furthermore, Directive 77/187 covers any person who is protected as an employee under national labour law (see *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar* (Case 105/84) [1985] ECR 2639, 2653, para 27, and *Dr Sophie Redmond Stichting v Bartol* (Case C-29/91) [1992] ECR I-3189, 3219, para 18) and it is not contested that such is the case with the employees concerned in these cases."**

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(A8) *Collino*

141. In **Collino** Advocate General Alber stated (in paragraph 49 of his opinion) that:

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> **"… It may be concluded that the scope of the Directive is not determined by the transferor and its status under public or private law, as long as the transferor is exercising an economic activity. It is not therefore the nature of the transferor which is decisive, but the nature of the activity carried on. The exercise of public authority cannot be the subject of a business transfer within the meaning of the Directive."**

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142. The Court of Justice said as follows in paragraphs 31 and 32 of its judgment:

> **"31. On the other hand, the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities does not constitute a transfer of an undertaking within the meaning of the Directive. In those cases the transfer concerns activities involving the exercise of public authority.**
>
> **32. So, the fact that the service transferred was the subject of a concession by a public body such as a municipality cannot exclude application of the Directive if the activity in question does not involve the exercise of public authority."**

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(A9) *Mayeur*

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143. In **Mayeur** Advocate General Léger said as follows in paragraphs 55 to 58 of his opinion:

> **"55. In the submission of the French Government, the activity carried on by APIM on behalf of the municipality of Metz cannot be characterised as an economic activity. The documents in the case, it maintains, show that the primary activity of APIM consisted in promoting the City of Metz and in attracting economic activities to its territory. That activity, carried out on behalf of a local authority and in the general interest, and thus in the public interest, is more akin to a task carried out in the general interest.**
>
> **56. That, however, is not how the Court has defined "economic activity".**
>
> **57. According to settled case law of the Court, any activity involving the offer of goods and services in a given market constitutes an economic activity. …**
>
> **58. That definition, laid down in the context of the law of competition and of the free movement of services, has been transposed to the context of Directive 77/187. …"**

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144. He went on to say as follows in paragraph 61 of his opinion, after referring to **Henke**:

> **"61. Furthermore, posts including functions which, although performed within a structure which could be classified as an economic entity, are linked to the exercise of public authority, do not constitute economic activities: *Henke* and *Sánchez Hidalgo* … The court has however given a strict definition to that type of post. It only covers posts which involve a genuine participation, directly or indirectly, in the exercise of public authority and in the functions intended to safeguard the general interests of the state or other public bodies … That definition encompasses posts which contribute to particular tasks of the public administration - for example, national defence, internal security, public finances, the judicial system and home affairs, posts in ministries and central banks - provided that the activities in question are specifically centred on a political or judicial power."**

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145. This was one of the fullest attempts to define where the boundary is to be drawn between economic activities on the one hand and public administration on the other hand. The Court of Justice did not attempt such a definition. It simply said as follows, in paragraphs 38 to 40 of its judgment:

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"38. Secondly, it is also clear from the order for reference that the defendant carried out publicity and information activities on behalf of the City of Metz in connection with services which the latter offers to the public.

39. Activity of that kind, consisting in the provision of services, is economic in nature and cannot be regarded as deriving from the exercise of public authority.

40. The transfer of an economic activity such as that carried out by the Defendant cannot be excluded from the scope of Directive 77/187 solely on the ground that it is carried out for non profit-making purpose or in the public interest. …"

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(A10) ***Ambulanz Glöckner***

146. In **Ambulanz Glöckner** Advocate General Jacobs said as follows in paragraphs 67 to 68

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of his opinion:

"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.

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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."

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147. The Court of Justice said as follows in paragraphs 19 and 20 of its judgment:

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"19. As regards the first of these points, 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. Any activity consisting in offering goods and services on a given market is an economic activity.

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."

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(A11) ***ALI***

148. **ALI** concerned the merger of the ALI and certain other public bodies to form the Office for Standards in Education, Children's Services and Skills (referred to as "New Ofsted"). The ALI's function was to inspect further education and vocational and work-based training. It had statutory powers to enter premises and to inspect and copy documents. There was no appeal against the Employment Tribunal's finding that the **Henke** exception applied to the transfer of the ALI's functions to New Ofsted. The Employment Tribunal had correctly stated that:

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> **"The key question was whether the ALI's functions involved the exercise of public authority."**

(A12) ***Scattolon***

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149. In **Scattolon** Advocate General Bot, after referring to **Henke**, said as follows in paragraph 51 of his opinion:

> **"51. I conclude from those considerations that such exclusion from the scope of Directive 77/187 is justified not by the public-law nature of the entities at issue, but rather, on the basis of a functional approach, by the fact that a transfer relates to activities involving the exercise of public authority. However, where a transfer relates to an economic activity, it falls within the scope of that directive. The public-law or private-law nature of the transferor and the transferee is of little importance, in that regard. Subsequent judgments demonstrate that the Court upheld that functional approach, placing the emphasis on the existence or otherwise of an activity involving the exercise of public authority."**

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150. The Court of Justice said as follows in paragraphs 43, 44, 54, 57 and 58 of its judgment:

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> **"43. The term "economic activity" … covers any activity consisting in offering goods or services on a given market: see *Ambulanz Glöckner v Landkreis Sudwestpfalz* (Case C-475/99) [2001] ECR I-8089, para 19; *Aeroports de Paris v Commission of the European Communities* (Case C-82/01) [2002] ECR I-9297, para 79; *Ministero dell'Economia e delle Finanze Cassa di Risparmio di Firenze SpA* (Case C-222/04) [2006] ECR I-289, para 108).**
>
> **44. Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers: see, in particular, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* (Case C-49/07) [2008] ECR I-4863; [2009] All ER (EC) 150, para 24 and case law cited, and, concerning Directive 77/187, *Henke v Gemeinde Schierke* (Case C-298/94) [1997] ICR 746, para 17. By contrast, services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic activities: see, in that respect, *Höfner v Macrotron GmbH* (Case C-41/90) [1991] ECR I-1979, para 22; *Aeroports de Paris*, para 82, and *Cassa di Risparmio di Firenze SpA*, paras 122 and 123.**
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> **…**

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> **54. Whilst it is true that, as the Italian Government has pointed out, the Court has excluded from the scope of Directive 77/187 the "reorganisation of structures of the public administration" and the "transfer of administrative functions between public administrative authorities" and that that exclusion has subsequently been confirmed in art.1(1) of that directive in the version resulting from Directive 98/50, and in art.1(1) of Directive 2001/23, the fact remains, as the Court has already pointed out, and as the AG points out in paras 46-51 of his Opinion, the scope of those expressions is limited to cases where the transfer concerns activities which fall within the exercise of public powers (*Collino* [2002] 3 CMLR 35 at [31] and [32] and case law cited).**

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> **…**
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> **57. There is nothing to justify developing that case law [*i.e. Henke and subsequent cases*] in the direction that public employees, protected as workers under national law and subject to a transfer to a new employer within the public administration, should not be able to benefit from the protection offered by Directive 77/187 solely on the ground that that transfer falls within the context of a reorganisation of that administration.**

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> **58. It is important to note in that regard that, if such an interpretation were accepted, any transfer imposed on such workers could be removed by the public authority concerned from the scope of Directive 77/187 simply by invoking the fact that the transfer forms part of a staff reorganisation. Important categories of workers carrying out economic activities within the meaning of the court's case law would thus risk being deprived of the protection provided for by Directive 77/187. That result would be difficult to reconcile both with the wording of article 2 of the latter, according to which the transferor and the transferee may be any physical or legal person having the capacity of employer, and with the need, bearing in mind the objective of social protection pursued by the Directive, to interpret exceptions to its application strictly (see, in relation to Directive 2001/23, *Commission of the European Communities v Italian Republic* (Case C-561/07) [2009] ECR I-4959, para 30 and case law cited)."**

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(A13) ***Law Society***

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151. The **Law Society** case concerned the forthcoming replacement of the Legal Complaints Service of the Law Society with the Office for Legal Complaints. Akenhead J held that there was to be no relevant transfer because there was to be no transfer of an economic entity which retained its identity. It follows that what Akenhead J said about the potential application of the

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Henke exception was obiter. As with the Employment Tribunal in **ALI**, he focused on the question whether the Legal Complaints Service exercised public authority. What he said was of limited, if any relevance to the present case, since he was concerned with an entity which had

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regulatory functions and which had "wide powers and duties of control over and regulation of solicitors". But it is relevant to note that he found that the Legal Complaints Service was a public administrative body and that, if it had been transferred as an entity, its transfer would have fallen

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within regulation 3(5) of the **TUPE Regulations**. He did not regard it as necessary for that purpose to determine whether the Law Society as a whole was a public administrative body.

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(A14) *Portimão*

152. In **Portimão** the Court of Justice said as follows in paragraph 34 of its judgment:

> **"The court has made clear in that regard that the notion of economic activity encompasses any activity consisting in offering goods or services on a given market. Activities which fall within the exercise of public powers are excluded as a matter of principle from classification as economic activity. However, services which are carried out in the public interest and without a profit motive and are in competition with those offered by operators who seek to make a profit may be classified as economic activities for the purposes of article 1(1)(c) of Directive 2001/23: *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* (Case C-108/10) [2012] ICR 740; [2011] ECR I-7491, paras 43 and 44 and the case law cited."**

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