THE COURT OF APPEAL

CIVIL

Neutral Citation: [2023] IECA 61

Court of Appeal Record Number: 2019/463, 464 & 465

Collins J.

Costello J.

Haughton J.

BETWEEN

ALPHONSUS MULDOON

Plaintiff/Appellant

AND

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND

AND THE ATTORNEY GENERAL, AND DUBLIN CITY COUNCIL

Defendants/Respondents

AND

BETWEEN

MARY KELLY (AS ADMINISTRATOR *AD LITEM* OF THE ESTATE

OF THOMAS KELLY DECEASED)

Plaintiff/Appellant

AND

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND

AND THE ATTORNEY GENERAL AND CLARE COUNTY COUNCIL

Defendants/Respondents

AND

BETWEEN

VINCENT MALONE

Plaintiff/Appellant

AND

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL AND DUBLIN CITY COUNCIL

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 16 March 2023

PRELIMINARY

1. The background to, and the procedural history of, these proceedings and the circumstances giving rise to the claims made by the respective Plaintiffs are set out in detail both in the judgment of the High Court (Peart J) and in the judgment of my colleague Costello J in these appeals. I gratefully adopt their accounts.

2. In addition to the issues addressed by Costello J in her judgment, with which I agree and to which I have nothing to add, the late Mr Muldoon[1] and Ms Kelly have also advanced a number of competition law claims which this judgment will address. Mr Malone did not make any competition law claim.[2] In the Agreed Issue Paper helpfully provided to the Court for the purpose of the appeals, the competition law issues which the Court is asked to determine are identified as follows:

> *"5. Was each Council an "undertaking" within the meaning of Article 86, Article 90 EC and section 5 of the Competition Act, 1991 at the material times?*
>
> *6. Were the Councils in a dominant position in a relevant market and, if so, did each of them abuse its dominant position in that market?*
>
> *7. Were the actions of the Councils capable of having an influence, direct or indirect, actual or potential, on the pattern of trade between Member States?*
>
> *8. Did the Minister and/or the State breach Article 90 EC by enacting or maintaining in force in the case of public undertakings and/or undertakings with special and/or exclusive rights measures contrary to the rules contained in the Treaty and, in particular, Article 86 EC?"*

[1] Sadly, Mr Muldoon died subsequent to the hearing of these appeals.

[2] No competition law claim was pursued by Mr Malone in circumstances where he obtained his licence directly from the relevant local authority (then Dublin Corporation) for a nominal fee in 1973, rather than on any secondary market.

3. Article 86 of the Treaty of Rome (subsequently Article 82 EC and now Article 102 TFEU) prohibits undertakings in a dominant position within the common market (now referred to as the internal market) or a substantial part of it from abusing that position in so far as it may affect trade between Member States, including by "*limiting production [or] markets to the prejudice of consumers."* I shall refer to this provision as Article 102 TFEU in this judgment. "*Undertaking*" is not defined in Article 102 but, as we shall see, there is a substantial body of jurisprudence addressing what it means. Article 102 TFEU is directly effective and national courts may (*inter alia*) award damages for its breach.[3]

4. Section 5 of the Competition Act 1991 similarly prohibited any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in a substantial part of the State. That prohibition is now found in section 5 of the Competition Act 2002 (as amended). "*Undertaking*" was defined in the 1991 Act (in section 3(1)) and that definition is repeated in section 3(1) of the 2002 Act. So far as material, it refers to "*a person, being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service."* "*Gain*" in this context is not limited to pecuniary gain or profit and "*for gain*" connotes "*merely an activity carried on or a service supplied … which is done in return for a charge or payment*": *Deane v Voluntary Health Insurance Board* [1992] 2 IR 319 ("*Deane v VHI*") , per Finlay CJ at 332. It was not suggested in argument that, for the purpose of these appeals, there

[3] See eg Case 453/99 *Courage v Crehan* [2001] ECR I-6297, para 23. See also Council Regulation (EC) No 1/2003.

was any relevant difference between the EU law and Irish law concepts of "*undertaking*".[4]

5. Article 90(1) of the Treaty of Rome (subsequently Article 86(1) EC and now Article 106(1) TFEU) provides that, in the case of *"public undertakings and undertakings to which Member States grant special or exclusive rights"*, Member States shall neither enact nor maintain in force any measure contrary to (*inter alia*) the rule provided for in Article 102 TFEU. I shall refer to this provision as Article 106(1) TFEU in this judgment. Article 106(1) TFEU is also directly effective.[5] The 2002 Act does not contain any equivalent to Article 106 TFEU.

6. In this Court the main battleground, and the principal focus of the parties' argument, was the first of the issues set out above, namely whether Dublin City Council and Ennis Town Council (now subsumed into Clare County Council as a result of the enactment of the Local Government Reform Act 2014) were "*undertakings*" at the relevant time. For the reasons set out in his Judgment ([2015] IEHC 649), Peart J held that they were not. It followed that the competition claims against the Councils failed. The issue is analysed in some detail in the Judge's Judgment but the essential basis for his conclusion is succinctly stated at para 210:

[4] In *Medicall Ambulance Ltd v Health Service Executive* [2011] IEHC 76, [2011] 1 IR 402 ("*Medicall Ambulance*"), Cooke J suggested by reference to the decision in *Deane v VHI* that an entity coming within the scope of the EU concept of undertaking might nonetheless not be an undertaking for the purposes of the 2002 Act where it was engaged in the supply of goods or provision of a service otherwise than in return for a charge or payment: para 19. It is not necessary to consider that issue further in this appeal.

[5] See eg Case C-179/90 *Port of Genoa* [1991] ECR I-5889, para 23.

> *"the licensing of taxis under powers given to them by the 1978 Regulations is not in my view an economic activity. It is an administrative/regulatory activity or function carried out by the Councils. I have no difficulty accepting as a matter of law that a local authority may, in circumstances where it is itself participating in an economic activity in addition to having a regulatory function, be considered to be an undertaking in relation to that economic activity. But its regulatory function must be severed from that other economic activity, so that when it is performing that purely regulatory function it is not to be considered an undertaking, and therefore is not subject to the competition rules under the Treaty. It follows from the fact that neither council is an undertaking, that neither can be considered to be a public undertaking for the purpose of Article 86. The competition rules do not apply to them. …"*

7. In the Judge's view, it followed from the fact that the Councils were not undertakings that Article 90 EC was not engaged and the claim against the State for breach of that Article could not succeed (Judgment, paras 212-213).

8. Mr Muldoon and Ms Kelly (to whom, for convenience, I shall refer in this judgment as *"the Appellants",* to the exclusion of Mr Malone) contend that the Judge erred in concluding that the Councils were not undertakings and accordingly was wrong to dismiss their competition law claims on that basis. On their case, the Councils were undertakings because they were engaged in an economic activity, comprising the supply into the market of a "*valuable tradeable commodity*", namely the taxi licences

issued by them from time to time. Those licences were transferable and, because of the severe limitations on the issuing of new licences (described in detail by Costello J in her judgment), a secondary market arose involving the sale of licences for very significant sums, many multiples of the fees that had been payable on the initial issue of such licences. According to the Appellants, the issuing of such licences constituted a market, characterised by them as an "*upstream*" market, because the licences were inputs in the "*downstream*" market, involving the supply of taxi services by licensed taxi drivers to members of the public. On their case, the Councils were clearly in a dominant position in that upstream market – each local authority effectively enjoying a statutory monopoly in the issuing of taxi licences within their functional area – and abused that position by limiting the number of licences issued by them in a manner which caused consumer harm. They say that they have also suffered loss as a result of that abuse, because they were compelled to pay large sums to purchase taxi licences on the secondary market (the late Mr Muldoon paid IR£80,000 for his licence in 1998 and the late Mr Kelly paid IR£107,000 in 1999) which lost all value when the taxi market was deregulated in 2000.

9. In addition to the claim against the Councils, the Appellants say that the State is liable to them on the basis that the Councils were *"public undertakings and undertakings to which Member States [granted] special or exclusive rights"* and that the State had enacted and maintained measures – the regulations governing the issue of taxi licences – which were contrary to Article 102, thus breaching Article 106(1). In order to bring that claim home, the Appellants must establish a breach or breaches of Article 102. That requires a showing that the Councils engaged in anti-competitive conduct *and* that such

conduct affected or may have affected trade between Member States. Whether the evidence established the required effect on trade is a matter of dispute and is the subject of issue 7. While that issue also goes to the Article 102 claim advanced against the Councils, its real practical importance is in respect of the Article 106 claim against the State. That is because, in the event that the Appellants persuade the Court that the Councils engaged in unlawful anti-competitive conduct but fail to establish the required effect on trade between Member States, they will nonetheless succeed in their section 5 claim and will be entitled to recover damages from the Councils on that basis (effect on trade between Member States not being an ingredient of the section 5 prohibition).

THE FUNCTIONS AT ISSUE

10. It is common case that the question of whether the Councils are to be regarded as undertakings turns on the nature of their functions relating to the issuing of new taxi licences and/or the transfer of existing taxi licences during the relevant period. That requires a careful analysis of the statutory licensing regime in force in that period.

11. Before undertaking that exercise, it may be helpful to provide some further context for it. A large number of authorities, Irish and European, were opened to the Court, many of which it will be necessary to discuss in due course. However, the broad parameters of the core issue may usefully be sketched at this point. The following is taken from chapter 3 of Faull & Nikpay, *The EU Law of Competition* (3rd ed; 2014) ("*Faull & Nikpay*"):

(1) Article 101(1) TFEU and Section 5 of the 2002 Act apply only to *undertakings*.

(2) In order to be an *undertaking*, an entity must be "*engaged in an economic activity, irrespective of its legal status and the way in which it is financed*" (para 3.27, citing *inter alia* Case 41/90 *Hofner & Elser*). That is defined as *"any activity consisting in offering goods and services on a given market*" (*ibid*, citing *inter alia* Case C-118/85 *Commission v Italy*).

(3) As a matter of principle, public bodies and entities operating under the aegis of the State may be undertakings in respect of some or all of their activities. But, in this context, "*a distinction is drawn 'between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market.'"* (para 3.39, citing *inter alia* Case C-343/95 *Cali & Figli*).

(4) It is only in the former situation – what the authors refer to as "*the public sector exception*" - that the competition rules do not apply.

(5) A "*critical factor*" in determining whether this public sector exception applies is:

> *"the nature of the activity carried out by the relevant entity (as distinct from the nature of the body performing a particular activity). Does the activity in question form part of the essential functions of the State? Put another way, does the activity fall within the exercise of powers which are typically those of a public authority? Consequently, in Compass Datenbank v Republik Osterrich, the Court of Justice pointed out that a public entity may be treated in a hybrid way for the purposes of EU competition law: as regards certain activities that constitute an economic activity, a public body may be regarded as an undertaking, whereas in relation to other activities that constitute the exercise of public powers, it may not be regarded as an undertaking. The Court of Justice went on to clarify that:*

'In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers'"

(Para 3.40: emphasis in the original; footnotes omitted)

12. Here, the Councils accept that the fact that they are local authorities does not, of itself, exclude the application of competition law to all of their activities. Conversely, Mr Muldoon and Ms Kelly accept that many of those activities involve the exercise of public powers and thus fall outside the ambit of Article 101 TFEU and section 5 of the 2002 Act. However, the parties sharply disagree as to the correct characterisation of the Councils' functions relating to the issuing of new taxi licences and/or the transfer of existing taxi licences during the relevant period and whether (as Mr Muldoon and Ms Kelly contend) those functions involve the exercise of an "*economic activity*" or whether (as the Councils argue) they involve and/are inseparably connected with the exercise of public powers. That is the central issue in the competition law appeals and it is for that reason that an analysis of the statutory licensing regime is crucial.

13. Part VII of the Road Traffic Act 1961 ("*the 1961 Act*") provided for the control and operation of public service vehicles (defined in section 3(1) as mechanically propelled vehicles used for the carriage of persons for reward). Part VII did not contain detailed

rules for the control and operation of such vehicles. Rather, section 82(1) gave the Minister for Local Government the power to make regulations for that purpose and section 82(2) identified a number of specific matters for which such regulations could provide, including *"(a) the licensing of public service vehicles"* and *"(c) the payment of specified fees in respect of licences, badges or plates granted under the regulations and the disposition of such fees."* The Minister could also make regulations for the licensing of drivers of public service vehicles ((2)(b)), the "*conduct and duties*" of such drivers ((2)(e)), the conditions (including the use of taximeters) subject to which public service vehicles could be operated ((2)(f)) and the authorising of maximum fares for "*street service vehicles*" ((2)(h)).

14. Prior to the enactment of the 1961 Act, the operation of public service vehicles was regulated by Part VII of the Road Traffic Act 1933. Part VII had provided for the issuing of public service vehicle licences by the Commissioner of An Garda Síochána ("*the Commissioner*") (section 84) and provided for the transfer of existing licences by the Commissioner on the transfer of the licensed vehicle (section 91). Use of an unlicensed vehicle for the carriage of passengers for reward was an offence (section 93).

15. Section 82 of the 1961 Act came into operation on 27 October 1963. The Road Traffic (Public Service Vehicles) Regulations, 1963 (SI 191 of 1963) (*"the 1963 Regulations*") came into effect on the same day. Regulation 5 of those Regulations prohibited the use of a vehicle for the carriage of passengers for reward in the absence of a public service vehicle licence. Again, the Commissioner had the function of issuing such licences (Regulation 20). In the case of taxis (referred to in the Regulations as "*public hire*

vehicles", in contradistinction to "*private hire vehicles*" or hackneys) the Commissioner was directed to grant any application once satisfied that the applicant was a fit and proper person to hold such a licence and that the vehicle complied with the regulations made under section 11 of the 1961 Act applicable to licensed public hire vehicles (Regulation 20(3)(b)). Thus the 1963 Regulations did not provide for any quantitative restrictions on the issuing of new taxi licences. Whether for that reason or otherwise, the 1963 Regulations made no provision for the *inter vivos* transfer of taxi licences.

16. The 1963 Regulations were amended from time to time, including amendments made to Regulation 20 in 1970 intended to ensure that licensed taxis would actually be made available for hire for specified minimum periods each week.[6] Other amendments limited the period during which licence applications could be made each year to the first two weeks of September (referred to by the Judge as the September licensing window).

17. In 1977, the Minister for Local Government made the Road Traffic (Public Service Vehicles) (Amendment) Regulations 1977 (SI 111 of 1977) ("*the 1977 Regulations*"), Regulation 15 of which provided, in effect, for the transfer of an existing taxi licence on a change of ownership of the licensed vehicle (strictly speaking, Regulation 15 referred to the *continuance* of the licence rather than its *transfer*) upon the application of the new owner to the Commissioner. No fee was prescribed for such application. While Regulation 15 was revoked by the Road Traffic (Public Service Vehicles)

[6] Road Traffic (Public Service Vehicles) (Amendment)(No 2) Regulations 1970 (SI 200 of 1970).

(Amendment) Regulations 1978 (SI 292 of 1978) ("*the 1978 Regulations*"), Regulation 9 of those Regulations made similar provision for the continuation of a taxi licence on the change of ownership of the licensed vehicle.

18. Also in 1977, the Minister for the Environment (as successor to the Minister for Local Government) made regulations eliminating the licensing period for 1977, effectively imposing a temporary moratorium on the issuing of new licences (Road Traffic (Public Service Vehicles) (Amendment) (No 3) Regulations 1977 (SI No 268 of 1977). As Costello J explains in her judgment, these regulations were challenged on the basis that section 82 of the 1961 Act did not permit the Minister to make regulations limiting the number of taxi licences. Those challenges were rejected by the High Court (Costello J) in *State (Kelly) v Minister for the Environment* (19 June 1978) and his decision was affirmed on appeal. Thus, as a matter of Irish public law, the Minister's power to make regulations for the *control* of taxis was held to be wide enough to permit the Minister to *limit* taxi numbers (though as Costello J also explains, a different view was subsequently taken by the High Court (Murphy J) in *Humphrey v Minister for the Environment* [2001] 1 IR 263 ("*Humphrey*")).

19. On the basis of the outcome in *State (Kelly) v Minister for the Environment* – or so it seems reasonable to assume – the Minister made the 1978 Regulations, Regulation 5(1) of which expressly conferred on local authorities specified in the table to it (which included Dublin Corporation (now Dublin City Council) and Ennis Town Council (now Clare County Council)) the function of determining the number of new public hire vehicle licences which could be granted within their respective areas. That function was

exercisable "*by resolution",* meaning that it was a reserved function exercisable by the elected members of each local authority rather than by the executive. Regulation 5(1) contained no criteria or guidance as to how such determinations were to be made by local authorities or what factors were to be considered by them. The function of issuing taxi licences remained vested in the Commissioner (Regulation 6) but the Commissioner was prohibited from granting new licences in excess of the number determined by the relevant local authority (Regulation 5(2)) and, in the absence of such a determination, the Commissioner was prohibited from granting any new licences whatever (Regulation 5(3)). Regulation 9 made provision for the continuance of taxi licences on a change of ownership of a licensed vehicle, on the application by the new owner, where the Commissioner was *"satisfied that he would grant a licence to the new owner if an application for the grant of a licence under article 6 of these Regulations were made to him at that time by the new owner."* By virtue of Regulation 18(1)(c), a fee of £7 was payable in respect of the grant of a taxi licence, payable to the "*licensing authority*" (the relevant local authority), to be disposed of in accordance with Article 6(1) of the Road Vehicles (Registration and Licensing) Order 1958 (SI No 15 of 1958), which effectively involved the transfer of all fee income to the Exchequer. No fee was prescribed for the *transfer* of an existing licence under Regulation 9.

20. The next significant legislative intervention took the form of the Road Traffic (Public Service Vehicles) (Amendment) Regulations 1991 (SI 272 of 1991) *("the 1991 Regulations*"). Regulation 4 substituted a new provision for Regulation 5 of the 1978 Regulations, providing for the determination by local authorities of the number of new licences to be granted, subject to the imposition of a cap of 100 new licences in respect

of the Dublin taximeter area during the October 1991 grant period. Again, the factors by reference to which such determinations were to be made were not prescribed. The function of issuing new licences remained with the Garda Commissioner and Regulation 5 and the Schedule introduced new criteria for considering applications for such licences. Regulation 7 significantly modified the fee regime, providing in Regulation 7(4) for the payment of a fee of £3,000 for the grant of a new taxi licence and in Regulation 7(5) for the payment of the same fee in respect of the continuance in force of an existing licence on change of ownership. Regulation 7(10) provided that all such fees were payable to the Commissioner and were to be "*used to defray the costs of the administration of the licensing of public service vehicles generally."* Finally, Regulation 12 imposed a moratorium on the grant of new hackney licences by the Commissioner.

21. That moratorium was ended by the Road Traffic (Public Service Vehicles) (Amendment) (No 2) Regulations 1992 (SI 172 of 1992). That aspect of the Regulations was the subject of unsuccessful challenge in *Hempenstall v Minister for the Environment* [1994] 2 IR 20, discussed in detail by Costello J in her judgment. For the purposes of this judgment, it is sufficient to note the emphasis in *Hempenstall* on the regulatory character of small public vehicle licences and on the fact that the purpose of the regulatory power given to the Minister was to protect the interests of users (and not licence holders) (at pages 28-29).

22. Those Regulations also created a new category of taxi licence, the "*wheelchair accessible public hire licence*", and provided in Regulations 7 and 8 for the granting of

no more than 50 such licences in respect of the Dublin taximeter area by the Commissioner, according to the criteria set out in the Second Schedule to the Regulations. The grant of those licences fell outside the existing statutory regime for determining the number of new licences to be granted (Regulation 6). Regulation 13 reduced the fee payable on the grant of a taxi licence to £100 and provided for a similar fee for the grant of a wheelchair accessible taxi licence.

23. The regulatory regime was significantly altered once again by the Road Traffic (Public Service Vehicles) (Amendment) Regulations 1995 (SI 136 of 1995) ("*the 1995 Regulations*"). Licensing authorities were given power to declare new taximeter areas and to alter the boundaries of existing areas (Regulation 7). That was declared to be a reserved function. Taxi licences, wheelchair accessible taxi licences and hackney licences were henceforth to be granted by the relevant licensing authority rather than by the Commissioner (Regulations 12 and 13). Licensing authorities had power to determine that a specified number of taxi licences or wheelchair accessible taxi licences were to be granted in respect of a relevant taximeter area (Regulation 8). That continued to be a reserved function. The Regulations set out the criteria for considering licence applications where the number of applications exceeded the number determined by the licensing authority (Regulation 11(2) and the Fifth and Sixth Schedules). Regulation 18 provided for the continuance of an existing licence where the licensed vehicle was being sold or otherwise transferred but permitted a licensing authority (acting by its elected members) to apply conditions or restrictions to the application of that regulation (Regulation 18(5)). The Fourth Schedule to the Regulations specified the fees to be paid on the grant of a new taxi licence (£3,000), the grant of a new wheelchair accessible

taxi licence (£100) and the continuation in force of an existing licence (£3,000). However, licensing authorities were given the power to amend those fees (Regulation 32). Again, that function was a reserved function, exercisable by the elected members. Regulation 6 imposed obligations of notice and consultation on licensing authorities prior to exercising any reserved function under the Regulations.

24. In common with the regulations it replaced, the 1995 Regulations contained a number of provisions regulating the manner in which taxi services were to be provided. In order to be licensed, a vehicle had to be certified by the Commissioner as suitable (Regulation 13(b)). Regulation 27 gave licensing authorities the power to fix maximum fares for taxis and wheelchair accessible taxis in their taximeter areas. The Regulations required the displaying of certain information by the driver, including the licence number (Regulation 35). The Regulations conferred wide powers of inspection on the Commissioner (Regulation 37). Licences were liable to be revoked on conviction of a criminal offence which called the fitness of the holder into question (Regulation 23). The Regulations also provided for appeals from a refusal to grant a licence application (Regulation 26), though such appeals did not apply in the absence of a Regulation 8 determination (Regulation 26(7)).

25. Regulation 18(1) of the 1995 Regulations was considered by the High Court (Geoghegan J) in *O' Dwyer v Minister for the Environment* [2001] 1 IR 255. The plaintiffs, who were holders of hackney licences, challenged (*inter alia*) Regulation 18(1) on the basis that it unlawfully discriminated against holders of hackney licences by providing for the transfer of taxi licences but not for the transfer of hackney licences.

That challenge was unsuccessful. Geoghegan J noted that, in contrast to the position regarding hackneys, there were limits on the number of taxi licences that could be issued. That explained why Regulation 18(1) had been enacted. In his view, it was entirely reasonable and "*certainly intra vires*" the Minister (page 261). The Minister's duties under the Road Traffic Acts were to provide for public transport services. Taxis and hackneys were regulated differently and *"[a]s a side effect of the manner in which taxis are regulated, there is in practice a saleable market in taxi licences but there was and is no legal obligation on [the Minister] to create or maintain such side effect (see Hempenstall v Minister for the Environment [1994] 2 IR 20)."* The fact that the different regulation of hackney licences did not produce a similar side effect did not render the regulatory scheme discriminatory. In each case there were side effects *"which are really of no interest to [the Minister] in his statutory obligations to regulate appropriate services for the public"* (at page 262).

26. Mr Muldoon and Mr Kelly each acquired their taxi licences in the period after the coming into operation of the 1995 Regulations (in 1998 and 1999 respectively). Each was required to pay a fee of £3,000 - in Mr Muldoon's case to Dublin Corporation and in Mr Kelly's case to Ennis Town Council - to secure the continuation of these licences. £3,000 was the prescribed fee set by the Minister under the 1995 Regulations. In each case, the amount paid to the previous holder of the licence (IR£80,000 and IR£107,000 respectively) was many multiples of the fee payable to the local authority.

27. In 2000, the licensing regime underwent radical change. The Road Traffic (Public Service Vehicles) (Amendment) Regulations 2000 (SI 3 of 2000) made new provision

for the granting of new taxi licences and wheelchair accessible taxi licences in Dublin, involving the grant of new licences to "*qualified persons"* (persons who, as of 31 December 1999, held a taxi licence or a wheelchair accessible licence granted by Dublin Corporation or who were entitled to such a licence by way of renewal or by reason of having been offered a licence which had not yet been processed), as well as the grant of 500 other taxi or wheelchair accessible taxi licences in accordance with the provisions of a scheme to be determined by the Minister (Regulation 5). The grant of licences to "*qualified persons*" was to be subject to the payment of the fees specified in Regulation 7 (£2,500 for a taxi licence, £250 for a wheelchair accessible licence).

28. These Regulations were challenged in *Humphrey*. Again, that decision is discussed in detail by Costello J. In *Humphrey*, the High Court (Murphy J) held that the Ministerial power to make regulations under section 82 of the 1961 Act was to secure "*the provision of a regulated service through a defined licensing system for the benefit of customers*" (at page 298). While the exercise of the power to establish qualitative standards for the grant of licences could *indirectly* have a quantitative effect, Murphy J considered that section 82 did not give the Minister power to *directly* impose quantitative restrictions on the granting of additional taxi licences, at least in the manner he had done (at page 301). The judge also laid some emphasis on the absence from section 82 or the regulations made under it of any indication of the factors to be considered in deciding to limit the number of licences. In his view, the Minister's powers under section 82 did not extend to discriminating, or permitting local authorities to discriminate, in favour of existing taxi holders in the granting of further licences.

Murphy J considered that the Minister had unlawfully fettered the discretion conferred by section 82.

29. Murphy J went on to suggest that the scheme of the Regulations, and in particular the effective restriction of new licences to existing licence holders, breached the non-discrimination provisions of Article 12 EC (now Article 18 TFEU) (at 303-304). He then referred to Article 86 EC (now Article 106 TFEU), which is of course relied on by the Appellants here. In his view, taxis fell within the regulatory framework of that Article as undertakings to which the State had granted special or exclusive rights. The scheme might also be impugned under Article 86 (Murphy J continued) on the ground that it might lead taxi drivers to abuse Article 82 EC (now Article 102 TFEU). While that "*might seem a little extreme"*, ECJ jurisprudence established that the grant of exclusivity, such as in the present case, may infringe Articles 86 and 82 either when the exercise of the exclusive rights cannot avoid being abusive or where such rights were liable to create a situation in which the undertaking was induced to commit an abuse. Taxis "*may very well be induced to commit abuses of their dominant position in Ireland by the scheme purportedly put in place by the Regulations of 2000"* (at 304-305).

30. As regards Murphy J's observations as to the possible application of Articles 82 and 86 EC, it is evident from the Judgment in these proceedings that in the High Court Mr Muldoon and Mr Kelly argued that individual taxi drivers were undertakings to which the State had granted *"special or exclusive rights*" and that the State had wrongfully enacted and/or maintained measures in breach of the rules in Article 82 EC (now Article 102 TFEU), thus acting in breach of Article 86 EC (now Article 102 TFEU). That

argument was rejected by the Judge (Judgment, para 212) and was not relied on before this Court. As a result, it is not addressed further in this judgment.

31. Consequent on his findings as to the scope of section 82 of the 1961 Act, Murphy J made an order declaring the Regulations *ultra vires* the Minister.

32. There is a further aspect of *Humphrey* that warrants notice. As well as challenging the limitation on the issuing of new taxi licences, the applicants challenged the decision of Dundalk Urban District Council to fix the fee for new taxi licences at €25,000. That fee appears to have been fixed by reference to the value of such licences on the secondary market (page 272). Murphy J considered that the imposition of such a fee was in the nature of a tax as it clearly was not related to the cost of administering the licensing regime or regulating and controlling taxis (page 294). He was not satisfied that the Oireachtas had contemplated the Minister having power to impose such a fee, less still that the Minister might delegate any such power to a local authority (*ibid*). The fees decision was accordingly *ultra vires*.[7]

[7] *Humphrey* is cited in Hogan, Morgan & Daly, *Administrative Law in Ireland* (5th ed; 2019) as an illustration of what the authors characterise as "*one of the more deeply rooted presumptions of the common law*", namely that taxes may not be levied by the State or public authorities in the absence of express words. Thus, it is said, the courts will not permit the imposition of a tax or other fiscal measure through the use of ambiguous language (at paras 12-40 - 12-41). Even where a power to impose a charge in respect of the provision of a public service is conferred in express terms, the exercise of such will be strictly scrutinised by the courts: *loc cit*, paras 5-148 – 5-160. *Island Ferries Teoranta v Minister for Communications* [2011] IEHC 388, [2015] IESC 95, [2015] 3 IR 637 *("Island Ferries*") is also relevant in this context and is discussed later in this judgment.

33. The Road Traffic (Public Service Vehicles) (Amendment) Regulations 2000 were purportedly revoked by Regulation 3(a) of the Road Traffic (Public Service Vehicles) (Amendment) (No 3) Regulations 2000 (SI 367 of 2000). Those Regulations removed all quantitative restrictions on the issuing of new taxi licences.

34. The Road Traffic (Public Service Vehicles) (Amendment) (No 3) Regulations 2000 were in turn challenged in *Gorman v Minister for the Environment and Local Government* [2001] 2 IR 414 ("*Gorman*"). While the High Court (Carney J) quashed Regulation 3(a) on the basis that it constituted an unwarranted interference with the applicants' appeal in *Humphrey*, the challenge was otherwise unsuccessful. *Gorman* is discussed in detail by Costello J. I need only draw attention to the emphasis placed by Carney J on the regulatory character of taxi licences. A brief passage from his judgment demonstrates the point. Having referred to *Hempenstall,* Carney J stated:

> *"The applicants in this case accepted a similar restriction on the exercise of their property rights ab initio. They must have been aware of the risk inherent in the licence that legislative change might affect its value. Dramatic legislative changes had been introduced by means of Regulations in 1978 and 1995 and the applicants were under no misapprehension that changes in the licensing scheme effected by means of Regulation could have a considerable impact on the value of their investment. Indeed, such conditions must be necessarily implied if the Minister of State is not to be unduly hampered in exercising his powers under statute in the public interest."* (pages 429-430)

35. The taxi licensing regime has undergone significant changes since the decision in *Gorman*. A national taxi regulator, the Commission for Taxi Regulation, was established by the Taxi Regulation Act 2003, with responsibility (*inter alia*) for issuing taxi licences. The Commission was subsequently dissolved and its functions transferred to the National Transport Authority. Notwithstanding these changes, the taxi sector continues to be highly regulated.

36. The survey above clearly establishes a number of propositions potentially relevant to the resolution of the competition law appeals:

- At all material times the power to *grant* new taxi licences has been conferred by law on a public authority/authorities – first on the Garda Commissioner, then on local authorities (and subsequently on the National Taxi Regulator and now on the National Transport Authority).

- In the period from 1978 to 2000, local authorities (acting by the elected members) were expressly authorised by law to limit the number of new taxi licences to be issued within their functional areas.

- At all material times, the power to charge a *fee* for the grant of a new taxi licence has also been expressly provided for by law. The fees payable have been prescribed by regulation, though after the adoption of the 1995 Regulations, local authorities (acting again by the elected members) had power to vary the prescribed fees.

- The power to *continue* an existing taxi licence in force following a change of ownership of the vehicle – involving, in effect, a transfer of that licence - was also conferred by law on a public authority/authorities – first on the Garda Commissioner, then on local authorities. This is, perhaps, a point of some significance, given the emphasis placed by the Appellants on the transferability of taxi licences. Such licences were transferable by reason of regulations made by the Minister under section 82 of the 1961 Act, not by reason of any decision made or policy adopted by licensing authorities. While, in any individual case, the licensing authority may have had some limited discretion to refuse to continue an existing licence in force on a change of ownership, the inherent transferability of such licences was a legislative fact by which they were bound.

- Again, the power to charge a *fee* for transferring an existing taxi licence was also expressly provided for by law. Again, the fees payable were prescribed by regulation, subject to the power of local authorities (acting by the elected members) to vary the prescribed fees following on the making of the 1995 Regulations.

- In making the regulations prescribing the functions and powers of the relevant licensing bodies, the Minister was, in principle – and also in actual practice - subject to judicial review. Equally, decisions by those licensing bodies in the exercise of the functions and powers conferred on them by the Minister, were in principle subject to judicial review. That included decisions regarding the

fixing of fees (*Humphrey*). While that may not be determinative of the question whether, in exercising their functions under the regulations, the licensing bodies were or were not undertakings engaged in economic activity – as to which see *Island Ferries*– it appears to me to be potentially significant nonetheless.

37. I pause here to emphasise that the issue here is the correct characterisation of the functions conferred on (*inter alia*) the Defendant Councils under the 1961 Act and the regulations made under it, not how well or how badly those bodies may have discharged those functions here. If the Councils were undertakings at the relevant time, (because they were engaging in an economic activity), then the manner in which they performed their functions will have to be considered in order to address the contention that they were guilty of abusing positions of dominance. But if the Councils were *not* undertakings (because they were performing public functions and exercising public powers), competition law does not provide a remedy for any failure to perform those functions properly. In that scenario, there may be other public and/or private law remedies available to persons aggrieved by such failure but none is provided by Article 102 and 106 TFEU and/or section 5 of the 2002 Act.

38. Similarly, in my view, in addressing the correct characterisation of the functions of the Defendant Councils, issues concerning the validity of the regulations made by the Minister are not material. Whether the 1961 Act gave the Minister the power to impose quantitative restrictions on the issue of new taxi licences and whether, assuming that the Minister had such a power, it could properly be delegated to local authorities, are issues on which the High Court has expressed different views. Costello J also addresses

the issue in her judgment in this appeal. But, in my view, those issues have no bearing on the proper characterisation of the functions purportedly conferred on, and exercised by, the Councils here for the purposes of competition law. Public functions and powers – if that is indeed what they were – are not transmuted into economic activity because the legislative measures conferring those functions and powers might subsequently be found to be *ultra vires* or otherwise invalid by reference to principles of Irish public law.

HIGH COURT HEARING AND JUDGMENT

39. The High Court hearing lasted some 24 days and Peart J heard from a large number of witnesses, including a number of expert economists who gave evidence on the competition law issues. Dr Mike Walker provided a report and gave evidence for Mr Muldoon. Dr Pat McCloughan also provided a report and gave evidence for Mr Muldoon directed to the question of whether the restrictions on taxi licences in Dublin and in the Limerick/Clare/Shannon regions in the 1995-2000 period may have affected trade between Member States. Dr Patrick Massey provided a report and gave evidence on behalf of the State. For Dublin City Council, Dr Colm McCarthy provided a report and gave evidence. Raef MacGiollarnath also provided a report and gave evidence for Dublin City Council, primarily by way of rebuttal of the evidence of Dr McCloughan. I do not propose to review the evidence given by these witnesses. In their submissions on appeal, each of the parties identified particular aspects of the evidence on which they placed reliance and which they variously submitted supported the conclusions of the Judge or fatally undermined those conclusions. So far as appears appropriate, I shall refer further to these aspects of their evidence when addressing the submissions made on appeal. However, the issue of whether the Defendant Councils were undertakings does not turn on the evidence.

40. In addition to these expert witnesses, other witnesses gave evidence and were cross-examined on issues said to have a bearing to the competition law issues, including witnesses from the Councils directed to the revenues received by them arising from the

payment of licence fees under the relevant Regulations, the expenditure incurred by them in discharging their functions under the Regulations and so on. I will refer further to this evidence as appropriate.

41. The Judge first addressed the competition case made against the State (para 204 onwards). At para 210 (quoted above) he explained that he had concluded that neither Council was an undertaking under competition law (the analysis leading to that conclusion is set out later in the Judgment and is discussed below). It followed that neither Council could be considered to be a public undertaking for the purposes of Article 106 TFEU. Article 106 TFEU was not a free-standing article – for it to be engaged, it would have to be established that the Councils had acted in breach of Article 102 TFEU (para 211). The Judge was also unpersuaded by the argument that Article 106 TFEU was engaged on the basis that each individual taxi owner was an undertaking to which the State had granted "*special or exclusive rights*" (para 212). As already noted, that argument was not made on appeal and nothing more will be said about it. It followed that the reliefs sought against the State on competition law grounds had to be refused (paras 213 and following).

42. The Judge addressed the competition law claims against the Councils at para 230 onwards of his Judgment. He summarised the evidence of Dr Walker as being to the effect that, from an economic perspective (Dr Walker had - correctly - made it clear both in his report and in his oral evidence that the question of whether the Council were undertakings was ultimately a legal question), the Councils were supplying a "*good*" (taxi licences) into an *upstream* market for a fee and that this had an effect on the

downstream market (the market for the provision of taxi services), leading to the development of a secondary market in which taxi licences were traded at very high prices. He also noted Dr Walker's view that the Councils' licensing activity was, in principle, capable of being delegated to private operators and operated for profit. Dr Walker's view that the Councils had been "*engaged for gain*" in the issuing of taxi licences was assisted by the fact that the fees set by the licensing authorities did not appear to bear any relationship to the actual cost of issuing licences. (para 239).

43. Peart J noted that he had been referred to a significant number of authorities, many of which are cited in his Judgment. He noted that each case was fact specific and that relevant principles must be applied in the light of the particular facts in particular cases (para 245). He referred in particular to the decision of the High Court (Cooke J) in *Lifeline Ambulance* and to that of the High Court (Keane J) in *Carrigaline Community Television Company Limited v Minister for Transport* [1997] 1 ILRM 241 ("*Carrigaline Community Television*"). There was, the Judge noted, no real dispute as to the relevant principles: the dispute was as to their application to the facts (para 249). Having noted the conflicting arguments of the parties, the Judge expressed his agreement with the submissions of the Councils (and of the State on the same issue). Applying the *"functional approach*" consistently advocated by the Court of Justice, the Judge was of the view that:

> *"The activity performed by the Council is one that it could only perform if it was specifically empowered to do so by the Minister under Regulations made under section 82 of the 1961 Act. It is not an activity that any other private actor may*

perform unless it is similarly authorised by Regulation. It is quintessentially a regulatory function in relation to a service controlled and operated initially by the Minister under the 1978 Regulations albeit that the local authorities were the decision-makers as to the number of licences that should be granted and the Garda Commissioner actually issued the licences, and later by the local authorities under the 1995 Regulations both as to the numbers of licences to be granted and the issue thereof. In either case the activity carried out by local authorities under the Regulations was regulatory in nature only." (para 252)

44. Noting that the market in respect of which the Councils were said to be undertakings was the market for taxi licences, and that the Councils were not trading in the taxi service market (and would indeed be undertakings if they did), the Judge continued:

"In deciding on the number of licences, and issuing same, and charging a licence fee, the councils are performing only a regulatory function or an administrative function in the public interest. The provision of a taxi service in the capital city, or indeed in any other city or town, is something that is done to meet a public need. The taxi industry is regulated in the public interest under powers given to the Minister in section 82 of the Act of 1961. Those powers to operate and control the small public service vehicle industry are powers to be exercised in the public interest, and not in the interests of the taxi licence owners. The fact, as already adverted to in another section of this judgment, that a wise Minister might consult widely, including with representatives of the taxi industry, before deciding on the manner in which his powers should properly be

exercised in the public interest does not alter the public interest nature of the function he is performing when making Regulations for that public service." (para 253)

45. The Judge then addressed "*the comparative criterion test"* – namely whether the licensing activity undertaken by the Councils was an activity which, at least in principle, was capable of being carried out by a private operator. In his view, the submissions of the plaintiffs, and the evidence led in support of their submissions, to the effect that the activity could be carried out by a private operator was "*somewhat contrived".* He went on:

"It bears no real relationship to a taxi industry regulated in the public interest. It is suggested that it would be possible that a number of different entities or persons could be authorised to issue licences, and furthermore that each could compete with the other, even on price, just as they might in relation to other goods and services. I must again say that I find that submission to be specious and syllogistic, and really an exercise in deductive reasoning in an attempt to disguise the reality of what is a purely regulatory nature of the activity. It is an approach which focuses too much on the comparative criterion test to the exclusion of the market participation test, the former confining its purview to the sole question whether the activity is one that could in principle be carried on by a private party." (para 254)

46. Noting what had been said by Advocate General Maduro in his Opinion in Case C-205/03 *FENIN v Commission* [2006] ECR I-6295 as to the limitations of the comparative criterion test (and the need to demonstrate actual participation in the market) the Judge observed that there was *"no market participation when the councils performed their purely regulatory function under powers expressly given to them, and only them, by the powers vested in the Minister under section 82 of the Act of 1961."* That was "*classically a regulatory activity – a public interest activity."* The fact that the function had been vested in the democratically elected members, rather than the executive, only served to emphasise the impossibility of the task being given to a private operator. There was "*no reality"* to that proposition in the Judge's view.

47. Peart J concluded thus:

> *"257. The fact that a secondary market in licences evolved as an incidental consequence of the Regulations is in my view irrelevant to the Court's consideration. The council never competed in the market for the provision of taxi services. The non-economic activity engaged in by the councils means that when performing this regulatory function they are not undertakings for the purpose of competition law, and therefore this activity fell at all times outside the competition rules."*

ARGUMENTS ON APPEAL

48. The Appellants say that the Judge was fundamentally mistaken in dismissing the secondary market in taxi licences as "*irrelevant*". On the contrary – so they say – the existence of the secondary market in taxi licences is central to any proper analysis of the competition law case. Here, as Mr Collins SC put it in argument, *"the Council was supplying and offering a valuable tradeable commodity, namely the licences on a market.. which they themselves .. or the legislature effectively created, for the sale and purchase of the licences."* That was, Mr Collins said, the "*essence of the argument*". The Defendant Councils supplied licences into the market and facilitated the transfer – the trade – of existing licences in the market. The market in licences was an *upstream* market (with two sources of supply, the issuing of new licences and the trade in existing licences) with the licences being essential inputs in the *downstream* market, which was the supply of taxi services by taxi drivers to members of the public.

49. In support of this argument, Mr Collins referred to the evidence of Dr Walker to the effect that taxi licences were a "*tradeable good*" which the Councils supplied into the market.[8] Mr Collins also referred to evidence given by Dr Walker to the effect that such activity (the supply of licences into the market) could, in principle, be carried out by a private company. One could imagine (so Dr Walker said) one of the Councils deciding to *"put it out for tender for somebody else to run selling licences."*[9] That was,

[8] Day 14, page 9 (Lines 19-20)

[9] Day 14, page 11 (Lines 24-25)

in Dr Walker's opinion (and Mr Collins' submission), sufficient to constitute the Councils as undertakings for the purposes of Article 102 TFEU and section 5 of the 2002 Act. According to Mr Collins, Mr Massey (for the State) had accepted that there were two upstream and downstream markets (though he had divided the upstream market in two, one involving the issue of new licences and the other the market in existing licences). Mr Massey had also accepted that the activity of issuing new licences could be sub-contracted to a private entity.

50. In the course of argument, the Court asked Mr Collins whether the issuing of taxi licences was not fundamentally an exercise of public power which, even if local authorities were to contract with a private operator to operate the licensing system, would retain that character, in the same way that the issuing of passports would remain a public power even if a private entity was contracted to administer the passport system. In response, Mr Collins suggested that there was a critical difference between the two. Passports were not a "*tradeable good*". The vast majority of entities carrying out public regulatory functions – such as the Passport Office – did not offer a "*tradeable commodity"* into a market. The distinguishing feature of the instant case – one which made it "*most unusual"* - was that taxi licences were tradeable. In further engagement with the Court, Mr Collins made it clear that it was the tradeable character of taxi licences, and the existence of a demand for such licences in the secondary market, that was at the core of his argument that the Councils had been acting as undertakings when granting new licences and authorising the transfer of existing licences.

51. Mr Collins brought the Court to the evidence given by Ms Tuliani - an officer of Dublin City Council responsible for accounting for the licence income received by the Council both on its own behalf and on behalf of the other Dublin local authorities – to the effect (so it was said) that there was a significant surplus left after accounting for regulatory costs. In 2000, according to Ms Tuliani, Dublin City Council had retained €5.2 million. That, Mr Collins said, was the kind of "*gain*" that Dublin City Council was making in relation to the setting of licence fees. Such fees had not been set for the purpose of simply recouping the administrative costs that might be associated with the operation of the licensing regime and reflected the fact that *"they had very valuable assets under their control*" of which they were "*the monopoly creators and the suppliers"*. However, Mr Collins made it clear that neither the level of fees charged for licences, nor the extent (if any) to which those fees might have generated a surplus, was central to his case. If only a nominal fee such as €100 had been charged, his argument would be *"exactly the same"*. What mattered was that local authorities had the power to charge; what fee was actually charged was not particularly relevant. Even if the fee income had exactly matched – or was indeed less than – the cost of regulating the taxi industry, it ultimately did not matter (*Deane v VHI* being cited in support of this submission). The issue by local authorities of taxi licences that were tradeable and that were in fact traded was, in itself, enough to constitute an economic activity and on that basis the local authorities were undertakings for the purpose of competition law.

52. Asked about other forms of transferable – tradeable – licences such as certain categories of intoxicating liquor licence, Mr Collins's position was that the issuing of such licences was an economic activity and did not shrink from the proposition that the issuing

authority would be an undertaking in law, even if that happened to be a court. Other forms of authorisation, such as planning permissions, were, in his submission, different from taxi licences in that there was no market for planning permissions and they were not transferable and were not tradeable commodities. The transferability of taxi licences was key.

53. While not determinative, Mr Collins suggested that it was helpful to consider whether the licensing function was, in principle, capable of being carried out by a private actor. As already mentioned, that issue had been addressed by Dr Walker in his evidence. Asked by the Court whether there was not a material difference between the purely administrative/clerical aspect of any given public function – which could, in principle, be sub-contracted in many if not most cases – and the sovereign or public power involved in that function, Mr Collins said that any suggestion that because a particular power was a public power, deriving from public authority, it fell outside the scope of competition law, was "*absolutely wrong*" and the case-law was "*crystal clear*" that such was not the case. As will be apparent, that proposition goes much too far in my view. What the jurisprudence does establish is that the fact that an activity has a public interest dimension and/or is carried out by a body the subject of public service obligations does not exclude the application of competition laws. But the exercise of *public power* – power that characteristically vests exclusively in the State – is in a different category. In any event, Mr Collins submitted, it was not simply the administrative function that was capable of being sub-contracted here: virtually the entirety of the licensing function could be contracted out. The only thing that the private operator would not have was the "*originating power*" which originated with a public authority. But that, he said, was

not an answer to the question of whether, in exercising the licensing function, local authorities, were undertakings. Similarly, the fact that the licensing function was intended to operate in the public interest was not determinative. It could operate in the public interest equally whether controlled by the elected members of licensing authorities or by a private body contracted by those authorities.

54. This issue arose again in the course of Mr Collins' reply. Asked by the Court whether somebody other than the State could licence public service vehicles in the State, Mr Collins accepted that the power to grant such a licence was "*quintessentially a power [of] the State*". Aspects of the licensing function were, he acknowledged, "*purely regulatory"*. The Court then asked how, having regard to what was said by the ECJ in Case C-138/11 *Compass-Datenbank GmbH v Republik Osterreich*, the regulatory aspects of the licensing public function of issuing could be disentangled from the economic activity relied on by the Appellants. In response, Mr Collins argued that selling the licences, a tradeable commodity, into the market was an economic activity which sat together and was intertwined with the regulatory function. When local authorities issued tradeable licences "*in their public interest mode*", they also carried out an economic activity. I will return to Case C-138/11 *Compass-Datenbank GmbH v Republik Osterreich* below.

55. In the course of his submissions, Mr Collins referred to a number of authorities, including the decisions of the Court of Justice in Case 41/90 *Hofner & Elser*, and Case C-364/92 *Eurocontrol* and the Opinion of Advocate General Jacobs in Case C-67/96, Joined Cases C-115/97, C-116/97 and C-117/97 and Case C-219/97 *Albany*, as well as

the Court of Justice's decision in Case C-82/01 P *Aeroports de Paris*, as well as a number of Irish decisions, *Carrigaline Community Television*, *Nurendale Limited t/a Panda Waste Services* [2009] IEHC 588, [2013] 3 IR 417 ("*Nurendale*") and *Island Ferries.* All of these are discussed further below.

56. The Court also heard briefly from Mr McGarry SC (for the State) and, at greater length, from Mr Bradley SC (for Dublin City Council) and Mr Murphy SC (for Clare County Council) on the competition law claims. Understandably, the State largely left the "*undertaking*" issue to the Councils. Again understandably, the Councils rested to a significant extent on the analysis and conclusions of the Judge. For Dublin City Council, Mr Bradley drew attention to evidence given by Mr McCarthy in the High Court to the effect that, from an economic perspective, the economic issue at stake was whether the regulators had made good or bad regulatory decisions, not whether they had breached competition law. In Mr McCarthy's view, making bad decisions about market access and capacity which damages consumers made them bad regulators rather than undertakings which had abused a dominant position. The test, Mr Bradley emphasised, was not whether the licences issued by the City Council were tradeable. Any secondary market on which licences were traded had not been created by the City Council. The test was whether, in issuing licences, the Council was acting in exercise of its public powers. That was the test applied in *Carrigaline Community Television.* The City Council did not participate in the taxi market which Mr Bradley suggested was an important consideration, citing Case C-205/03 *FENIN*. As for the argument that there was an upstream market in which the City Council was a participant, Mr Bradley said that the upstream/downstream market construct was inconsistent with the

applicable test. If the Appellants' logic was accepted, then Eurocontrol ought to have been held to be an undertaking given that it provided a valuable input – air traffic control services – that was essential for airlines if they wished to provide commercial aviation services. The reality was that Eurocontrol was acting as a regulator, exercising public powers in the public interest and that was also the case with the City Council *qua* taxi licensing authority.

57. For Clare County Council Mr Murphy SC drew attention to Cooke J's analysis of the scope of application of Article 102 TFEU and the distinction between economic and non-economic activities when engaged in by public authorities in *Lifeline Ambulance.* Section 81 of the 1961 Act and the regulations made under it created a carefully constructed statutory scheme which had as its source State power and which had as its operational focus the maintenance of a system of regulation and control of taxis in the public interest and involving multiple interested parties, including the State, the Council, the Gardaí, taxi drivers and the public. Mr Murphy brought the Court to para 38 of the ECJ's decision in *Compass-Datenbank GmbH* and to the Court's statement that, where a public authority carried on different activities, including economic activity, and that economic activity cannot be separated from the exercise of its public powers, the activities of that entity as a whole remain activities connected with the exercise of those public powers. That, he submitted, was the position here insofar as Clare County Council could be said to have been engaging in economic activity at all.

58. All of the parties, through Counsel, also addressed the issue of effect on trade (issue 7 above). However, in light of my conclusion on the question of whether the Defendant

Councils were "*undertakings*", it is unnecessary for me to address that issue and accordingly I do not propose to say anything further about it.

ANALYSIS

The Authorities

59. The Court was referred to a great many authorities. Even though there was little if any real dispute as to the relevant principles, the authorities help to illustrate how those principles have developed and how they have been applied in practice and assist in identifying the factors relevant to the Court's assessment.

The Irish Cases

60. I will first consider the significant body of Irish caselaw. The decision of the Supreme Court in *Deane v VHI* should first be mentioned. The particular point at issue there was whether the VHI could be said to be "*engaged for gain*" given that its statutory purpose was not to make a profit but to provide a service in the public interest. In the High Court, Costello J held that the VHI was not engaged for gain but on appeal the Supreme Court held that the fact that the VHI was providing a service in return for a charge or payment was sufficient to constitute it as an undertaking. Notably, the VHI did not dispute that it was providing a service. That is unsurprising – private health insurance was and is clearly a service capable of being provided by private operators. That is, of course, demonstrated in a concrete way by the existence of a market in private health insurance in the State in which the VHI competes with a number of private providers.

61. The plaintiffs in *Carrigaline Community Television* relied (*inter alia*) on *Deane v VHI* so as to contend that the Minister for Communications was acting as an undertaking when issuing television retransmission licences under the Wireless Telegraphy (Television Programme Retransmission) Regulations 1989.[10] The licences were initially granted for one year, subject to a payment of £20,000, and could be renewed for a further period of 9 years, subject to payment each year of a "*renewal fee*" equivalent to 5% of the licensee's gross revenue. Thus, the plaintiffs argued, the Minister was engaged in issuing licences "*for gain."* In response, the Minister argued that his functions were of a purely administrative or regulatory character and that the performance of such functions did not constitute an activity in the course of trade even where gain resulted. Keane J accepted the Minister's argument. His analysis is relatively brief and so I shall set it out in *extenso*:

> *"The Minister, whether as an individual or as a body corporate, is an undertaking within the meaning of ss 4 and 5 of the Competition Act, if he is "engaged for gain" as that expression was interpreted by the Supreme Court in Deane v VHI. It appears from that decision that if a body such as the Minister supplies a service in return for a charge or payment, he will be 'engaged for gain' and hence be within the ambit of ss 4 and 5.*
>
> *It is also clear, however, that if the Minister in granting licences for transmission is engaged in no more than a regulatory or administrative function, then the fact that he imposes a charge for the granting of the licence does not of itself mean*

[10] SI No 30 of 1989

that he is 'engaged for gain'. The exaction of charges for licenses is a standard feature of legislation of this nature: if no such charges were levied, the taxpayers would have to fund out of their own pockets the necessary regulatory and administrative scheme as a result of the existence of which the successful applicants for licenses can expect to make profits. It is a misuse of language to describe the imposition of charges of this nature as the provision of a service in return for payment and the licensing authority as being in any meaningful sense 'engaged for gain.'

In the case of the MMDS licenses, the Minister, in addition to the initial levy of £20,000, charges an annual fee based on 5% of the turnover. This in my view does not convert him from a regulator into a person providing a service for payment. The annual charge enables the Minister on behalf of the public to recoup on a continuing basis some of the expenses incurred by his department in administering and policing the licensing regime. Whether it equates to those costs or leaves him with a surplus or a deficiency cannot affect the legal capacity in which he receives the annual levy which is solely that of a regulator and administrator. The decision of the European Court of Justice in Eurocontrol and of Hirst J in Eurocontrol are apposite in this context and fully bear out this conclusion.

As I am satisfied that the Minister is not an undertaking within the meaning of ss 4 and 5 of the Competition Act, it follows that neither the grant of the license to Cork Communications nor the letter to Mr Hayes of February 1993 was in breach

of the provisions of those sections and did not require notification to the Competition Authority under the provisions of the Act." (at 290-291)

Keane J went on to reject the argument that, if the Minister was in a dominant position, his activities were not saved by Article 90 of the Treaty (now Article 106 TFEU). The plaintiffs had argued that the Minister's action in granting exclusive licences to commercial bodies could not be regarded as one taken in the public interest for considerations of a non-economic nature. That was, in his view:

".. a wholly unsustainable argument. Whether the Minister was right or wrong in the view he took that the granting of the MMDS licenses on an exclusive basis was the best method of ensuring the widespread reception of multi-channel television and the protection and development of the cable infrastructure, it was unarguably a decision taken in what he saw as the public interest in ensuring that as many people as possible had access to the widest range of television broadcasting and that the cable infrastructure was protected and developed. The fact that others, including the Plaintiffs, disagreed with his view that these objectives could best be attained by the establishment of the MMDS system on an exclusive basis, did not make it any the less a decision taken for purely non-economic reasons in the public interest." (at 291-292)

62. In their written submissions, the Appellants indicated that they reserved the right to contend that *Carrigaline Community Television* was wrongly decided.[11] Ultimately,

[11] At para 127 and footnote 217.

however, that contention was not pressed and the Court was not invited to over-rule Keane J's decision. Rather, Mr Collins said, it did not assist one way or the other because it did not concern transferable licences. That may well be so (though in fact the 1989 Regulations did not, on their face, contain any prohibition on transfer) but the decision is, in my view, far from irrelevant. The licences at issue authorised television retransmission on a commercial basis. The licensees were undoubtedly engaging in the provision of a service for gain. The licences were an essential "*input*" for the purpose of providing that service. That is, of course, true of very many forms of statutory licence or authorisation. The licences clearly had a commercial value. Here (and this is perhaps an unusual feature of the case), the Minister did not simply impose a fee on the initial grant of the licence – he directly participated in the revenue generated by the commercial activities of the licensees over the lifetime of the licence. However, in the High Court's view, none of that altered the essentially regulatory nature of the Minister's functions or converted him "*from a regulator into a person providing a service for payment."*

63. Before leaving *Carrigaline Community Television*, I should say that I am not persuaded that subsequent High Court authority (including *Nurendale, Island Ferries* and *Medicall Ambulance*) and/or subsequent decisions of the European Courts (including *Aeroports de Paris*) cast any doubt on the decision of Keane J or undermine the validity of his analysis. The fact that, in each of those decisions, the relevant public body was held to be an undertaking is not, in itself, a ground for suggesting that *Carrigaline Community Television* was wrongly decided. As will become apparent, each of those decisions involved materially different facts, by reason of which their outcomes are not,

on any proper analysis, inconsistent with *Carrigaline Community Television*. As regards the outcome in *Carrigaline Community Television* itself, even if it could be said that, in its assessment of whether the Minister was an undertaking, the High Court might have given more weight to the fact that the Minister was not simply charging a licence fee, but was effectively requiring a share of the commercial revenue of the licensees (thus, arguably, participating in the market), revenue-sharing was not, in any event, a feature of the taxi-licensing regime at any stage.

64. In *Nurendale*, a private waste operator challenged a variation in the Waste Management Plan for the Dublin Region made by the respondent local authorities, the effect of which was that all rights to collect household waste in the Dublin area would henceforth be vested in a single operator who, at the choice of the respondents, would be either the local authority or a nominated private operator, selected after a tender process. Amongst other grounds, the applicant contended that the variation was in breach of sections 4 and/or 5 of the 2002 Act. The local authorities disputed the application of the 2002 Act to their statutory functions under the Waste Management Act 1996 relating to the making and variation of waste management plans.

65. The judgment of the High Court (McKechnie J) contains a detailed survey of the authorities, including a lengthy discussion of the Court of Justice's decision in Case 49/07 *MOTOE*. *Carrigaline Community Television* was explained as one in which the Minister was not operating in the market of television broadcast (para 57). McKechnie J extracted the following propositions from the authorities:

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

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

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

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

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

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

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

viii) where administrative power is granted to an undertaking this may, in certain circumstances, breach Articles 82 and 86(1) of the EC Treaty where such power is not the subject of restrictions, obligations, and review" [para 60]

66. Applying those principles, McKechnie J had little difficulty in concluding that the collection of household waste was an economic activity in which the local authorities were undertakings. They each provided such a service in their respective functional areas. Each imposed a charge for doing so. Not only could private operators carry on that business under market conditions, "*as a matter of fact they do."* Private operators were active in the household waste collection market and, in such circumstances, it would be "*absurd*" to suggest that the collection of household waste was not an economic activity (para 61).

67. The fact that the local authorities were "*commercially engaged"* in the household waste collection market was critical to the judge's analysis of the impugned variation. The variation sought to alter the competitive environment of that market and, in the judge's view, in circumstances where *"the regulatory acts affect the same activity, and impact on private operators on the same market where the respondents also commercially engage, the regulatory role will not preclude them from being found to be undertakings*." That, in the judge's view, was consistent with *MOTOE* and with Case

T-196/04 *Ryanair Ltd v Commission*. Otherwise, the State or other public bodies would be free "*to engage in all forms of regulatory abuses for commercial gain*" (para 62). He continued:

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

68. McKechnie J went on to consider an argument made by the local authorities to the effect that, as they were fulfilling statutory duties, the exercise of those duties could not be challenged *via* sections 4 and 5 of the 2002 Act. The local authorities also relied on the "*state defence doctrine".* McKechnie J rejected those arguments. The application of the 2002 Act would not prevent the local authorities from fulfilling their statutory obligations under the Waste Management Act 1996 having regard to the nature of those obligations, given that the Act did not oblige them to collect household waste (other than perhaps as a collector of last resort) and did not provide that only local authorities

could collect household waste (para 71). As for the state defence doctrine, McKechnie J was satisfied that the local authorities had a "*margin of manoeuvre*" such that the doctrine could have no application (para 72).

69. McKechnie J proceeded to find that the variation of the Dublin waste management plan was in breach of sections 4 and 5 of the 2002 Act. For good measure, he also found that the variation was *ultra vires* the powers conferred on the respondents by the 1996 Act and that the decision to make the variation was vitiated by bias and pre-judgment.

70. No challenge was made to the correctness of the decision in *Nurendale*. I express no view on McKechnie J's characterisation of the disputed variation as economic rather than administrative in nature, particularly given his earlier acceptance that the variation power was a regulatory function. There may be room for debate as to whether that conclusion follows from *Wouters.* There may also be room for debate as to the relevance of *MOTOE* in this context, absent any finding of cross-border effect such as to engage EU competition rules (see paras 142-144 of *Nurendale*). As will appear, Article 86 EC (now Article 106 TFEU) played a significant part in the Court of Justice's analysis in *MOTOE*.

71. Furthermore, in contrast to the position in *MOTOE* (where the licensing function entrusted to the private body was not subject to review),[12] the statutory function of varying a waste management plan vested in local authorities *was* subject to judicial

[12] *MOTOE*, at para 52, where the Court observed that the statutory rule gave the licensing function to MOTOE without "*that power being made subject by that rule to restrictions, obligations and review".*

review. That being so, the High Court's suggestion that, absent the application of the competition rules, the local authorities would be free "*to engage in all forms of regulatory abuses for commercial gain*" appears questionable, not least because the applicants in fact succeeded in their judicial review challenge to the variations at issue in *Nurendale*. But no such debate arises here in any event. Taking the judgment at its height, the local authorities were found to be undertakings in exercising their statutory power to vary the waste management plan because – and only because – the variation was intended to "*substantially reorder*" the existing market for household waste collection, a market in which those authorities were commercially engaged. But for their engagement in household waste collection, the defendant councils would not have been undertakings at all. Had the Councils been participants in the market for the provision of taxi services, it might be said to follow from *Nurendale* that in exercising their functions under the Regulations they would have been acting as undertakings. However, the Councils here did not engage in the taxi services market. They simply issued taxi licences from time to time for a fee and also exercised the function conferred on them in relation to the continuation (transfer) of existing licences, again for a fee. That, *Nurendale* suggests, was "*clearly a purely public act*" (para 52).

72. It seems clear from *Nurendale* that McKechnie J must not have considered that the fact that the variation was amenable to judicial review precluded a finding that the respondent local authorities were "*undertakings*" for the purposes of the 2002 Act and thus subject to the competition rules contained in sections 4 and 5. Given the ambit of judicial review in this jurisdiction, that is, in principle, perhaps unsurprising. Many public authorities have functions conferred on them by statute that are essentially

commercial or quasi-commercial in character and it has generally been considered that, in exercising such functions, such authorities are amenable to judicial review. Even so, as I have said, there appears to me to be room for debate as to whether, in *Nurendale* itself, more weight ought to have been given to the fact that the Councils' functions in relation to the waste management plan were public law powers, which were properly exercisable only in the public interest and which were subject to judicial review. The decision next considered – that of the Supreme Court in *Hemat v The Medical Council* [2010] IESC 24, [2010] 3 IR 615 ("*Hemat*") – suggests that these are powerful considerations in this context.

73. The issue in *Hemat* was whether the Medical Council was an "*association of undertakings*" for the purposes of section 4 of the 2002 Act. That issue arose in the context of a challenge by a medical doctor to a sanction imposed on him for breach of restrictions on advertising adopted by the Council. The plaintiff contended that such restrictions breached section 4. The High Court (McKechnie J) held as a preliminary issue that the Medical Council was not an association of undertakings. On appeal, that decision was affirmed by the Supreme Court, per Fennelly J (Murray CJ and Denham, Hardiman and Geoghegan JJ agreeing). Fennelly J referred to the "*crucially important distinction"* that the Court of Justice had drawn in the following passage from its judgment in *Cali & Figli* (at para 16 of that judgment):

> *"As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the*

exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market"

74. The essential question, in his view, was whether the particular body at issue engaged in or carried on an economic activity. If it did, the competition rules applied, even if the body was established under public law. If, on the other hand, the body performed a task or function which in its nature is that of a public body, the competition rules did not apply. Fennelly J then added an important observation:

> *"But the fact that the activities of the body have an economic effect does not alter that conclusion. That is not the test. The question is whether it is engaged in an economic activity in the ordinary sense of providing goods or services which are the normal indicia of market behaviour."* (at para 47)

75. Fennelly J went on to point out that the Court of Justice had refrained from laying down a set of rules from which it could be deduced *a priori* whether a particular body was an undertaking or an association of undertakings. The underlying principle was that the competition law rules applied to any body provided that it is engaged in economic activity. A body did not escape the application of the competition rules because it was established in public law or carried on some public functions. A body may be a hybrid, exercising some powers of a public nature, while also acting, in other respects, in protection of the economic interests of its members. That was why in Case C-309/99 *Wouters,* the Court of Justice repeatedly asked itself the combined question whether the

Bar of the Netherlands was an association of undertakings when adopting the particular regulation at issue in those proceedings. [13]

76. The Medical Council was conferred with statutory powers and functions in the public interest (here Fennelly J cited *Philips v The Medical Council* [1991] 2 IR 115 and *Kenny v The Dental Council* [2004] IEHC 105, [2009] 4 IR 321, in which the High Court had rejected the contention that the Dental Council was an association of undertakings). If the members of the Council allowed themselves to be motivated by the economic interests of the medical profession in the exercise of their functions, they would be abusing their power and acting *ultra vires* and any ruling or decision adopted for that purpose would be amenable to being quashed on judicial review (para 61). While the majority of the Council were doctors, it could not be described as a representative body of the medical profession (in *"sharp contrast*" with the respective Dutch bodies representing the medical and legal profession which were considered in Cases C-180/98 – C-184/98 *Pavlov* and in *Wouters*) (para 63). As to the nature of the impugned measure, Fennelly J acknowledged that, in the ordinary way, restrictions on advertising fall within the economic field but, in his view, the advertising restrictions imposed by the Council were "*predominantly motivated by considerations of the interests of patients which is in the public interest*" and "*only incidentally concerned with economic matters*" (para 71).

[13] The "*combined question*" that arises in these appeals would thus be whether local authorities are undertakings when exercising their functions under the 1961 Act, and the regulations made from time to time under section 81 of the 1961 Act, in relation to the issue and transfer of taxi licences.

77. The emphasis placed by Fennelly J on the fact that the functions of the Medical Council could only be performed in the public interest and that its decisions were amenable to judicial review if those functions were exercised other than in the public interest clearly has a resonance here.

78. The decisions of the High Court (Cooke J) in *Medicall Ambulance* and *Lifeline Ambulance* can conveniently be discussed together, given that they both address the application of the competition rules to the HSE in relation to different aspects of the provision of ambulance services in the State.

79. In *Medicall Ambulance*, the applicant (the operator of a fleet of private ambulances) challenged a "*booking protocol*" adopted by the HSE which changed the regime for the allocation of calls for ambulance transfer of private patients (over which it could exercise control by virtue of being the operator of the control centres through which requests for services were directed) and defined standards of performance for private ambulances, asserting that the protocol was *ultra vires* the HSE and also that it was an abuse by the HSE of its dominant position in the market for the provision of ambulance services in the State, in breach of section 5 of the 2002 Act. The issue of whether the HSE was an undertaking was heard as a preliminary issue. Cooke J referred to many of the authorities opened to the Court on this appeal. It was, he said, clear that the taking of a payment or the making of a charge for a service did not of itself necessarily characterise an entity as an economic operator and therefore an undertaking (the HSE provided an ambulance service to private patients for which it imposed a cost-based charge, usually payable by the patient's private health insurer). Where a public body

(including a government minister) acts exclusively in a regulatory capacity or discharges a public interest function, its imposition of a fee or other charge "*does not convert the conduct or act into an economic activity as such*" (para 20). Cooke J cited *Carrigaline Community Television* and *Eurocontrol* as illustrations of that principle. However, it was also clear that a public authority primarily established and principally engaged in activities of a public interest and non-economic character, may nonetheless fall to be treated as an undertaking if and when it engaged in economic activity. The activities carried on by a public authority may therefore require to be analysed separately (para 21, citing *MOTOE*). Thus, "*neither the objectives for which a body or organisation has been established nor the basis of its financing, nor the fact that it carries on predominantly public interest and non-economic activities prevents the entity being classified as an undertaking for other activities even when those activities may be merely incidental to its main area of operation"* (para 22). Cooke J then referred to the private operator test in terms which merit citation in full:

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

which is the subject matter of the allegation. <u>What is the entity in question actually doing when it engages in the conduct sought to be impugned</u>?" (my emphasis)

80. After a careful analysis of the facts, Cooke J concluded that the particular activity challenged by the applicant – the imposition of a "*booking protocol"* which involved a new way of allocating private ambulance calls as between private operators and as between those operators and the HSE's National Ambulance Service – that had the necessary indices of an economic activity to make the HSE an undertaking. Firstly, there clearly was a market in the State for the provision of ambulance services to private patients and such services were being provided by private operators, who were in competition with one another and, to a degree, with the National Ambulance Service. Secondly, such services were clearly provided "*for gain".* Private operators provided such services on a commercial basis. The National Ambulance Service also charged for such services and the fact that its charges were not set at a profit-generating level was not relevant. Thirdly, Cooke J noted that the National Ambulance Service also provided ambulance services in the "*events market*" (for concerts, sporting events and other such large scale events). Although the disputed booking protocol had no application to the events market, the fact that the HSE could make use of its ambulance fleet in that way was, in the judge's view, a relevant consideration when assessing whether it was an undertaking. That appraisal was, in Cooke J's view, consistent with the approach taken by the Court of Justice in Case C-475/99 *Ambulanz Glockner*. As for the HSE's argument that the imposition of the booking protocol was exclusively an act in its regulatory capacity in laying down standards for ambulance services, the High Court

noted that the HSE did not appear to have any statutory function or responsibility in that area. Even if it had, such a function would clearly be capable of being discharged independently of the day-to-day management of call centres and the allocation of transfer requests to particular operators. Finally, the fact that the bulk of the ambulance services provided by the National Ambulance Service involved the transfer of private patients for which no charge was payable did not affect the issue of whether the HSE was "*engaged for gain*".

81. The High Court's conclusion in *Medicall Ambulance* appears entirely unsurprising on the facts. The HSE, through its National Ambulance Service, provided ambulance services to private patients, in competition with private operators. It had, as a matter of law, no relevant regulatory functions and so its intervention in the market could not be characterised as regulatory in character. But any regulatory functions that it might have had would not have encompassed its intervention in the allocation of calls between competing providers (including itself) in any event.

82. The transfer of <u>public</u> patients was at issue in *Lifeline Ambulance*. The plaintiff had provided ambulance services to the HSE for many years, pursuant to successive framework agreements, including for inter-hospital critical care transfer of public patients and emergency response services (emergency response services were provided without regard to whether the patient was a public or private patient). In 2011, the HSE issued an invitation for a new framework agreement which eliminated emergency response services altogether and which covered non-emergency patient transfer services and only "*in very exceptional services*" any inter-hospital critical care services.

The changes would have a significant adverse impact on the plaintiff. It brought proceedings asserting that the HSE was in a dominant position in the market for the purchase of ambulance services to supplement the services of the National Ambulance Service and that it was obliged to refrain from conduct that had the object or effect of diminishing or eliminating the extent of the plaintiff's participation in that market. The High Court set down a series of preliminary issues for trial, including whether the HSE operated as an undertaking in the market for the provision of ambulance services for inter-hospital transfer of patients and for emergency services. Issues relating to market definition were also set down.

83. Noting the plaintiff's reliance on his judgment in *Medicall Ambulance,* Cooke J pointed out two important differences between the two cases. In *Medicall Ambulance,* the court had been primarily concerned with the role of the National Ambulance Service in the provision of transport for private patients, areas where "*private operators also provided, or were interested in providing, services on a competing, commercial basis*" (para 17). Secondly, *Medicall Ambulance* had involved the HSE as *provider* of such services, whereas the present case involved the HSE as purchaser of private ambulance services to supplement its publicly provided service. The High Court then discussed a number of Court of Justice decisions, including *Eurocontrol*, *Ambulanz Glockner*, *MOTOE* and *FENIN*, as well as the decision of the UK Competition Appeal Tribunal in *Bettercare Group Ltd v Director General of Fair Trading* [2002] CAT 7, [2002] Competition Appeal Reports 299. Applying the principles he took from those authorities, the court concluded that the HSE was not an undertaking in relation to the purchase of ambulance services for public patients. To qualify as such an undertaking,

the HSE would have to be engaged for gain in an activity on the supply side, that is as the provider for gain of some service. But the HSE provided ambulance services to public patients, including emergency services, without charge. It was not, therefore, involved in an economic activity on the supply side in relation to public patients and its activity as purchaser accordingly did not make it an undertaking for the purpose of the 2002 Act.

84. Cooke J's analysis of *Eurocontrol* should be noticed. The judgment, in his view, illustrated that, irrespective of how a public authority is established or financed or whatever its legal status, it can in principle be an undertaking if it is engaged in an economic activity. On the other hand, he observed, "*it also illustrates the fact that such a public undertaking will nevertheless be excluded from the competition rules even where it is engaged in the provision of a service which could conceivably be carried out by private undertakings and even where it makes a charge for those services, provided that it is performing those services exclusively in exercise of its powers as a public authority with the objective of securing a benefit in the public interest"* (para 32; my emphasis).

85. The different outcomes in *Lifeline Ambulance* and *Medicall Ambulance* emphasise the importance of engaging in a close analysis of the nature of the functions which the body actually performs.

86. The last Irish decision to which it is necessary to refer is *Island Ferries v Minister for Communications.* Island Ferries operated a ferry service between Galway and the Aran

Islands, operating from Rossaveel harbour. Rossaveel was a fishery harbour centre under the Fishery Harbour Centres Act 1968. In 2003, the Minister for Communications, Marine and Natural Resources made an order under the 1968 Act fixing charges for the use of fishery harbour centres, including Rossaveel. The order altered the existing charges regime in a number of ways significantly impacting on Island Ferries and it brought proceedings challenging the order as being *ultra vires* the Minister and as a breach of section 5 of the 2002 Act. In separate proceedings, brought on similar grounds, Island Ferries challenged bye-laws made by Galway County Council fixing the charges for use of Kilronan Harbour on Inis Mor.

87. Both proceedings were heard in the High Court by Cooke J. (as is all too apparent from this judgment, the late Cooke J made an immense contribution to competition law jurisprudence in this jurisdiction, quite apart from his very significant contribution as a judge of the Court of First Instance). As regards the challenge to the Rossaveel order, the judge held that it was *ultra vires* the powers of the Minister under the 1968 Act because the Oireachtas had not contemplated that those powers might be exercised to make an order having the manifestly severe and unreasonably oppressive impact that the 2003 order had on Island Ferries particularly (para 55). The judgment of Cooke J sets out in detail the features of the 2003 order, and its very particular impact on Island Ferries, that led him to that conclusion, including that the Minister was not fixing a fair or reasonable commercial price for the use of the harbour but was instead seeking to generate extra revenue to cover the cost of managing and operating all of the fishery harbour centres (paras 59-62). That conclusion was sufficient to resolve the plaintiff's essential grievance but Cooke J went on to address the competition law claim given the

possibility of an appeal to the Supreme Court which might result in the validity of the 2003 order being upheld.

88. In Cooke J's view, the Minister was clearly an undertaking for the purposes of the 2002 Act. The Minister *"operates a facility – the harbour – with commercial activities and purposes and does so by allowing a variety of operators providing commercial services (including fishing vessels, fish processors, suppliers of various services and materials, ferry operators, car parking and so on) in return for the various dues, tolls and other charges imposed."* That the Minister was not required to operate the harbour on a profitable basis was irrelevant once the facilities and services were provided for gain (para 75). Because of its location and other characteristics including water depth, the harbour was "*effectively an essential facility*" for any operator wishing to provide sea transport services between the mainland and the islands (para 76). The Minister thus occupied a dominant position in the market for the provision of facilities for the operation of such services, and in particular passenger services, to the Aran Islands and the Minister's position was not materially different from that of other comparable harbour authorities or harbour service operators (para 77). The imposition of charges which were not based on the value or cost of the service provided but which were rather intended to exploit passenger traffic as a new source of revenue amounted to an abuse of that position (paras 80-81).

89. In the second action (*Island Ferries Teoranta v Galway County Council* [2013] IEHC 587) the plaintiff's claim failed. The bye-laws did not go beyond permissible bounds and, even though it was "*probably correct*" that Galway County Council was an

undertaking and that Kilronan harbour was an "*essential facility"* (in the sense in which that term had been considered in the Article 102 TFEU jurisprudence), the conduct of the Council in adopting the impugned bye-law could not constitute an abuse of any dominant position it held (paras 77 – 78).

90. Both judgments were appealed to the Supreme Court and were heard and determined together. Neither appeal succeeded. Charleton J gave the only judgment (Denham CJ, O' Donnell, McKechnie and Dunne JJ agreeing). His judgment notes that it had been conceded that Galway County Council and the Minister were undertakings and were in a position of dominance in the relevant market. Accordingly, there was no further discussion of that issue. However, the judgment contains an illuminating discussion of the proper parameters of a power to charge when conferred by the Oireachtas on a subordinate authority or body.

91. Cooke J's conclusion that the Minister was an undertaking again appears entirely unsurprising. The harbour was a centre of commercial activity. Although the Minister was a public authority, and although the power to fix charges was conferred by statute, the fixing of charges for access to and use of a commercial harbour does not inherently involve the exercise of State authority. Ports may be – and are in fact – owned and/or operated by private operators who impose charges for access and use. Indeed, some of the earliest of the "*essential facilities"* decisions made by the European Commission involved the port of Holyhead, which was (and continues to be) operated by a private operator: *Faull & Nikpay*, paras 4.602 – 4.605.

92. *Island Ferries* is a further illustration of statutory functions being subject to judicial review and also subject to the competition rules in the 2002 Act.

Caselaw of the EU Courts

93. There is a large volume of authority from the EU Courts. I shall focus on those cases on which the parties placed particular reliance in their submissions.

94. The decision of the Court of Justice in Case C-41/90, *Hofner & Elser* provides a useful starting point. In a claim for outstanding fees by recruitment consultants who procured an executive candidate for a private employer, a question arose as to whether the contract was enforceable, having regard to the fact that, under German law (the AFG), a federal agency (the Federal Employment Office) was effectively given a monopoly in employment procurement. The German court hearing the contractual claim referred a number of questions to the Court of Justice, including whether the Federal Employment Office was in a dominant position. That in turn raised the issue of whether the Office was an undertaking within the meaning of Articles 85 and 86 of the Treaty of Rome (Articles 105 and 106 TFEU). The Court had little difficulty in holding that it was. Even if employment procurement activities were normally entrusted to public agencies, that could not affect the economic nature of such activities. Employment procurement, particularly executive recruitment, had not always been and was not necessarily carried out by public entities (para 22). In reality, as Fennelly J observed in *Hemat*, "*it was quite obvious that employment procurement was an economic activity*"

(para 43). In my view, the taxi licensing activities of the Councils here bear no resemblance to the employment procurement activities at issue in *Hofner & Elser.*

95. As we have seen, the Court of Justice's decision in *Eurocontrol* has frequently been cited by the courts here. The issue there was whether Eurocontrol, an international organisation established in 1960 and whose function it was (*inter alia*) to establish and collect the route charges levied on users of air space within Europe. Eurocontrol also provided air traffic control over the Benelux countries and northern Germany (and was required to do so for the benefit of all aircraft, whether they had paid the route charge or not). It was financed by contributions from Contracting States and did not retain the charges collected by it. Eurocontrol did not fix the level of route charges payable; rather it applied a common formula advised by the International Civil Aviation Organisation (ICAO), applying a *"rate per unit*" fixed by individual Contracting States. SAT (which had been sued in Belgium for unpaid route charges) asserted that the activities of Eurocontrol as a whole constituted economic activities, including its air traffic control activities which, according to SAT, could be carried on by private undertakings. In the alternative, SAT argued that the collection of route charges was an economic activity.

96. The Court of Justice had previously considered the status of Eurocontrol in the context of Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Case 29/76 *LTU v Eurocontrol*; Joined Cases 9/77 and 10/77 *Bavaria Fluggesellschaft v Eurocontrol*) and those decisions indicated that "*Eurocontrol must, in collecting the charges, be regarded as public authority acting in the exercise of its powers*" (para 16). It was also relevant that Eurocontrol did not

control the amount of the charges. "*Taken as a whole*", the Court found that "*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*" and were not of an economic nature such as to justify the application of the Treaty rules of competition (para 30).

97. It seems to me that the facts of *Eurocontrol* are materially different to the facts here and, in consequence, the decision is of limited assistance.

98. *Cali & Figli* is arguably more relevant. A private body, SERG, was entrusted (in the form of an exclusive concession) with the provision of a compulsory surveillance and rapid intervention service intended to protect against oil pollution at the Port of Genoa. SERG was authorised to apply a system of tariffs approved by the Port Authority. Cali was invoiced by SERG in respect of anti-pollution surveillance services which it had carried out on Cali's behalf which Cali refused to discharge. The Tribunale di Genova referred a number of questions directed to the application of the competition rules to SERG. In that context, the Court first addressed whether the activity carried out by SERG fell within the scope of Article 86. For that purpose, a distinction had to be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial and commercial nature by offering goods or services on the market (para 16). That distinction, it will be recalled, was described as "*crucially important*" by Fennelly J in *Hemat*. Whether the State was acting directly through a body forming part of the administration or by way of a body

on which it had conferred special or exclusive rights was of no importance (para 17). What was necessary was to consider the nature of the activities carried on by the public undertaking or body on which the State had conferred special or exclusive rights (para 18).

99. In the Court's view, the anti-pollution surveillance for which SERG was responsible was a task in the public interest which formed part of the essential functions of the State as regards the protection of the maritime environment (para 22). That task was connected with the exercise of powers which were typically those of a public authority and was not of an economic nature justifying the application of the competition rules in the Treaty (para 23). The levying of a charge – which the Court noted had been approved by the public authorities - was an integral part of the activity and could not affect its legal status (para 24). Article 86 therefore did not apply and the other competition law issues referred did not arise.

100. The CJEU's decision in *Albany,* referred to by Mr Collins, involved (*inter alia*) the issue of whether a pension fund responsible for managing a supplementary scheme set up as a result of a collective agreement between the employers side and the workers side constituted an undertaking. The Court concluded that it did, emphasising that the benefits to members were dependent on investment returns, in respect of which it was, like an insurance company, subject to supervision by the insurance regulator (para 82) and that the fund was effectively in competition with insurance companies (para 84).

101. Insofar as Mr Collins relied on *Albany,* Mr Collins did not suggest that it involved facts comparable to the facts here. Rather, he relied on the discussion of general principle in the Opinion of Advocate General Jacobs. At para 311 of his Opinion, the Advocate General noted that the Court had generally adopted a functional approach to the issue of whether a body was an undertaking subject to the competition rules. It followed from that functional approach (so the Advocate General continued at para 312) that some recurrent arguments had been rejected as irrelevant by the Court. Firstly, neither the legal status of the entity nor the way it was financed was significant. Secondly, the non-profit making character of an entity, or the fact that it pursued non-economic objectives was in principle irrelevant. Thirdly, the fact that certain entities had been entrusted by the State with certain tasks in the public interest did not mean that they were not undertakings, since Article 90 of the Treaty (now Article 106 TFEU) would then be meaningless. Thus the competition rules applied to the activities of public telecommunication providers, public service broadcasters and so on. Finally, the mere fact that certain activities are normally entrusted to public agencies did not suffice to shelter those activities from the competition rules. *Hofner & Elser* was cited as authority for that latter proposition.

102. Advocate General Jacobs' analysis was not the subject of any dispute. I note that, at para 314 of his Opinion, he identified two situations in which *"an entity's activities may be sheltered from the applicability of the competition rules"*. Again, the Advocate General provides a useful synthesis of the caselaw. Firstly, competition rules are not applicable to "*activities in the exercise of official authority*" or emanations of the State "*acting in their capacity as public authorities*". That was so whether the State exercised

its authority directly or by way of a private body on which it conferred special or exclusive rights. An entity acted in the exercise of official authority where the activity in question was "*a task in the public interest which forms part of the essential functions of the State"* and where the activity "*is connected by its nature, its aim and the rules to which it is subject with the exercise of those powers ... which are typically those of a public authority*." Secondly, it seemed to follow from *Hofner & Elser* that the competition rules did not apply if the activity in question "*has always been and is necessarily carried out by public entities*".

103. *Ambulanz Glockner* can be mentioned briefly. It concerned the application of the competition rules to medical aid organisations that, in Germany, had responsibility for the provision of ambulance services, both as regards emergency transport and ordinary patient transport (German law drew a distinction between the two). The organisations imposed a charge for their services but they were non-profit making. Ambulanz Glockner had previously held an authorisation to provide patient transport services but the authorities had refused to renew that authorisation, essentially because of objections from the medical aid organisations operating in the relevant area, who complained that they had unused capacity. The referring court raised questions as to whether the conditions in Article 90(1) had been fulfilled. It did not appear to have any doubt that the medical aid organisations were undertakings (para 16) and the issue was dealt with briefly by the Court, which stated that the activities of the organisations had not always been, and were not necessarily, carried out by such organisations or by public authorities (Ambulanz Glockner had, the Court noted, itself provided both emergency

transport and patient transport services) and consequently the provision of such services constituted an economic activity (para 20).

104. The essential issue in *Aeroports de Paris* was whether Aeroports de Paris (ADP) was subject to the competition rules in relation to the provision of aircraft catering services at Orly and Roissy-Charles-de-Gaulle airports. ADP was a public corporation with the statutory responsibility for managing those airports. In 1988, following a tender process, it chose a third-party provider, AFS, to provide all aircraft catering services at Orly (other than to Air France, which self-handled). AFS was required to pay a fee based on its turnover. A further long-term agreement was signed in 1992 under which AFS was authorized to provide airline catering services at Orly and to occupy certain buildings within the airport and to build on certain other land. Again, a commercial fee was calculated as a proportion of turnover. Subsequently, ADP granted a 25-year concession to OAT, another ground handler that was a subsidiary of Air France. The charges payable by OAT were lower than the charges payable by ATF. ATF complained to the European Commission that ADP was imposing discriminatory fees, contrary to Article 86. The Commission held that ADP had infringed Article 86 and ordered it to bring the infringement to an end. ADP then brought an action for annulment which was rejected by the Court of First Instance (now the General Court). ADP appealed to the Court of Justice. In its appeal, ADP raised a number of issues including whether it was an undertaking within the scope of Article 86.

105. The Court held that the Court of First Instance was entitled to find that the provision of airport facilities to airlines and service providers, in return for a fee freely fixed by

ADP, constituted an economic activity (para 78). It referred, with evident approval, to the distinction that the Court of First Instance had drawn between the purely administrative/supervisory activities of ADP on the one and, on the other hand, the management and operation of the Paris airports, which were remunerated by commercial fees varying according to turnover (para 76). Management of the airport infrastructure could not be classified as a supervisory activity nor could it be concluded that relations with suppliers of ground handling services fell within the exercise by ADP of its official powers as a public authority or that those relations were not separable from ADP's activities in the exercise of such powers (para 77). The Court of First Instance had also been right to point out that the fact that an activity may be exercised by a private undertaking amounted to further evidence that the activity in question could be described as a business activity. The challenge to the finding that ADP was an undertaking was therefore rejected (as was the remainder of ADP's appeal)

106. On the facts, the conclusion that ADP was an undertaking appears inevitable. Airports may be - and in fact frequently are - privately owned and operated. The operational management of airport infrastructure is not inherently an exercise of public authority, any more than is the operational management of fishing harbours. [14]

107. *FENIN*, a decision of the Grand Chamber, was concerned with whether the public bodies which ran the Spanish national health system (the Sistema Nacional de Salud or

[14] That is not to say that aspects of infrastructure management may not involve the exercise of public/supervisory functions: see the discussion of Member State practice in this area in Roth et al, *Bellamy & Child European Community Law of Competition* (8th ed, 2018) at 2.019.

SNS) were undertakings in respect of the purchase by them of medical goods and equipment. FENIN was an association of undertakings which sold such goods and equipment (sales to the SNS bodies represented more than 80% of the turnover of those undertakings). FENIN had submitted a complaint to the European Commission alleging systematic delays in payment by the SNS bodies which, in its view, constituted an abuse of a dominant position within the meaning of Article 82 EC (now Article 103 TFEU). The Commission dismissed the complaint on the basis, firstly, that the SNS bodies did not act as undertakings where they participate in the management of the public health service and, secondly, their capacity as purchasers could not be dissociated from the use made of the medical goods and equipment following their purchase. The Court of First Instance upheld the Commission's analysis and conclusions. FENIN's appeal to the Court of Justice was also unsuccessful. In the Court's view, the Court of First Instance had "*rightly deduced .. 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."* As we have seen, *FENIN* was one of the authorities relied on by Cooke J in *Lifeline Ambulance.*

108. Advocate General Maduro's Opinion in *FENIN* is also worthy of note (and, it will be recalled, was referred by the Judge in his Judgment). He noted that the use of a comparative criterion dated from the judgment in *Hofner & Elser*, referring to the Court's statement (cited above) that employment procurement had not always been, and was not necessarily, carried out by public entities. He also referred in this context to the Opinion of Advocate General Tesauro in Joined cases C-159/91 and C-160/91 *Poucet and Pistre* and to the Court's judgment in *Ambulanz Glockner*. Where, however,

there was no competitive market, the application of the comparative criterion became more difficult. In order to ensure that the absence of effective competition on a market did not lead to its automatic exclusion from the scope of competition law, the comparative criterion was extended to include any activity *capable* of being carried out by a profit-making organisation. However, if applied literally, that would enable any activity to be included within the scope of competition law because *"[a]lmost all activities are capable of being carried on by private operators"*. There was, he noted, nothing in theory to prevent the defence of a State being contracted out (para 12). The caselaw had therefore developed a second criterion of participation in a market or the carrying on of an activity in a market context. It was not, in his view, "*the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions",* those conditions being "*distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with solidarity*". That approach allowed it to be determined whether a market exists or not, even if the legislation in force prevented genuine competition emerging on that market (para 13).

109. AG Maduro went on to consider the case-law where the Court had classified certain activities as non-economic. The Court looked at the nature, the aim and the rules which govern an activity. Having noted some of the activities which had been considered to form part of the essential functions of the State, he observed that *"[m]ore generally, all cases which involve the exercise of official authority for the purpose of regulating the market and not with a view to participating in it fall outside the scope of competition law*" (para 15). Later in his Opinion, AG Maduro observed that, in seeking to determine

whether an activity carried on by the State or a State entity was of an economic nature, the Court was entering "*dangerous territory*" since it had to balance "*the need to protect undistorted competition on the common market and respect for the powers of the Member States*." The power of the State in the political sphere was subject to democratic control. A different control – the competition rules – was imposed on economic operators acting on a market. But there was no justification, where the State was acting as an economic operator, for relieving it of all control (para 26).

110. *MOTOE* was another Grand Chamber decision. MOTOE was a non-profit making association governed by private law whose object was the organisation of motorcycling competitions in Greece. It sought authorisation from the competent minister to organise a particular programme of motorcycling competitions. In accordance with Article 49 of the Greek Road Traffic Code, the programme was sent to Automobile and Touring Club of Greece (ELPA) for its consent, which was a statutory precondition to authorisation. ELPA was the International Motorcycling Federation (FIM) representative in Greece. ELPA was a non-profit body which was also involved in the organisation of motorcycling competitions (which it could undertake without having to obtain any third party authorisation) and, for the purpose of exploiting those events commercially, entered into sponsorship, advertising and insurance contracts (para 23). ELPA did not provide its consent and MOTOE challenged Article 49 *inter alia* on the basis that it was contrary to Articles 82 and 86 EC as it enabled ELPA, which itself organised motorcycle competitions, to impose a monopoly in that field and to abuse its position. The Greek court made a reference to the Court of Justice directed to whether the

competition rules applied to ELPA and, if so, whether Article 49 of the Greek Road Traffic Code was compatible with those rules.

111. The Court agreed with the Advocate General (AG Kokott) that the fact that, for the exercise of part of its activities, an entity was vested with public powers, did not, in itself, prevent it from being classified as an undertaking for the purposes of competition law in respect of the remainder of its activities. The classification as an activity falling within the exercise of public powers or as an economic activity had to be carried out separately for each activity exercised by a given entity (para 25). In the present case, that made it necessary to distinguish between the participation of an entity such as ELPA in the decision-making process of the public authorities from the economic activities engaged in by such an entity, such as the organisation and commercial exploitation of motorcycling events. The power of such an entity to give its consent to applications for authorisation of those events did not prevent it being considered an undertaking so far as its economic activities were concerned (para 26).

112. ELPA was therefore an undertaking (para 29). Having regard to the terms of Article 49 of the Greek Road Traffic Code, it had to be considered an undertaking which had been granted special rights within the meaning of Article 86(1) EC (para 43). However, (the Court once again expressly agreeing with the Advocate General), the power to grant consent to applications for authorisation to organise motorcycle events could not be classified as an economic activity (para 46). Accordingly, the ELPA could not be considered an undertaking entrusted with a service of general economic interest within the meaning of Article 86(1) EC (para 47).

113. In the Court's view, Articles 82 and 86(1) precluded a national rule such as Article 49 of the Road Traffic Code. A Member State breached the prohibitions in those provisions if the undertaking granted special or exclusive rights, merely by exercising those rights, was led to abuse its dominant provision or where such rights were liable to create a situation in which the undertaking was led to commit such abuses (para 49). In any event, those provisions were infringed where a measure imputable to a Member State gave rise to a risk of an abuse of a dominant position (para 50). The Court concluded its analysis as follows:

> *"50 A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust a legal person such as ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount de facto to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised, thereby placing that entity at an obvious advantage over its competitors (see, by analogy, Case C-202/88 France v Commission [1991] ECR I-1223, paragraph 51, and Case C-18/88 GB Inno BM [1991] ECR I-5941, paragraph 25). Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact, confirmed at the hearing before the Court, that,*

when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grant it the required authorisation.

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

In the light of the foregoing, the answer to the questions referred must be that a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review."

114. *MOTOE* is undoubtedly a significant decision. But its scope must be properly understood. The Court did not decide that the authorisation function of ELPA under the Greek Road Traffic Code was an economic activity. On the contrary, both the Court

and the Advocate General clearly held that it was not. Had that been the only activity that ELPA was engaged in, then it would not have come within Article 82 EC. It was an undertaking by reason of its activities in the organisation and commercial exploitation of motorcycling events. Article 86 EC was engaged because ELPA was an undertaking to which special rights had been granted by Greece. None of those factors have any application here in my view.

115. Finally, there is the decision of the Court of Justice in *Compass-Datenbank GmbH v Republik Osterreich.* It concerned the Firmenbuch, the Austrian equivalent of the Companies Registration Office database. Following a procurement exercise, Austria conferred rights of access to the database to a number of undertakings (referred to in the judgment as *"billing agencies*") who made the data available to customers. Payment was made for access and the billing agencies made a return by charging an additional amount to their customers. In each case, the charges were fixed by regulation. Billing agencies and their customers were subject to certain restrictions on the use and further circulation of the data.

116. Compass-Datenbank had enjoyed unfettered access to the Firmenbuch, with no restriction on the use of the data it accessed. In 2001 (after the establishment of the billing agencies) Austria issued proceedings seeking to prevent it from using the Firmenbuch data, including its storage, reproduction or transmission to third parties. A provisional order was made against the company. In separate proceedings Compass-Datenbank sought an order compelling Austria to grant it certain forms of access to the Firmenbuch database. Ultimately, it relied on competition law as the basis for that

claim, contending that Austria was an undertaking with a dominant position in the market, on the basis that the Firmenbuch database was an essential facility (para 28). An Austrian court referred a number of questions directed to whether Austria was an undertaking and to the application of the essential facilities doctrine.

117. The Court began its analysis by reciting the now familiar principles (paras 35 – 37). It went on to observe that insofar as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking. However, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remained activities connected with the exercise of public powers (para 38).[15] The Court proceeded to closely analyse the activities of Austria relating to the Firmenbuch database. The data collection activity, on the basis of a statutory obligation, fell within the exercise of public powers (para 40), as did the activity of maintaining the database and providing access to it (para 41). The charging of fees for access did not change the legal classification of the activity (para 42). Acting to protect the data by restricting or preventing re-use of the information in the database did not make Austria an undertaking either (para 47).

[15] The judgment in *Compass-Datenbank GmbH v Republik Osterreich* cited Case C-113/07 P *SELEX Sistemi* as support for this statement. So far as material, the Court of Justice in *SELEX Sistemi* (differing from the Court of First Instance) held that Eurocontrol's function of assisting national administrations in relation to the planning, specification and establishment of air traffic systems and services could not be separated from its public powers in relation to air safety. The language of para 38 has been repeated by the Court of Justice subsequently: see for instance Case C-687/17 P, *Aanbestedingskalender BV*, para 18.

Characterising the Functions at issue here

118. That the Councils here are public authorities is not, of course, in dispute. They are local authorities established and continued by successive enactments of the United Kingdom Parliament, the Oireachtas of the Irish Free State Constitution and the Oireachtas established by Bunreacht na hÉireann (most recently in the form of the Local Government Act 2001 as amended). Bunreacht na hÉireann was itself amended in 1999, by the insertion of Article 28A, which provides explicit constitutional recognition of the important role of local government in the State and which, in Article 28A.2, provides that there shall be *"such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law."*

119. Again, there is no dispute that the functions at issue here were conferred on the Councils (*qua* local authority) by law, namely the regulations made from time to time by the relevant Minister pursuant to section 82 of the 1961 Act.

120. That the Councils are public authorities, exercising functions conferred on them by law, does not, of course, exclude the possibility that, in exercising those functions, they are engaged in economic activity such that they are "*undertakings*". Again, that proposition was not in dispute in these appeals. Many public authorities established by law are, in whole or in part, engaged in the supply of goods and/or the provision of services on a

commercial basis, in areas such as transport services and infrastructure (*Aeroports de Paris, Island Ferries*), health insurance (*Deane v VHI*) and many others besides.

121. That fees were payable to the Councils on the issue, as well as on the transfer, of a taxi licence is also not a matter of dispute. But the fact that fees were payable to the Councils does not, in itself, establish that they were engaged in economic activity. Nor is that question determined by a consideration of whether the Councils' fee income was such as to generate a net surplus or whether, conversely, it was insufficient to cover the Councils' costs. That was accepted by Mr Collins in argument and, in my view, correctly so in light of the authorities. If (as the Appellants contend) the issuing of taxi licences by the Councils is properly to be regarded as involving "*the supply or distribution of goods"*, then it would seem to follow that the Councils were "*engaged for gain"* in that supply or distribution, given that they charged a fee. Surplus/profit is not a requirement. Equally, if (as the Councils contend) the issue of taxi licences is properly to be seen not as an economic activity but rather as an "*exercise of official authority*", the fact (if fact it be) that the fees received by them generated a surplus is, in itself, *nihil ad rem.*[16]

[16] That being so, it is unnecessary to consider further the evidence given in the High Court as to the income and expenditure of the Councils in relation to taxis. In particular, it is unnecessary to consider whether the figures given in evidence, and relied on in argument, as to the net surplus said to have been generated by Dublin City Council from taxi licence fee income in fact captured all of the costs of taxi regulation, including costs incurred by the Commissioner in carrying out his or her functions under the regulations (including the vetting of applications for licences, the inspection of public service vehicles and the enforcement of the regulations generally), the provision of taxi stands and so on.

122. The critical question for the resolution of the competition law appeals is whether the licensing functions of the Councils at issue here involved "*the exercise of official authority*" or, as it has also been put, whether those functions "[*fell*] *within the exercise of powers which are typically those of a public authority"* or involved *"the exercise of public powers"* or whether, to the contrary, those functions involved "*economic activities of an industrial or commercial nature by offering goods or services on the market".*

123. In my view, the essential licensing function here unquestionably involved the exercise of "*official authority*" and "*public powers*". The power to grant taxi licences was one conferred by the State, exercising its legislative power (by way of primary legislation enacted by the Oireachtas in the form of section 82 of the 1961 Act and by way of secondary legislation made by the relevant Minister in the form of the regulations made from time to time in exercise of the powers conferred by section 82). The taxi licensing regime thus created had a regulatory purpose, intended to promote and protect the public interest, not any private or commercial interest: see (*inter alia*) *Hempenstall*, *O' Dwyer v Minister for the Environment* and *Gorman*. The judicial power of the State – in the form of judicial review proceedings – was available to ensure that the powers thus conferred on local authorities were exercised for their proper purpose (illustrated in a concrete way by *Humphrey*). Only the State had the power to authorise the granting of taxi licences and to determine the conditions on which they could be granted (including the payment of fees and whether licences would be transferable). No private body or economic operator had any such power. In providing for a taxi licensing regime, the State was clearly exercising its prerogatives as an independent and

sovereign state. Indeed, Mr Collins himself acknowledged in argument that the licensing power was "*quintessentially a power of the State*" and that aspects of the licensing function were "*purely regulatory*".

124. What the Appellants now appear to contend (and this may reflect something of a refinement of the position taken by them in the High Court) is not that the taxi licensing functions of local authorities involved, *per se,* the carrying out of an economic activity by them. Rather, the Appellants say, it was the issuing of *transferable* licences that constituted economic activity, because such licences were tradeable commodities on the secondary market.

125. There are, in my view, immediate difficulties with that argument. *Compass-Datenbank GmbH v Republik Osterreich* indicates that, even where a public authority is engaged in economic activity, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by the public authority as a whole remain activities connected with the exercise of public powers. Here, it is not at all clear how the activity said by the Appellants to constitute economic activity can be separated from the functions of local authorities apparently accepted to involve the exercise of public powers. The distinction between the issuing of taxi licences *per se* (now apparently accepted by the Appellants as a regulatory function) and the issuing of *transferable* licences (said to be an economic activity) is problematic. Local authorities did not issue two categories of licence, one transferable and one not. At all material times, *all* of the taxi licences issued by local authorities were transferable. Second, and related to that, the licences were transferable not because of any decision – still less any commercially-

motivated decision – made by the issuing local authorities: licences were transferable because the Minister, exercising the powers delegated to him by the Oireachtas, decided that they should be so. The transferability of taxi licences was therefore itself an inherent feature of the regulatory regime, the result of the exercise of public powers by the Minister, as delegate of the Oireachtas.

126. Doubtless, taxi licences had a commercial value and decisions of local authorities to exercise their power to grant new licences, or to refrain from doing so, potentially had an economic effect. That was also true of the MMDS licences at issue in *Carrigaline Community Television.* That is a feature of many regulatory regimes. A myriad of regulatory decisions made by public authorities have economic impact and serve to confer commercial benefits on private economic operators (or to withhold such benefits). Many forms of regulatory authorisation have significant commercial value because they permit the grantee to engage in activity that carries with it the potential to make a profit. The authorisations that permitted waste operators to collect household waste in *Nurendale* clearly had commercial value. As in *Carrigaline Community Television*, they were necessary inputs for the purpose of providing commercial waste collection services to the householders and enhanced the profit-earning capacity (and market value) of the operators. The same is true of broadcasting licences. The commercial utilisation of land generally requires authorisation by way of planning permission (and may require another form of statutory consent also, such as a licence from the Environmental Protection Agency). In a similar way, registration as a medical practitioner under the Medical Practitioners Acts or as a solicitor under the Solicitors' Acts is a necessary input for the provision, respectively, of medical and legal services

for reward. That is, of course, true of very many forms of statutory licence or authorisation. A host of licensing/authorisation decisions can plausibly be said to have "*downstream effects*" insofar as they involve the creation of "*inputs*" that are necessary for the carrying on of *downstream* economic activity (the regulated activity that can be carried on, and only carried on, pursuant to a regulatory permission(s)). There is nothing unique or exceptional about the taxi licensing regime in that respect.

127. As Fennelly J made clear in *Hemat*, "*the fact that the activities of the body have an economic effect … is not the test."* If it were, the so-called "*public sector exception"* would shrink to vanishing point. The test is whether the body "*is engaged in an economic activity in the ordinary sense of providing goods or services which are the normal indicia of market behaviour."*

128. The fact that taxi licences were transferable (or, as the Appellants would have it, "*tradeable*") is not unique either. Many forms of intoxicating liquor licences are transferable (in the sense that they may be transferred along with licensed premises). Furthermore, certain categories of licence – including public house licences – are "*tradeable*". While a public house licence cannot be sold separately from the premises to which it attaches, the licensee may enter into an agreement with a third party whereby the licensee consents to the extinguishment of the licence, allowing for the grant of a new licence to the third party concerned: see *Cassidy on the Licensing Acts* (3rd ed; 2010) at para 7-07 and following. As of 2010, the author says, licences were achieving prices between €55,000 and €65,000, apparently depressed by the enactment of section

18 of the Intoxicating Liquor Act 2000 (*ibid*). Off-licences can be extinguished (and turned to account) in a similar way: *Op cit*, at para 8-40.

129. Mr Collins bravely suggested that licences tradeable in that way might well be characterised as "*goods*" and the courts responsible for granting such licences (public house licences are issued by the Circuit Court and off-licences (other than in relation to wine) are issued by the District Court) might therefore fall to be regarded as "*undertakings*". While that position has the virtue of consistency, it nonetheless seems wholly implausible to me. The granting of liquor licences by courts in circumstances where the court considers that the applicable criteria set down by the Oireachtas have been satisfied appears to me to be a paradigmatic example of the exercise of the "*official authority*" of the State.

130. Many other examples might be given. Prior to the abolition of the quota regime in 2015 anyone wishing to enter into commercial milk production (or to increase existing production) required a milk quota. While a quota was not a licence in any formal sense, it was nonetheless a *sine qua non* – or, in the language of economics, a necessary "*input*" – for commercial milk production. Milk quotas attached to, and generally transferred with, the land. However, they could be leased and, at least latterly, could be traded: see Regulation 20 of the European Communities (Milk Quota) Regulations 2008.[17] It is a well-known fact that there came to be a significant secondary market in milk quotas, apparently without any suggestion that those agencies responsible for

[17] SI 227/2008.

allocating quotas and/or facilitating their trade were "*undertakings*" bound by competition rules.

131. By way of further examples, a fee is payable in respect of the grant of a waste collection permit under section 34 of the Waste Management Act 1996 (as amended) and such permits are transferable in accordance with section 34B of that Act. A fee is payable in respect of the grant of a waste licence under section 40 of that Act and such licences are transferable in accordance with section 47. It may of course be said that there is no secondary market in waste licences as such, just as there is no secondary market in planning permissions or other forms of development consent, as they cannot be sold separately from the land to which they relate (though that is not true of waste collection permits). That point was indeed made by Mr Collins in argument when the issue of planning permissions was raised. But even if planning permissions (and similar authorisations) cannot be traded separately, they clearly have the effect of enhancing (perhaps very significantly) the value of a readily tradeable "*good*" – land/property - and any market transaction involving such land/property can be expected to reflect that added value. Planning permissions, and other such authorisations, have value and are, at least indirectly, tradeable, yet even so the Appellants shrank from any suggestion that the relevant planning authorities, local authorities exercising their functions under the Waste Management Act 1996 (as amended) or agencies such as the Environmental Protection Agency were "*undertakings*" whose licencing/authorisation functions were subject to the competition rules.

132. In reality, transferability *per se* is not what the Appellants rely on. The existence of a secondary market, in which licences changed hands for significant fees, is the cornerstone of their case. But the particular dynamics of the secondary market, and in particular the prices which taxi licences commanded on that market at any given time, cannot affect the issue of principle. It cannot be the case that taxi licences fall to be regarded as "*tradeable goods*", and the local authorities who issued them and facilitated their transfer are accordingly to be regarded as "*undertaking*s", on the basis of some subjective assessment of the volume of activity on the secondary market or the prices that were realised on that market. As a matter of principle, if the Appellants' arguments are correct, *any* trade in taxi licences for *any* consideration ought to be sufficient to engage the application of the competition rules.

133. The Judge, it is said, wrongly disregarded the existence of this secondary market and did not engage with the gravamen of the Appellants' case. I disagree. The Judge regarded the existence of the secondary market as fundamentally irrelevant to his assessment of the nature of the Councils' licensing functions (Judgment, para 257). I share that view. As Geoghegan J observed in *O' Dwyer v Minister for the Environment*, that secondary market was a "*side effect*" (or, as the Judge put it, "*an incidental consequence*") of the manner in which taxis were regulated. The transferability of taxi licences was mandated by (secondary) legislation. The Councils did not participate in, or profit from, the secondary market. Its sole role was to give effect to the regulations providing for transfer. It was suggested that, in some instances, local authorities fixed, or considered fixing, fees for new licences by reference to the prices being achieved on the secondary market. If so, those local authorities were going beyond what was

permitted under the regulations and, for that reason, I do not consider that any such conduct, or proposed conduct, is relevant to the assessment here. In any event, the fee paid by each of the Appellants to the Councils here was the default fee prescribed by the Minister.

134. As the Judge emphasised in this part of his analysis, the Councils never competed in the market for taxi services. Criticism was made of this observation, not because it was suggested to be incorrect but rather because it was said to be wholly irrelevant, given that the Appellants had never suggested otherwise. I do not accept that criticism. The point being addressed by the Judge at this point in his analysis is whether the secondary market was relevant to the characterisation of the licensing functions of the Councils. Had the Councils been competing in the market for taxi services – if they held taxi licences – clearly their interests in that regard might be affected by the operation of the secondary market and that, in turn, could be said to affect, or potentially affect, the manner in which they exercised their licensing functions. Variants of that argument had succeeded in *MOTOE* and *Nurendale*. In each, the exercise of regulatory functions was held to come within competition rules in circumstances where the regulator was competing on the regulated market (or an adjacent market) that created a linkage between the regulatory function and market activity that affected the characterisation of the regulatory function. There was no such linkage here and the Judge was perfectly entitled to give weight to that point.

135. As for the suggestion that a private operator could have carried out the licensing function here, I would reject that suggestion as emphatically as did the Judge. In my

view, the argument fails to get off the ground. A private operator simply would not have the power to grant a taxi licence to anyone unless authorised by the State to do so. That "*originating power*", as Mr Collins put it in argument, is not some ancillary feature – it is the *sine qua non* of any licensing regime. If a private operator were to be authorised to operate the taxi licensing regime, it would effectively be exercising public power as the delegate or agent of the State, in the same way as the private entity (SERG) carrying out environmental surveillance in the Port of Genoa in *Cali & Figli* was acting. In such a scenario, the State would have to set the "*ground rules*" as it clearly would not be constitutionally permissible for the State to simply hand over the licensing function to a private operator. That being so, even if the licensing function was capable of being delegated to a private operator, it would not be carried out under "*market conditions".* Fundamentally, the fact that public functions are capable, operationally, of being delegated to a private operator, does not alter the public complexion of those functions. As for the suggestion that private operators might operate competing licensing regimes, or might compete with the local authority in the licensing of taxis, that is, with respect, entirely implausible.

136. In my view, principle and authority both point very clearly to the conclusion that the Councils' licensing functions here involved the exercise of the "*official authority*" and *"public power*" of the State. It did not involve the Councils carrying on "*economic activities of an industrial or commercial nature by offering goods or services on the market."* It would be a distortion of language and of reality to characterise the taxi licence issued by the Council as "*goods*" offered on the market as part of a commercial or economic activity. No doubt, such licences had a commercial value to holders. That

is a common feature of regulatory authorisations. That the licences were transferable was an incident of the regulatory regime, reflecting a policy decision made by the relevant Minister as delegate of the Oireachtas. The fact that licences were traded on a secondary market does not alter the nature and purpose of the functions at issue here or indicate that those functions went beyond, or involved something more than or different to, the exercise of regulatory functions of a kind characteristic of the exercise of the State's sovereign power. The activity at issue here was a function undertaken in the public interest which was connected by its nature, its aims and the rules to which it is subject with the exercise of powers characteristic of a public authority.

137. Even if it was the case that some aspect of the licensing function might be said to involve an economic activity – and, for the reasons set out above, that is not the case here in my view – any such economic activity could not be separated from the exercise of the Council's public powers and, accordingly "*the activities exercised by [the Councils] as a whole remain activities connected with the exercise of those public powers'*": *Compass-Datenbank GmbH v Republik Osterreich*.

CONCLUSIONS

138. For the reasons set out in this judgment – the excessive length of which may, I hope, be at least partly excused by a desire to do justice to the arguments advanced with such skill and conviction by Mr Collins – I agree with the Judge's conclusion that the Councils were not undertakings, and therefore were not subject to the competition rules, in carrying out their licensing functions pursuant to the regulations made under section 82 of the 1961 Act. That suffices to dispose of the competition law appeal (including the claim against the State based on Article 106 TFEU) and it therefore is unnecessary to address the issue of cross-border effects. I express no view on that issue nor do I express any view on whether, if the Councils were undertakings, they were in a dominant position or whether, if so, the manner in which they performed their functions involved any abuse of that dominant position.

139. I would therefore dismiss the Appellants' appeals on their competition law claims and affirm the order of the High Court dismissing those claims.

140. As regards the remainder of the appeals brought by the Appellants, as well as the appeal of Mr Malone, I have read the judgment of Costello J and for the reasons set out in her judgment, with which I agree, I agree that the appeals should be dismissed.

Costello and Haughton JJ agree with this judgment and with the order proposed.