IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Case No. 1006/2/1/01

New Court
Carey Street
London WC2A 2JT

26 March 2002

Before:

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

Sitting as a tribunal in Northern Ireland

BETWEEN:

BETTERCARE GROUP LIMITED

Applicant

supported by

THE REGISTERED HOMES CONFEDERATION OF NORTHERN IRELAND LIMITED

BEDFORDSHIRE CARE GROUP

Interveners

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

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

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

Heard at the Royal Courts of Justice, Belfast, on 5 February 2002.

JUDGMENT (Admissibility)

1. This judgment deals with a preliminary issue, namely whether, in rejecting a complaint made to him by Bettercare Group Limited ("Bettercare"), the Director General of Fair Trading ("the Director") has taken a decision that is appealable to this Tribunal under section 47 of the Competition Act 1998. The answer to that question determines whether the Tribunal has any jurisdiction to hear the appeal under section 47 which Bettercare lodged at the Tribunal's registry on 21 November 2001.

Background

2. The Competition Act 1998 ("the Act") came into force on 1 March 2000. Part I of the Act introduces into the law of the United Kingdom two prohibitions, known as the Chapter I and Chapter II prohibitions respectively, which are modelled on Articles 81 and 82 of the EC Treaty.

3. Section 2 of the Act imposes the Chapter I prohibition. Subject to various exclusions and exemptions, section 2(1) provides that "agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited ..."

4. Section 18 of the Act imposes the Chapter II prohibition. Subject to certain excluded cases, section 18(1) provides that "any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom".

5. The effect of section 60 of the Act is that, broadly speaking, questions arising under Part I of the Act in relation to competition within the United Kingdom are to be dealt with, so far as possible, and "having regard to any relevant differences", in a manner consistent with Community Law: see section 60(1) and (2).

6. Under Chapter III of the Act the Director is given powers to investigate and enforce the prohibitions of Chapters I and II. These include powers to conduct investigations (section 25), obtain documents and information (section 26), and enter premises with or without a warrant (sections 27 to 29). The Director may also make directions with a view to bringing infringements of the Chapter I or Chapter II prohibitions to an end (sections 32 to 34), adopt interim measures (section 35), and impose penalties (section 36). Before taking such decisions, he must give the persons concerned an opportunity to be heard under section 31. Certain

agreements may be notified to the Director with a view to obtaining guidance as to whether the Chapter I prohibition is infringed (section 13), or a decision that the Chapter I prohibition is not infringed (section 14(1) and (2)), or an individual exemption from the Chapter I prohibition (section 14(3), read with sections 4 and 9). Similarly conduct may be notified to the Director by a person who thinks his conduct may infringe the Chapter II prohibition (section 20), with a view to obtaining guidance as to whether his conduct infringes the Chapter II prohibition (section 21) or a decision as to whether the Chapter II prohibition is infringed (section 22).

7. The various procedures to be followed by the Director are governed by rules made by the Director under section 51 of the Act and approved by the Secretary of State: see The Competition Act 1998 (Director's Rules) Order 2000, SI 2000 no. 293 ("the Director's Rules").

8. We are told that the Director receives a large number of complaints by third parties alleging infringements of the Chapter I or Chapter II prohibitions. Such complaints are an important source of information to the Director and in some cases lead him to exercise his powers of investigation.

9. Bettercare is engaged in the provision of nursing home and residential care services in Northern Ireland. Bettercare has two facilities in the Shankhill area of Belfast, the Glencairn Care Centre and the Tennent Street Care Centre, which are registered with the Eastern Health and Social Services Board. The North and West Belfast Health and Social Services Trust ("North & West") purchases from Bettercare nursing care services and accommodation at those two centres. According to Bettercare, North & West purchases the vast majority of the services provided by the two centres.

10. On 23 November 2000 the Managing Director of Bettercare wrote to the Office of Fair Trading complaining, in effect, that North & West was abusing its dominant position as the sole purchaser of care services from Bettercare by offering unreasonably low contract prices and unfair terms.

11. Correspondence then passed between the Director's officials and Bettercare, and later Bettercare's solicitors, L'Estrange & Brett, which we set out in more detail below. The upshot of that correspondence was that by letters of 25 July 2001, 21 September 2001 and 2 November 2001, the Director's officials declined to take Bettercare's complaint any further. As appears from the correspondence set out below, the essential reason given was that North & West was not acting as "an undertaking" within the meaning of section 18(1) of the Act when purchasing nursing care services and accommodation from Bettercare.

12. By an application dated 21 November 2001 Bettercare appealed to this Tribunal. Notice of the appeal was published in the London, Edinburgh and Belfast Gazettes on 30 November 2001 and also on the Tribunal's website at www.competition-commission.org.uk.

13. The provisions governing appeals to this Tribunal are set out in sections 46 to 48 of the Act.

14. Section 46 provides so far as relevant:

> "**46.**-(1) Any party to an agreement in respect of which the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the Director-
>
> (a) as to whether the Chapter I prohibition has been infringed,
> (b) as to whether the Chapter II prohibition has been infringed,
> (c) as to whether to grant an individual exemption,
> (d) in respect of an individual exemption-
> (i) as to whether to impose any condition or obligation under section 4(3)(a) or 5(1)(c),
> (ii) where such a condition or obligation has been imposed, as to the condition or obligation,
> (iii) as to the period fixed under section 4(3)(b), or
> (iv) as to the date fixed under section 4(5),
> (e) as to-
> (i) whether to extend the period for which an individual exemption has effect, or
> (ii) the period of any such extension,
> (f) cancelling an exemption,
> (g) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,
> (h) withdrawing or varying any of the decisions in paragraphs (a) to (f) following an application under section 47(1),
>
> and includes a direction given under section 32, 33 or 35 and such other decision as may be prescribed.
> ..."

15. Section 47 of the Act provides:

> "**47.**-(1) A person who does not fall within section 46(1) or (2) may apply to the Director asking him to withdraw or vary a decision ("the relevant decision") falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed.
>
> (2) the application must-
>
> (a) be made in writing, within such period as the Director may specify in rules under section 51; and
> (b) give the applicant's reasons for considering that the relevant decision should be withdrawn or (as the case may be) varied.

(3) If the Director decides-

(a) that the applicant does not have a sufficient interest in the relevant decision,

(b) that, in the case of an applicant claiming to represent persons who have such an interest, the applicant does not represent such persons, or

(c) that the persons represented by the applicant do not have such an interest,

he must notify the applicant of his decision.

(4) If the Director, having considered the application, decides that it does not show sufficient reason why he should withdraw or vary the relevant decision, he must notify the applicant of his decision.

(5) Otherwise, the Director must deal with the application in accordance with such procedure as may be specified in rules under section 51.

(6) The applicant may appeal to the Competition Commission against a decision of the Director notified under subsection (3) or (4).

(7) The making of an application does not suspend the effect of the relevant decision."

16. By section 48(1) any appeal made to the Competition Commission under section 46 or 47 is to be determined by an appeal tribunal established in accordance with Part III of Schedule 7 of the Act, that is to say by this Tribunal. The Tribunal's powers on appeal are set out in Part I of Schedule 8 of the Act, at paragraph 3. The procedure before the Tribunal is governed by the Competition Commission Appeal Tribunal Rules 2000, SI 2000 no. 261, ("the Tribunal's Rules") made under Part II of Schedule 8.

17. It can immediately be seen that section 46 of the Act, set out above, is directed to appeals by the parties principally affected by a decision of the Director, that is to say

— the parties to an agreement in respect of which the Director has made a decision "as to whether the Chapter I prohibition has been infringed" (section 46(1) and (3)(a)); or

— any person in respect of whose conduct the Director has made a decision "as to whether the Chapter II prohibition has been infringed" (section 46(2) and (3)(b)).

18. On the other hand, section 47 of the Act plainly envisages appeals to the Tribunal by third parties who do not fall within section 46(1) and (2). That section entitles third parties to apply to the Director asking him

> "to withdraw or vary a decision ("the relevant decision") falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed".

19. Although the Secretary of State has prescribed a minor category of further appealable decisions (see The Competition Act 1998 (Notification of Excluded Agreements and Appealable Decisions Regulations 2000, SI 2000 no. 263) for present purposes no material decisions other

than those set out in section 46(3)(a) to (f) of the Act have been prescribed. What is said, however, by Bettercare is that, in the course of the correspondence with Bettercare, the Director made a "relevant decision" within section 46(3)(b), namely a decision "as to whether the Chapter II prohibition has been infringed", and that Bettercare effectively asked the Director to withdraw or vary that decision in compliance with section 47(1). According to Bettercare, the correspondence shows that the Director decided not to withdraw or vary the "relevant decision" within the meaning of section 47(4), with the consequence that Bettercare is entitled to appeal to the Tribunal under section 47(6).

20. Those arguments raise two issues. The first issue, upon which the arguments have primarily centred, is whether, in the course of the correspondence, the Director has made "a decision as to whether the Chapter II prohibition has been infringed", within the meaning of section 46(3)(b), so as to entitle Bettercare to ask the Director to withdraw or vary that decision under section 47(1). If the answer to that question is in the affirmative, the second, and subsidiary, issue is whether in the course of the correspondence the procedure under section 47 has been sufficiently followed so as to entitle Bettercare to bring an appeal under section 47(6).

21. At a case management conference held on 20 December 2001 the Tribunal directed that the admissibility of Bettercare's appeal should be heard as a preliminary issue and that the Director's defence, to be filed by 11 January 2002, should be limited, at this stage, to that issue.

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

23. Finally at the same case management conference, the Tribunal admitted the requests to intervene, in support of Bettercare, made, pursuant to Rule 14 of the Tribunal's Rules, by the Registered Homes Confederation of Northern Ireland Limited on 17 December 2001, and the Bedfordshire Care Group on 18 December 2001. The Registered Homes Confederation of Northern Ireland ("RHC") represents a substantial number of private nursing and residential home owners in Northern Ireland. The Bedfordshire Care Group represents private nursing and residential care owners in Bedfordshire and has made a complaint to the Director similar to that of Bettercare. The Director's response to that complaint seems to have been virtually identical to the response received by Bettercare. Bettercare and the interveners are all represented by the

same solicitors and counsel. The interveners have not made separate submissions on the question of admissibility.

The correspondence between the parties

24. In our view the question whether the Director has taken "a decision as to whether the Chapter II prohibition is infringed" within the meaning of section 46(3)(b) of the Act is primarily a question of fact to be decided in accordance with the particular circumstances of this case. Accordingly we set out the relevant correspondence in some detail.

25. On 23 November 2000, Bettercare's Managing Director complained to the Director, in effect, that North & West, Bettercare's main customer, was abusing a dominant position by offering unfairly low prices and unfair terms in its purchases from Bettercare of nursing home and residential care services.

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

> "The Office has received several complaints about local authorities (LAs) and it may be useful to you if I provide you with some background as to the Office's jurisdiction with regards to the activities of LAs.
>
> ...
>
> As you are aware, LAs are obliged, usually by statute, to purchase certain services, for example residential care, B&B accommodation and nursing home care services (collectively 'Social Care') for the disadvantaged in society. The purchase of Social Care is regarded as necessary because the market fails to satisfy the housing needs of the entire population.
>
> LAs are also active in the economic business of supplying Social Care. An LA, then, has two identities in the circumstances described above – as the primary buyer of Social Care and as a supplier of nursing home care services. This would appear to be the case with North and West whom you say also supplies nursing home care services.
>
> It is important to note that the CA98 only applies to agreements between undertakings (Chapter I) or the conduct of the undertakings (Chapter II). The key issue is therefore whether an LA will, in any particular circumstance, be an undertaking for this purpose. Pursuant to section 60 of the CA98, the definition of an undertaking depends on the case law of the European Court of Justice. In *Höfner & Elser*, the European Court of Justice said:
>
> > 'in the context of competition law, ... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.
>
> Clearly, an LA can act as an undertaking when it is engaging in economic activity, but, in our view, an LA will probably not be acting as an undertaking when it is exercising its 'public interest-type' functions.

> On the basis of the facts set out above, we take the view that LAs are not undertakings for the purposes of the Chapter I and II prohibitions to the extent that they are purchasing Social Care for the disadvantaged in society using monies raised by taxation. We consider that the activities of an LA acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value are not the activities of an undertaking engaging in economic activity. In this context, the role of government is to correct market failure and so, inevitably, LA spending will affect markets and raise competition issues of a general policy nature. However, such spending does not raise legal issues under the CA98 and so the DGFT has no power to intervene.
>
> It seems clear from the information in your letter that the activities that concern you arise from North and West's activities as a purchaser of Social Care (i.e. nursing home care). In our view, for the reasons explained above, these activities do not fall for consideration under competition legislation and the DGFT is therefore unable to intervene.
>
> ...
>
> That being said, you will appreciate that this is a preliminary view of officials and neither binds the DGFT nor is a substitute for statutory guidance. You should seek your own legal advice before coming to a final view yourself. We should be happy to receive detailed legal representations on our preliminary view should you think we have adopted the wrong approach or misunderstood the situation."

27. On 21 June 2001, L'Estrange & Brett, solicitors instructed on behalf of Bettercare, responded to the Director's letter of 29 November 2000. In that letter L'Estrange & Brett set out in some detail over seven pages the constitution, functions and powers of North & West, which is apparently established pursuant to Article 10 and Schedule 3 of the Health and Pension Social Services (NI) Order 1991, no. 194 (NI). On the basis of the relevant statutory provisions L'Estrange & Brett argued:

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

28. On that basis, submitted L'Estrange & Brett, North & West was an undertaking to which the Chapter II prohibition applies. That conclusion was supported by detailed reference to the case law of the Court of Justice of the European Communities, and to the decision of the Supreme Court of Ireland in *Deane and others v The Voluntary Health Insurance Board* [1992] 2 IR 319. L'Estrange & Brett concluded that the statement in the Office's letter of 29 November 2000 that a local authority "will probably not be acting as an undertaking when it is exercising its public interest-type functions" is inconsistent with EC law. Furthermore, the fact that North & West was purchasing social care services "at zero or less than full economic value" was, according to L'Estrange & Brett, a result of North & West's conduct in the market, rather than

the intrinsic nature of the purchasing activity in question, and amounted to an abuse of a dominant position.

29. The Director's officials replied by letter of 25 July 2001 in these terms:

> "We have considered the matters you raised and have the following comments to make.
>
> You have outlined the constitution, functions and powers of N&W and argued that it is engaged in economic activity (alongside its public interest responsibilities) and so can be viewed as an undertaking for the purposes of the Competition Act 1998 ("the CA98"). We are grateful to you for clarifying N&W's status and functions. We also note the case law you cite in support of your contention that local authorities can be undertakings, in particular those cases where so-called public law activities have been held to be economic activities. This is a complex area but we do not consider that the additional information on N&W's activities or the case law you cite alters the views expressed in our letter of 29 November 2000.
>
> We do not dispute that N&W may be engaged in economic activities for certain purposes and therefore may be an undertaking for those purposes. However we do not share your view that N&W is acting as an undertaking for **all** purposes.
>
> As you note in your letter, N&W appears to have two principal activities: as a **purchaser** of social care services for persons in need using monies raised by taxation; and as a **supplier** of local care services in competition with the voluntary and private sector.
>
> The European Courts have held that it is necessary to distinguish between public authorities and public undertakings. (See in particular Case 118/85 *Commission v Italy* [1987] ECR 2599.) This recognises the fact that state entities can act either by exercising public powers or by carrying on economic activities by offering goods and services on the market. In order to determine whether the CA98 applies, it is therefore necessary to consider the precise nature of the activities being exercised in each case rather than the entity's legal form or powers. Merely because an entity carries on some economic activities does not mean it is an undertaking for all purposes. (See also *Hofner & Elser*, to which you refer, where the German Federal Employment Agency had two roles: supplying procurement services in competition with private bodies, which was regarded as an economic activity, and administering unemployment benefits, which would not be.)
>
> Looking at local authorities, including healthcare trusts such as N&W, our current view is that they can act as an undertaking when they are engaging in economic activities, such as supplying residential accommodation in competition with private sector care homes, but they would not appear to be when they are exercising their "public interest-type" functions. By this we mean functions which are not generally provided on a commercial basis in competition with private sector business and which fulfil an exclusively social function. (See in particular Case C-343/95 *Diego Cali & Figli SrL v Servizi Ecologici Porto di Genova Spa* [1997] ECR I-1547 and *Eurocontrol*, to which you refer in your letter.)
>
> The abuse you client is alleging, namely non-cost related low prices offered by N&W for residential and nursing home care services, relates to N&W's activities as a purchaser of social care. The purchasing of such services for the disadvantaged in society using monies raised by taxation would seem to be typically those of the State and would not appear to be of an economic or commercial nature. Therefore, when acting as a purchaser of social care we do not

currently consider that N&W is acting as a undertaking for the purposes of the CA98."

30. By letter of 31 August 2001, L'Estrange & Brett further contested the position taken by the Director's officials in the letter of 25 July 2001:

> "...
>
> As we detailed in our letter of 21 June 2001, the current market activities of North and West are, in our view, distinguishable from the activities of the public authorities detailed in the case law used to support your conclusion that North and West is not engaged in economic activity in the purchasing of services from the private sector. We submit that your above statement does not adequately appreciate the activities of North and West when considered in relation to established case law. When a local authority is supplying residential accommodation for residents/patients, it is engaged in non-economic activity and in discharging its statutory duty, it is providing "functions which are typically those of the State". It is not engaged in economic activity and is not in competition with the private sector. In our view residents/patients benefiting from statutory health-care services could not be classified as, or compared to, consumers.
>
> However, local authorities discharging their statutory duty by purchasing said health care services from the private sector are engaged in economic activity. The European Commission has stated that the concept of an undertaking 'covers any activity directed at trade in goods or services irrespective of the legal form of the undertaking and regardless of whether or not it is intended to earn profits'.
>
> You refer in your letter to Case 118/85 *Commission v Italy* [1987] ECR 2599 and that to determine whether or not a state entity is a public undertaking for the purposes of competition law it is necessary to consider the precise nature of the activities being exercised by that entity, which can act either by exercising public powers or by carrying on economic activities, for example, offering goods and services in the market. We would contend that state entities, in this case North and West, are also carrying on economic activities by purchasing services in the market, particularly where it is a monopsonist in that market, and uses that position of dominance to create and determine economic conditions with that market.
>
> ..."

31. After a further detailed analysis of the law, L'Estrange & Brett concluded their letter of 31 August 2001 by saying:

> "We would wish you to address the above comments and to engage in an examination of the precise nature of the activities being exercised by North and West. We would also ask you to confirm that your response to our complaint that North and West is infringing the Chapter 2 prohibition of the Competition Act 1998 by abusing its dominant position is a decision of the Director General of Fair Trading."

32. By letter dated 21 September 2001, the Director's officials replied:

> "Thank you for your letter of 31 August on behalf of your client, BetterCare Group Ltd, commenting on the Office's letter to you of 25 July.

> We have read and noted your further comments about the Office's views on undertakings, relevant caselaw and the activities of N&W. We have also noted that you have not provided any new evidence on this matter. While we were interested to read these comments, we regret to inform you that we are not persuaded that this is sufficient to cause us to alter our original opinion (given in earlier correspondence).
>
> Our response to your complaint is based on a lack of reasonable grounds to suspect an infringement of the Competition Act 1998. We believe that the complaint rejection is not a decision capable of appeal within sections 46 and 47 of the Act."

33. By letter dated 25 October 2001, L'Estrange & Brett contended that the Director's refusal to investigate the matter further was not based on the lack of evidence supplied by Bettercare, but simply on the conclusion that North & West was not acting as "an undertaking" when acting as a purchaser of social care. L'Estrange & Brett concluded:

> "As your decision is, in effect, a decision by the Director that the Chapter II prohibition, as detailed in the Act, has not been infringed, we believe that it is a decision capable of appeal within sections 46 and 47 of the Act."

34. The Director's officials replied by letter of 2 November 2001 in these terms:

> "…
>
> Pursuant to section 25 of the Act, the Director General can only conduct an investigation if there are reasonable grounds for suspecting inter alia that the Chapter II prohibition has been infringed. To meet this requirement the Director General must satisfy himself that on the basis of the evidence before him that there are reasonable grounds to suspect that each of the elements of the Chapter II prohibition is satisfied (section 18). In the present case, for the reasons set out in our letters of 29 November 2000 and 25 July 2001, we do not believe that N&W, is an undertaking when purchasing social care. Contrary to your assertions at paragraph 3 of your letter, this view is based upon the evidence provided by your clients as to the activities of N&W, in particular as set out in your letters of 23 November 2000, 21 June 2001 and 31 August respectively and in light of EC case law to which we are bound by virtue of section 60 of the Act.
>
> Because we are of the view that N&W is not an undertaking when purchasing social care, the Director General is unable to launch an investigation under the Act. It was therefore, unnecessary for us to consider whether there were reasonable grounds to suspect that any conduct of N&W as alleged by you client was an abuse. Moreover, as indicated previously, we do not consider that in rejecting your client's complaint and closing our file because section 25 has not been met, the Director General has adopted an appealable decision.
>
> Finally, I should like to reassure you that the evidence and arguments submitted by you on your client's behalf have been given full and careful consideration by the Office."

Arguments of the parties

Bettercare's submissions

35. Bettercare's submission, as elaborated in its skeleton argument, is relatively simple. On a fair reading of the correspondence, says Bettercare, the Director decided that North & West was not an "undertaking", for the purposes of the Chapter II prohibition, when engaged in the purchase of what the Director describes as "social care". Since the Chapter II prohibition applies only to "undertakings" within the meaning of that section, the Director has by necessary implication taken a decision that the Chapter II prohibition has not been infringed in respect of the matters raised by Bettercare regarding the conduct of North & West. It follows that the Director has taken a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b). Accordingly, Bettercare was entitled to ask the Director to withdraw or vary that decision pursuant to section 47(1). According to Bettercare, the "relevant decision" for the purposes of section 47(1) is the Director's letter of 25 July 2001. L'Estrange & Brett's letter of 31 August 2001 constitutes a request to the Director to withdraw or vary that decision, and the Director's letter of 21 September 2001 constitutes the notification of the Director's decision not to withdraw or vary the relevant decision for the purposes of section 47(4), which Bettercare is entitled to appeal under section 47(6). According to Bettercare, the letter of 21 September 2001 is clarified by the letter of 2 November 2001.

36. Bettercare accepts that the Director has a discretion as to whether or not to conduct an investigation under section 25 of the Act; he also has a discretion as to whether or not to adopt a decision as to whether the Chapter I and Chapter II prohibitions have been infringed. However, the fact that the Director has such discretion does not preclude the possibility that he has in fact taken a decision as to whether the Chapter II prohibition has been infringed in the instant case. That is a question of substance, which depends on the facts and not on whether the Director himself chooses to label a particular document as "a decision". In this case, the matter cannot simply be characterised, as the Director seeks to do, as an (unappealable) decision to the effect that the Director has decided not to conduct an investigation under section 25 on the basis that there are "no reasonable grounds for suspecting an infringement". In reality, the Director has decided that North & West is not acting as an "undertaking" when purchasing social care and is thus outwith the ambit of the Chapter II prohibition. That, according to Bettercare, constitutes "a decision as to whether the Chapter II prohibition is infringed" by the conduct of North & West in purchasing social care from Bettercare. According to Bettercare, that decision is by its nature final, and no other decision could be envisaged, whatever further investigations might take place.

37. According to Bettercare, the alternative remedy of judicial review, which the Director concedes would lie, would not be satisfactory given that the Tribunal has been set up under the Act. The various procedural difficulties raised by the Director in relation to various provisions to be found in the Director's Rules (see below), either do not apply or cannot be relied upon by the Director. The Director cannot invoke his own procedural failure to follow his own Rules in order to show that there is no decision in this case. Similarly the Director's "floodgates" arguments are unduly alarmist. The fact that the Director has taken a decision in this case does not mean that an appeal will lie in all cases where, for one reason or another, he declines to take a complaint further.

38. In the alternative, finally, Bettercare advances a wholly different argument which is to the effect that Bettercare is a "party to an agreement in respect of which the Director has made a decision", within the meaning of section 46(1), namely the contract between Bettercare and North & West for the provision of residential and nursing home care services which is annexed to the application in this case. Accordingly, Bettercare are entitled to bring an appeal directly under section 46(1) of the Act.

The Director's submissions

39. The Director's submissions are more complex. His fundamental submission, as set out in the defence and elaborated in his skeleton argument, is that the rejection of a complaint is not an appealable decision under section 47 of the Act, but merely notification to the complainant that the Director does not deem it appropriate to proceed to a decision as to whether there has been an infringement. Such a rejection may give grounds for seeking judicial review, but is not appealable under section 47.

40. In the Director's view, under the scheme of the Act appealable decisions are confined to final and definitive measures that the Director may decide to adopt as the culmination of a full administrative procedure, where the Director is satisfied to the requisite standard of proof whether or not there is an infringement, and after taking into account all the facts and circumstances appearing to him to be relevant (including consulting the primary parties). No such finality is implied by the mere rejection of a complaint.

41. The Director submits that he has never denied that, should further factual material come to light, the question whether North & West carries on an "economic activity" could be reconsidered. Indeed, the Director in argument seemed to suggest that the material so far presented to him would be an inadequate basis on which to take a "final decision" on that point.

By inviting the Tribunal to investigate the matter further in the substantive appeal, Bettercare itself seems to concede that the alleged "decision" is not, in fact, final.

42. As regards the scheme of the Act, the Director submits that he may make a decision as to whether the Chapter I or II prohibitions have been infringed either (a) following an application by a primary party or (b) on his own initiative.

43. As regards applications by a primary party, a party to an agreement may, under section 14(1) of the Act notify an agreement to the Director and apply to him for a decision. Section 14(2) of the Act provides:

> "On an application under this section, the Director may make a decision as to –
> (a) whether the Chapter I prohibition has been infringed; and
> (b) if it has not been infringed, whether that is because of the effect of an exclusion or because the agreement is exempt from the prohibition."

44. Similarly, by virtue of sections 20(1) and 22(1), a person who thinks that his conduct may infringe the Chapter II prohibition may notify that conduct to the Director and apply to him for a decision. Section 22(2) of the Act provides:

> "On an application under this section, the Director may make a decision as to –
> (a) whether the Chapter II prohibition has been infringed; and
> (b) if it has not been infringed, whether that is because of the effect of an exclusion."

45. According to the Director, the use of the word "may" in sections 14(2) and 22(2) shows that, even on an application to him for a decision, he still has a discretion *not* to adopt a decision. That is expressly confirmed by Rule 15(2) of the Director's Rules, which provides:

> "(2) Where the Director determines an application for a decision by exercising his discretion not to give a decision, he shall –
> (a) give written notice of that fact to:
> (i) the applicant; and
> (ii) subject to rules 25 and 26 below, those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be
> ..."

46. As regards decisions taken on the Director's own initiative, section 25 of the Act provides:

> "The Director may conduct an investigation if there are reasonable grounds for suspecting –
> (a) that the Chapter I prohibition has been infringed; or
> (b) that the Chapter II prohibition has been infringed."

47. Thus, argues the Director, even where there *are* reasonable grounds for suspecting an infringement he is still given a discretion as to whether to pursue the matter, even to the stage of an investigation, let alone to the stage of a decision.

48. The Director also draws attention to the procedural consequences that follow under the Director's Rules once he has made a decision whether or not the Chapter I or the Chapter II prohibition has been infringed. Thus Rule 15(1) of the Director's Rules provides:

> "15.–(1) If the Director has made a decision as to whether or not an agreement has infringed the Chapter I prohibition, or as to whether or not conduct has infringed the Chapter II prohibition, he shall, without delay:
>
> (a) give written notice of the decision:
>
> (i) …
>
> (ii) where no application has been made ... to each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be,
>
> stating in the decision the facts on which he bases it and his reasons for making it; and
>
> (b) publish the decision.
>
> ..."

(We observe in passing that the "application" referred to is an application under section 14 or 22 of the Act.)

49. Furthermore by virtue of section 16(1) of the Act, where the Director has determined an application under section 14 of the Act by making a decision that the Chapter I prohibition has not been infringed, paragraphs (2) to (5) of the Act limit the Director's ability to take further action to cases where there has been a material changes of circumstances or the provision of incomplete, false or misleading information. By virtue of section 24 of the Act, similar restrictions apply where the Director has determined an application under section 22 by making a decision that the conduct in question does not infringe the Chapter II prohibition: section 24(1).

50. Rule 16 of the Director's Rules provides:

> "16. If, having made a decision that an agreement has not infringed the Chapter I prohibition, or that conduct has not infringed the Chapter II prohibition, the Director proposes to take further action under Part I, he shall:
>
> (a) where the decision was made following an application, consult the applicant and ... those persons whom the applicant has identified in the application as being the other parties to the agreement , or the other persons, if any, who are engaged in the conduct, as the case may be, which is the subject of the decision; and

(b) where no application has been made ... consult each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which is the subject of the decision."

51. Turning to the position of third parties under section 47, the Director emphasises that, in accordance with section 47(2), an application to withdraw or vary a relevant decision under section 47 must:

"(a) be made in writing, within such period as the Director may specify in rules under section 51; and
(b) give the applicant's reasons for considering that the relevant decision should be withdrawn or (as the case may be) varied."

52. In that connection, Rules 28(1) to (3) of the Director's Rules provide:

"28.–(1) An application under section 47(1) asking the Director to withdraw or vary a decision shall:

(a) be submitted in writing to that Director within one month from the date of publication of that decision by means of entry in the register maintained by the Director General of Fair Trading under rule 8 above;
(b) comply with paragraph (2) below; and
(c) include the documents specified in paragraph (3) below.

(2) An application submitted under paragraph (1) above shall be signed by the applicant, or by a duly authorised representative of the applicant, and shall state the applicant's reasons:

(a) for considering that he has a sufficient interest in the decision referred to in paragraph (1) above; or
(b) where he claims to represent persons who have a sufficient interest in that decision:
(i) for claiming that he represents those persons; and
(ii) for claiming that those persons have sufficient interest in that decision.

(3) The documents specified for the purposes of paragraph (1) above are the following:

(a) three copies of the application; and
(b) where the application is signed by a solicitor or other representative of an applicant, written proof of that representative's authority to act on that applicant's behalf."

53. According to the Director, those provisions show that third parties are in a collateral or ancillary relationship to the Director's decisions as to whether there has been an infringement. The Director draws attention to the remarks of the relevant Minister, Lord Simon of Highbury, during the passage of the Competition Bill (Hansard, House of Lords Debates, 17 November 1997, col 451-452).

54. The Director states that in the year to 31 March 2001 he opened about 1500 case files as a result of complaints received, but only 46 investigations were commenced under section 25. Although the Director normally gives brief reasons to a complainant as to why he is not proceeding to an investigation he would not possibly do so comprehensively in every case, nor satisfy himself, to the requisite standard of proof, that there had been no infringement.

55. These various provisions all point, says the Director, to the conclusion that the decisions as to infringement referred to in paragraphs (a) and (b) of section 46(3) are confined to the final and definitive measures that the Director, in his discretion, *may* adopt at the culmination of an administrative procedure: if persons making an application for a decision under sections 14(2) or 22(2) of the Act cannot compel the Director to make a decision, it would be very odd if complainants could do so. Furthermore, the rejection of a complaint in equivalent circumstances by the European Commission would not be regarded as a decision as to whether the rules on competition have been infringed: Case 298/83 *CICCE v Commission* [1985] ECR 1105.

56. Moreover, the Director emphasises that appeals to the Tribunal are, under paragraph 3(1) of Schedule 8 of the Act, "on the merits", unlike appeals to the Court of First Instance of the European Communities where appeals are limited to the grounds set out in Article 230 of the EC Treaty. According to the Director, the wide nature of the Tribunal's jurisdiction supports the view that the word "decision" in section 46(3)(a) and (b) is to be construed narrowly. If the concept of a "decision" in that context were wide enough to include the rejection of a complaint the Tribunal would be drawn into deciding matters "on the merits" which had not been fully investigated by the Director, thus wrongly transforming the Tribunal from an appellate body to a forum for the primary investigation of factual matters. This risk is illustrated, in the present case, says the Director, by the fact that the intervener RCH is seeking to introduce new material, purportedly showing that local health trusts in Northern Ireland are favouring their own statutory homes at the expense of private operators. Even if the Tribunal were merely to remit the matter to the Director, a large volume of appeals against rejection of complaints would involve a substantial diversion of the Director's resources and "skew the Director's administrative priorities". In a case such as the present, the appropriate remedy is judicial review, as would be possible in accordance with *R v General Council of the Bar ex parte Percival* [1990] 3 WLR 323.

57. The submission that "a decision" for the purposes of section 46(3)(a) and (b) is limited to a final act, taken at the culmination of a full administrative procedure, is supported, says the Director, by (i) the fact that the kinds of decision referred to in paragraphs (c) to (h) of section 46(3), are all final decisions, with the exception of interim directions given under section 35 of the Act; (ii) the fact that the rights of appeal conferred on the primary parties under section 46 all relate to decisions that would not normally be taken until after the culmination of a full administrative procedure; and (iii) certain statements made in Parliament by Ministers during the passage of the Competition Bill (Mr Griffiths on 18 June 1998, Hansard, House of Commons Standing Committee G, 13th sitting, col 488, and Lord Simon on 17 November 1997, Hansard, House of Lords debates, col 450-451).

58. According to the Director, if Bettercare's arguments were accepted, "the effective operation of the Act would become almost impossible" because of the large volume of complaints. The Director would be forced into only rarely rejecting complaints, or limiting the reasons for rejecting a complaint, for fear of creating an appealable decision. Either development would be contrary to good administration. Moreover, if the rejection of a complaint is a decision (i) the Director would have difficulty in re-opening the matter, and could not make an unannounced visit on the basis of new facts, by virtue of Rule 16(b) of the Director's Rules; (ii) the Director would have to publish the decision under Rule 15(1) of the Director's Rules, a fact that might deter potential complainants; and (iii) the primary parties complained against will typically only become aware of the case at the appeal stage, as has happened to North & West in the present case.

59. In consequence of all these matters, concludes the Director, a complainant cannot manufacture an appeal under section 47 by the simple expedient of making a complaint and then inviting the Director to withdraw his rejection of the complaint.

60. As to whether Bettercare in this case in fact followed the procedural requirements of section 47(2) and Rule 28 of the Director's Rules, the Director alleges in the defence that Bettercare had failed to comply with Rule 28, but he does not further elaborate that point.

Analysis under section 47

61. We have asked ourselves three questions:

(i) Does the correspondence between the Director and Bettercare contain "a decision"?

(ii) If so, does any such decision constitute an "appealable decision" as to whether the Chapter II prohibition has been infringed?

(iii) If so, has the procedure envisaged by section 47 been observed?

(i) Does the correspondence between the Director and Bettercare contain "a decision"?

62. There is no definition in the Act of what constitutes "a decision". On the ordinary meaning of words, to take "a decision" in a legal context means simply to decide or determine a question or issue. Whether such a decision has been taken for the purposes of the Act is, in our view, a question of substance, not form, to be determined objectively. If there is, in substance, a decision, it is immaterial whether it is formally entitled "a decision": otherwise the decision-maker could avoid his act being characterised as a decision simply by failing to affix the appropriate label.

63. It seems clear that the Director's letter of 29 November 2000 (paragraph 26 above) does not have, in itself, any decisional character. That letter is stated to be "a prevailing view of officials and neither binds the DGFT nor is a substitute for statutory guidance" (last sentence). The Director's officials invite further representations, "should you think we have adopted the wrong approach or misunderstood the situation" (ibid). Nonetheless, it seems clear that, even at that stage, the Director and his officials are aware that the point at issue – namely whether local authorities or health trusts are acting as "an undertaking" when purchasing social care – was one of principle. Apparently, several other complaints about local authorities had been received. In addition, it is clear from the letter of 29 November 2000 that considerable thought had already gone into the question whether an entity such as North & West is an undertaking "when it is exercising its public interest-type functions", in the light notably of the case of *Höfner & Elser* [1991] ECR I-1979. As regards North & West's activities as a "purchaser of Social Care (i.e. nursing home care)" it is explicitly stated in the letter of 29 November 2000:

> "In our view, for the reasons explained above, these activities do not fall for consideration under competition legislation and the DGFT is therefore unable to intervene."

64. There then follows L'Estrange & Brett's letter to the Director dated 21 June 2001 (paragraphs 27 and 28 above) which contests the Director's view on "the undertaking" point, describes the

constitution, functions and powers of North & West, and presents a detailed legal submission based on some nine decided European cases, and the Irish case of *Deane*. L'Estrange & Brett's letter of 21 June 2001 also seeks to refute the Director's contention, in the letter of 29 November 2000, that North & West is "acting as the purchaser of Social Care of last resort in an area of zero or less than full economic value".

65. The Director's reply of 25 July 2001 (paragraph 29 above) to the letter of 21 June 2001 makes it clear, on the first page, that the Director's officials have considered the information supplied as to the constitution, functions and powers of North & West, and the case law cited. However, that letter states

> "... we do not consider that the additional information on N&W's activities or the case law you cite alters the views expressed in our letter of 29 November 2000."

That statement is followed by discussion and citation of decided cases, notably Case 118/85 *Commission v Italy* [1987] ECR 2599, Case C-343/95 *Diego Cali & Figli* [1997] ECR I-1347 and *Eurocontrol* [1994] ECR I-43, as well as *Höfner and Elser*. The letter of 25 July 2001 then states:

> "Therefore, when acting as a purchaser of social care we do not currently consider that N&W is acting as an undertaking for the purposes of CA98
>
> ...
>
> I hope the above helps to clarify our position."

66. It is true that the letter of 25 July 2001 states "we currently consider" that N&W is not an undertaking, when acting as a purchaser of social care, rather than "we have decided" that N&W is not an undertaking when so acting. On the other hand, when read with the letter of 29 November 2000, to which the letter of 25 July 2001 refers, it seems to us that, at the very least, the letter of 25 July 2001 states a carefully considered and, to all appearances, final view on the Director's behalf that North & West is not acting as an undertaking when purchasing social care. In our view it can fairly be said that, in the letter of 25 July 2001, those acting on behalf of the Director conclude that, on the basis of the detailed information sought and given to them, North & West is not, in the relevant respect, "an undertaking".

67. L'Estrange & Brett return to the fray in their letter of 31 August 2001, which reiterates the submissions already made. That letter concludes

> "We would wish you to address the above comments and to engage in an examination of the precise nature of the activities being exercised by North and West. We would also ask you to confirm that your response to our complaint that North and West is infringing the Chapter 2 prohibition of the Competition Act

1998 by abusing its dominant position is a decision of the Director General of Fair Trading."

68. The Director's response of 21 September 2001 states:

> "We have read and noted your further comments about the Office's views on undertakings, relevant caselaw and the activities of N&W. We have also noted that you have not provided any new evidence on this matter. While we were interested to read these comments, we regret to inform you that we are not persuaded that this is sufficient to cause us to alter our original opinion (given in earlier correspondence).
>
> Our response to your complaint is based on a lack of reasonable grounds to suspect an infringement of the Competition Act 1998. We believe that the complaint rejection is not a decision capable of appeal within sections 46 and 47 of the Act."

69. In referring to "the complaint rejection" that letter, it seems to us, plainly has "decisional quality". In our view, at least by 21 September 2001, if not by 25 July 2001, the Director has decided to reject the complaint. In the letter of 21 September 2001 that decision is described as a "complaint rejection" which is said to be "based on lack of reasonable grounds to suspect an infringement". However, it is also clear, from the reference back to the earlier correspondence, that the Director's position is based, in essence, on his concluded view that North & West is not "an undertaking" when acting as a purchaser of social care, as very fully set out in the Director's letters of 29 November 2000 and 25 July 2001.

70. The reason for the Director's decision to reject the complaint is, finally, made very clear by the Director's letter of 2 November 2001 (paragraph 34 above), in reply to L'Estrange & Brett's further letter of 25 October 2001. In the letter of 2 November 2001, the Director says

> "In the present case, for the reasons set out in our letters of 29 November 2000 and 25 July 2001, we do not believe that N&W is an undertaking when purchasing social care.
>
> ...
>
> Because we are of the view that N&W is not an undertaking when purchasing social care, the Director General is unable to launch an investigation under the Act."

71. Taking the correspondence as a whole, we find that the Director has come to a "decision" (i) that N&W is not an undertaking when purchasing social care; (ii) that, in consequence, he has no grounds for suspecting an infringement of the Chapter II prohibition; and (iii) that, in consequence of (i) and (ii), Bettercare's complaint is rejected.

72. At this stage of the analysis, it could be said that a "decision" to the above effect is perhaps communicated more clearly by the letter of 21 September 2001 than it is by the letter of 25 July 2001. However the letter of 25 July 2001 is the letter in which the substantive reason for the Director's "decision" is to be found, as confirmed in both the letter of 21 September 2001 and in the subsequent letter of 2 November 2001. That letter of 25 July 2001 in turn refers back to the consistent view that the Director has maintained in this matter ever since his first expression of view in the letter of 29 November 2000.

73. Accordingly it seems to us that a "decision" has been adopted by the Director in this case. That conclusion, as we understand it, is not seriously disputed by the Director, whose position was that he had adopted an act of a sufficiently determinative character to be subject to judicial review. Whether such an act was to be described as a decision was, submitted counsel for the Director, "a matter of semantics".

(ii) Is the decision an "appealable" decision?

74. We turn to the question whether the decision to be found in the correspondence is one that is capable of being appealed to this Tribunal under section 47 of the Act. We start by dealing with a number of the Director's arguments that respectfully seem to us only distantly relevant to the facts of the present case.

75. First, this case is not concerned with the situation where the Director considers that there *has* been an infringement of the Chapter I or Chapter II prohibition. It is evident that where the Director considers that there *has* been such an infringement, he may proceed to a decision to that effect only after following a full administrative procedure. He must, notably, open an investigation under section 25 (paragraph 46 above). He is likely to make use of his investigative powers under sections 26 to 29.

76. When taking infringement decisions, the Director must also afford the person concerned an opportunity to be heard pursuant to section 31. That section, which is implemented by Rule 14 of the Director's Rules, provides:

> "31.-(1) Subsection (2) applies if, as the result of an investigation conducted under section 25, the Director proposes to make-
>
> (a) a decision that the Chapter I prohibition has been infringed; or
>
> (b) a decision that the Chapter II prohibition has been infringed.
>
> (2) Before making the decision, the Director must-
>
> (a) give written notice to the person (or persons) likely to be affected by the proposed decision; and

(b) give that person (or those persons) an opportunity to make representations."

77. However, the fact that a full administrative procedure is necessary in order to take a decision that there *is* an infringement of the Chapter I or II prohibition, does not mean that a full administrative procedure is necessary in order to decide that the relevant prohibition is *not* infringed.

78. In our view, the Director's argument that a full administrative procedure is necessary before the Director can make a decision of *non*-infringement, does not find direct statutory support in the provisions of the Act. We note, in particular, that section 31 presupposes that the Director will not proceed to a decision that the Chapter I or II prohibition *has* been infringed except as a result of an investigation conducted under section 25. Section 25, in turn, provides that the Director may conduct such an investigation where he has "reasonable grounds for suspecting" that one of the prohibitions *has* been infringed. However, nothing in section 25 obliges the Director to conduct such an investigation if he concludes that the relevant prohibition has *not* been infringed. Similarly, nothing in section 31 obliges the Director to give any notice under that section where he proposes to make a decision that the relevant prohibition is *not* infringed.

79. Moreover, this case is not concerned with the situation where the Director takes a decision that the relevant prohibition has *not* been infringed following a formal application to him for a "negative clearance" of an agreement under section 14, or of conduct under section 22 of the Act. Such applications are governed by certain formal requirements, including the completion of Form N, notification to other parties affected, and an entry on a public register: see Schedules 5 and 6 of the Act, and Rules 1 to 8 of the Director's Rules. The public may be consulted: Rules 12(1)(b) and 12(2) of the Director's Rules. None of that formality applies where (as in the present case) there is no application under section 14 or section 22. Similarly the various restrictions upon the Director reopening the matter following a decision that the relevant prohibition has not been infringed under sections 14 or 22, which are set out in sections 16 and 24 of the Act respectively, have no application in the present case.

80. Thirdly, and correctly in our view, Bettercare does not challenge in any way the Director's main submission that he has a discretion under the Act whether or not to conduct an investigation, and whether or not to proceed to a decision, whether on an application under section 14 or section 22, or otherwise. It may possibly be (we express no view as to the position in Northern Ireland, England & Wales or Scotland, respectively) that the exercise of the Director's discretion not to proceed to a decision, or even conduct an investigation, could be

susceptible to judicial review on the basis of such cases as *R v General Council of the Bar ex parte Percival* [1990] 3 WLR 323. Subject to that possibility, we for our part would accept that the Director has a discretion under the Act whether to (i) open an investigation under section 25, or (ii) proceed to a decision as to whether or not there has been an infringement. In particular, in our view, a complainant has no right to compel the Director to proceed to take a decision that there *has* been an infringement, subject only to the as yet unexplored possibility of judicial review of the exercise of his discretion.

81. These matters are, however, not in issue in the present case. The issue in this case is not whether the Director has a discretion to take a decision as to whether or not the Chapter II prohibition is infringed, but whether he has in fact done so.

82. That takes us on to the main question, which is how the Director's decision to reject Bettercare's complaint in this case is to be analysed. Is it, as the Director submits, to be analysed merely as the exercise of the Director's discretion not to conduct an investigation under section 25 for lack of reasonable grounds to suspect an infringement? Or is it, as Bettercare submits, a decision that the Chapter II prohibition is not infringed because North & West is not acting as an undertaking when purchasing social care?

83. In addressing this central issue, it is not in our view helpful to use the concept of a "decision to reject a complaint" because such a term is ambiguous. The Director may decide to "reject a complaint" for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed.

84. On the other hand, the Director may, in fact, decide to reject a complaint on the ground that there is no infringement. Nothing in the Act prevents the Director from taking a decision, following a complaint, that there has been no infringement. The Director has already done so in a number of decisions which seem to be plainly decisions, within the meaning of section 46(3)(a) or (b), to the effect that the Chapter I or Chapter II prohibitions has not been infringed, for example because there is no dominant position: (see e.g. Dixon Stores Group Limited/

Compaq Computer Limited/Packard Bell NEC Limited UKCLR [2001] 670; Consignia plc and Postal Preference Service Limited UKCLR [2001] 846; ICL/ Synstar UKCLR [2001] 902.

85. It is true that the decisions of this kind so far taken have a more formal appearance, have apparently been more fully investigated and are more fully reasoned than in the present case. However, we see nothing in the Act to exclude the possibility that the Director may legitimately decide that there is no infringement without conducting a formal investigation, and giving only brief reasons, because in his view the matter is sufficiently clear to enable him to reach a decision without further ado.

86. In our view that is the reality of the situation in this case. As already indicated, in our opinion the correspondence viewed objectively does disclose a decision by or on behalf of the Director to the effect that North & West is not an undertaking within the meaning of section 18 of the Act when acting as a purchaser of social care. As Bettercare submits, the question whether the conduct in question is that of "an undertaking" within the meaning of section 18 is one of the essential ingredients in establishing an infringement of the Chapter II prohibition. We therefore accept Bettercare's submission that, in deciding that North & West is not acting as an undertaking in the relevant respect, the Director has necessarily decided that the Chapter II prohibition is not infringed as regards the subject matter of Bettercare's complaint. It follows that, in our respectful view, the Director, in this case, has taken a decision as to whether or not the Chapter II prohibition has been infringed, within the meaning of section 46(3)(b) of the Act.

87. It is true that, on the contested view of the facts and the law he takes, the Director's decision that North & West is not an undertaking also precludes him from launching an investigation under section 25 of the Act since, on the Director's view, it necessarily follows that he has "no reasonable grounds for suspecting" an infringement. However, in our view, one cannot convert what is in substance an appealable decision into an unappealable decision by the simple device of describing it as the exercise of the Director's administrative discretion not to proceed further on the basis of lack of reasonable grounds for suspecting an infringement. It all depends on the substance. In our view, if, as a matter of substance, the Director's statement that he has no reasonable grounds for suspecting an infringement in fact masks a decision by the Director that the Chapter II prohibition is not infringed, there is still a "relevant decision" for the purposes of section 47(1). In the present case, in our view, the Director has, in effect, decided that the conduct in question does not infringe the Chapter II prohibition, *with the consequence* that he cannot proceed under section 25. But that consequence, in our view, is merely the secondary result of the primary decision that there has been no infringement.

88. We thus reject the Director's submission that the decision in this case should be characterised merely as an unappealable exercise of his discretion not to proceed further on the ground that the Director "has no reasonable grounds for suspecting an infringement" under section 25. There may well be cases where the Director feels he has insufficient material in his possession to conduct an investigation under section 25, without being in a position to decide whether or not there is, in fact, an infringement. But in this case, it seems to us, the statements in the letters of 25 September and 2 November 2001, that the Director has "no reasonable grounds for suspecting an infringement", while correct as far as they go, should not be allowed to conceal the fact that the Director has, in reality, decided that there is no infringement.

89. It is also plain on the facts of this case that the Director considered that he has sufficient information before him to decide that, as a matter of law, North & West is not acting as an undertaking in the relevant respect. As we see it, the Director had no statutory obligation, either to launch an investigation under section 25, or to inform North & West, before coming to that conclusion. It is true that the decision taken by the Director is taken on the basis of the facts known to him at the time, but that is true of all decisions taken by the Director. The question whether the factual basis for the Director's decision was satisfactory is a different issue. In our view it is clear from his letters of 25 July, 21 September and 2 November 2001, that the Director considered himself sufficiently informed to take a decision on the question whether North & West was acting as "an undertaking".

90. As to the various arguments concerning the availability of judicial review to Bettercare in the circumstances of this case, it seems to us, respectfully, that the position is relatively straightforward. If there is a relevant decision for the purposes of section 47(1), then a disappointed complainant has an appeal to this tribunal. If, on a true analysis, there is no relevant decision, but only an exercise of discretion not involving a decision whether the Chapter I or II prohibition has been infringed, then a disappointed complainant may have a remedy, if at all, by way of judicial review at common law. Which route applies depends solely on whether there is a "relevant decision" or not.

91. As we see it, possible complications arise only if too narrow a view is taken of what constitutes a "relevant decision" for the purposes of section 47(1). On the Director's approach, so it seems to us, quite a lot of substantive issues under the Act could arise in judicial review proceedings. In the present case, it is true, the issue is limited to whether North & West is an undertaking, albeit that that question is not a particularly straightforward matter in a competition law context. In other cases, however, the issue could be whether there was a dominant position, or

an abuse, or, in respect to the Chapter I prohibition, whether there was an agreement, or a restriction or distortion of competition. Those are legal and/or economic issues, or questions of mixed law or fact, which this Tribunal is supposed to be equipped to deal with, notably by virtue of the requirements governing the appointment of chairmen (Schedule 7, paragraphs 4(3) and 26(2)), the process of appointment of appeal panel members, and the training of appeal panel members (Schedule 7, paragraph 24). The Tribunal is also a single tribunal for the United Kingdom.

92. In those circumstances, we are not ourselves convinced that acts of the Director which go beyond the mere exercise of a discretion, and constitute a decision on the substance, were intended by Parliament to be susceptible to judicial review in whichever of the three domestic jurisdictions is appropriate, rather than "funnelled", as it were, through the Tribunal.

93. There will, no doubt, be borderline cases where it is debatable whether the Director has "taken a decision that there is no infringement" or merely "exercised a discretion not to proceed". That question, so it seems to us, has to be decided by the Tribunal on the facts of each case. If the matter is disputed, it must be decided by the Tribunal at the outset: *R (Commissioners of Customs & Excise) v VAT Tribunal (Belfast)* [1977] NILR 58. While the fact that the Director has not labelled the act in question as "a decision" may be relevant, the absence of such a label is not in our view determinative of the issue whether there is a decision: it all depends on the facts, viewed objectively.

94. As to the Director's submission that, if Bettercare is right, "the effective operation of the Act would become almost impossible", his argument in this case is not whether Bettercare has *any* remedy; the argument is about *which* remedy is available to Bettercare, namely an appeal to the Tribunal, or judicial review. Indeed, the Director rests a large part of his argument on the submission that Bettercare could have sought judicial review, presumably under Order 53 of the Rules of the Supreme Court of Northern Ireland. In those circumstances, we do not quite see why the Act would be workable had Bettercare sought judicial review, but becomes unworkable if Bettercare can appeal to the Tribunal. In either case there would be proceedings, both sets of proceedings would involve resources, and there would, presumably, be a determination of "the undertaking" issue, in one form or another. On the facts of this case, we do not therefore accept the argument that, if Bettercare is right, there would be a material effect on the efficient use of the Director's resources, nor the argument that his administrative priorities may in some way become "skewed".

95. It is true that under Schedule 8, paragraph 3(1) of the Act, "the Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal". Similarly, under paragraph 3(2) of Schedule 8:

> "(2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may–
>
> (a) remit the matter to the Director,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
>
> (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
>
> (e) make any other decision which the Director could himself have made."

96. Those powers are wider than are normally available on judicial review under Order 53 of the Rules of the Supreme Court of Northern Ireland or the equivalent provisions in England & Wales (Part 54 of the Civil Procedure Rules) or Scotland (Chapter 58 of the Rules of the Court of Session). Nonetheless, in our view this Tribunal is essentially an appellate tribunal, not a tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did. If it turns out, in the course of the appeal, that the Director was insufficiently informed, in our view the appropriate course will usually be for the Tribunal to remit, rather than to attempt to investigate the merits for the first time. We do not therefore accept the Director's submission that the balance between the respective functions of the Director and the Tribunal under the Act would become significantly unbalanced if the present appeal is admissible.

97. More generally, we are somewhat sceptical about the Director's 'floodgates' arguments. We are deciding the present case on its own facts. We are not deciding any other case. We suspect that in many other cases it will turn out that, unlike in this case, the Director has not in fact made a decision whether the relevant prohibition has been infringed. Even in other cases where for some reason he decides the Act does not apply, in many instances the answer will be so obvious that no-one is likely to invest time and money in bringing an appeal. Some remaining cases, it is true, may give rise to appeals, but we doubt whether it will be anything like the volume of appeals feared by the Director. In those circumstances, we do not think that there would be any good reason for the Director to modify his good administrative practice of explaining to a complainant why he is not proceeding with his case.

98. As the Director submits, it seems to be the case that by virtue of Rule 15(1) of the Director's Rules (paragraph 48 above) the Director must (a) give written notice of a decision as to whether or not conduct has infringed the Chapter II prohibition to each person who is engaged in the conduct (Rule 15(1)(a)(ii)) and (b) publish the decision. Similar obligations apply in respect of the parties to an agreement where the Director takes a decision as to whether or not the Chapter I prohibition is infringed. On the face of it, those provisions would require the Director to notify North & West of his decision in the present case, and to publish that decision.

99. We do not see any compelling reason why the Director should not notify North & West of his decision in the circumstances of the present case. As to the argument that complainants may be less willing to come forward if they know that the person complained against will have to be informed if the Director takes a decision whether or not the relevant prohibition is infringed, that has not deterred Bettercare in the present case. In any event, we understand that the Director has in place arrangements for protecting the identity of complainants. If, in any particular case, a complainant was concerned about his identity being revealed, it would still be open to the Director not to take a decision. Self evidently, a complainant who wishes to challenge a decision under section 47(1) necessarily accepts that his identity will become known.

100. As to publication, we see no real difficulty either. Indeed, we would have thought that in the present case publication of the Director's position would be in the public interest. After all, the Director has decided a point of public importance – namely that a local authority is not acting as an undertaking when purchasing social care – which has major implications for the activities of local authorities and health trusts generally. The publication of his decision could tend to conserve resources by discouraging other complaints on the same issue.

101. As regards Rule 16(1)(b) of the Director's Rules, (paragraph 50 above), that Rule provides that once the Director has made a decision that conduct has not infringed the Chapter II prohibition, he must consult the person who is engaged in the conduct concerned if he proposes to take "further action" under Part I of the Act. The same applies where the Director has decided that an agreement does not infringe the Chapter I prohibition, as regards the parties to that agreement. If Bettercare is correct, says the Director, Rule 16(1)(b) would prevent him making an unannounced visit (sometimes known as a 'dawn raid') under section 28 of the Act on the basis of new facts.

102. We would not wish to be taken as deciding that Rule 16(1)(b) would effectively prevent the Director from exercising his powers under section 28 in circumstances such as the present. Nor do we have any concrete basis for assessing whether the risk to which the Director refers is or might be significant. If Rule 16(1)(b) does have the effect which the Director suggests, it is not clear to us why such a limitation on the Director's powers should be thought necessary, since such a Rule does not appear to be required by the rule-making power contained in Schedule 9, paragraph 5(1)(d) of the Act.

103. Even if Rule 16(1)(b) arguably has the effect for which the Director contends, we do not see how the existence of Rule 16(1)(b) can be determinative of whether, on the facts of this case, there is or is not a decision as to whether the Chapter II prohibition is infringed. Since we have found on the facts that there is such a decision, Rule 16(1)(b) has whatever consequence it has, unless and until that Rule is modified. Furthermore, the Director's Rules constitute subordinate legislation, made by the Director himself under section 51(1) of the Act and approved by the Secretary of State under section 51, subsections (5) to (9) of the Act. In general, we hesitate to place too much reliance on the terms of such subordinate legislation when construing primary legislation, in this case the meaning of section 46(3)(b) of the Act.

104. As regards the citations from Hansard relied on by the Director, we are doubtful whether the statements in question fall within the conditions set out in the majority decision in *Pepper v Hart* [1993] AC 593. As is well known, Lord Browne-Wilkinson said at p. 640B-C:

> "the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous, obscure or leads to an absurdity; (b) the material relied upon consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear. Further than this, I would not at present go."

Lord Bridge said at p. 617 A-B:

> "It should, in my opinion, only be in rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue, that reference to Hansard should be permitted. Indeed, it is only in such cases that reference to Hansard is likely to be of any assistance to the courts."

Those conditions are to be strictly insisted on: *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme* [2001] 2 WLR 15, 31H and 32G (Lord Bingham); *Re A (No 2)* [2001] 2 WLR 1546 at [81] (Lord Hope).

105. In our view the point at issue in this case is largely a factual one, namely whether or not the Director has made a decision, and we doubt whether Parliamentary statements are likely to throw light on that issue.

106. Lord Simon of Highbury, the sponsoring Minister, said in the House of Lords Debate, 17 November 1997, at col 451-452:

> "In responding to the group of amendments tabled by the noble Lords, Lord Kingsland and Lord Lucas, it may be helpful to outline the considerations behind devising the mechanism by which third parties should be able to appeal a decision of the director. ...
>
> ...we carefully considered the option proposed by the amendments of the noble Lord, Lord Lucas, of allowing a third party to go directly to the tribunal without first approaching the director ... I am grateful for the opportunity to listen to the arguments. However, I continue to prefer the approach set out in Clause 46. That is because it should help avoid unnecessary appeals. ***For example, the third party might have new information which was not available at the time the director took his decision. The director could discuss the new information and concerns with the parties who are the subject of the decision and it might be that a revised decision is issued which is acceptable to all and which avoids the cost of setting up an appeal tribunal***." (Emphasis added by the Director)

107. It is apparent from the context that this citation is not addressing the point at issue in this case, which is whether the correspondence amounts to a decision within the meaning of section 46(3)(b), but the different question of whether a third party who wishes to appeal such a decision should be able to come directly to the Tribunal, or whether he should first have to ask the Director to withdraw or vary that decision. Lord Simon's remarks are directed to the procedure to be followed, not to the question whether there is a decision in the first place. (We note in passing that in the Enterprise Bill, the Government is proposing to abolish the procedure envisaged by section 47 in order to permit complainants having a sufficient interest in the matter to appeal directly to the tribunal without first asking the Director to withdraw or vary his decision.)

108. The Director also relies on the following statement by Mr Nigel Griffiths on behalf of the Government (House of Commons Standing Committee G (Competition Bill) 18 June 1998, col 488:

> "Amendment No. 218 would add to the list of appealable decisions. We intend that only substantive decisions should be appealable to the tribunal. ***By that, I mean final decisions by the director general at the conclusion of a procedure or investigation at a stage at which the interested parties will be affected.*** We do not intend to provide an appeal to the Competition Commission on intermediate steps in the director general's proceedings or his analysis on the way to making decisions. To do so would be to open up endless and unnecessary scope for delay

> and obstruction. Our proposals provide for a full and fair appeal once a substantive decision has been taken. None of the items listed in the amendment are substantive decisions." (Emphasis added by the Director)

109. The Director further relies on this statement by Lord Simon (House of Lords Debates, 17 November 1997, col 450-451:

> "It is important that we understand the sequence well. ***It is appropriate for the process to be followed and a decision made by the director, and a total finding then to be appealable on the basis of the facts.*** We would not like to split the process going through to the director by appealing facts on the way. That may not be the most efficient process." (Emphasis added by the Director)

110. Again, examination of the context of both these statements shows that the point being addressed is a different one. The proposed amendments, upon which the Government's representatives are commenting, were apparently aimed at introducing various interim appeals that could be brought in the course of the procedure followed by the Director in reaching a finding of infringement. For example, it was suggested that, once the Director had found that there was a dominant position, that finding could be appealed before the Director proceeded to the next stage of his investigation, namely whether there was an abuse. Similarly it was suggested that facts found by the Director "on the way" to his final decision could be subject to an appeal. The Government rejected these suggestions on the grounds that the right to appeal should arise once the Director had reached his decision, rather than while the Director was still *en route*.

111. It can immediately be seen that the context of these suggestions, namely the Director bringing infringement proceedings, was quite different from the present context, which is a decision by the Director that there is *no* infringement. The citations just quoted do not relate at all to the rights of complainants.

112. We do not find any of the references relied on by the Director relevant within the principles of *Pepper v Hart*.

113. Finally as regards the Director's point that, if Bettercare is right, the principal party (here North & West) will only hear of the matter once there is an appeal, that is simply the consequence of the fact that in this case the Director felt that the position was so clear that he could take a decision without consulting or informing North & West or conducting an investigation under section 25. If in a particular case the Director feels that it is so clear that the Act does not apply (for example, by virtue of an exclusion under schedules 1 to 4, a block exemption under

sections 6 to 10, or for some other reason) that he is in a position to decide the matter against the complainant, we see no reason why he should not do so if he wishes, without seeking the views of the person complained against.

114. Although it is true that the Act makes only passing reference to complaints, in respects not presently material (see e.g. section 5(7) (withdrawal of block exemption), sections 15(2)(d) and 23(2)(c) (complaint following statutory guidance)), section 47 plainly envisages that third parties should have a right of appeal to this tribunal. The exercise of that right depends, under section 47(1), on the existence of a "relevant decision", namely in this case a decision within the meaning of section 46(3)(b) as to whether the Chapter II prohibition has been infringed. For the reasons given above, we consider that on the facts of this case the Director has taken such a decision. In principle, therefore, that decision is appealable under section 47.

(iii) Has the procedure envisaged by section 47 been observed?

115. In this appeal both parties, and notably the Director, have concentrated on the point of principle, namely whether there is a decision in this case capable of being appealed under section 47. Although we have heard little argument on the procedural aspects of section 47, the question whether the section 47 procedure has in fact been observed in this case is not entirely free from difficulty.

116. Section 47 (paragraph 15 above) envisages (i) that there is a "relevant decision" for the purposes of section 47(1); (ii) that the Director has been asked to withdraw or vary that decision under section 47(1); (iii) that such a request is made in writing, within the period specified in the Director's Rules, giving the applicant's reasons for considering that the relevant decision should be withdrawn or varied, pursuant to section 47(2); (iv) that the applicant has a "sufficient interest" (section 47(3)); and (v) that the Director has decided that the application does not show sufficient reason why he should withdraw or vary the relevant decision, and has notified the applicant of his decision: section 47(4). If those conditions are satisfied, the applicant, in this case Bettercare, may appeal to the Tribunal against the Director's refusal to withdraw or vary the relevant decision, pursuant to section 47(6). Nothing turns in this case on whether Bettercare has a "sufficient interest", it being conceded that it has.

117. Rule 28 of the Director's Rules (paragraph 52 above) requires notably that an application under section 47 be submitted in writing to the Director "within one month of the date of the publication of that decision by means of entry in the register" maintained by the Director under Rule 8 of the Director's Rules: Rule 28(1)(a). Since it is common ground that the decision in

question has not been published by means of entry in the register maintained by the Director under Rule 8 (applicable in this case by virtue of Rule 30(4)), it appears that Bettercare is not in breach of the time limit set out in Rule 28(1)(a).

118. Turning to the correspondence, it is true that Bettercare's solicitors did not explicitly refer to section 47 when writing to the Director, nor did they use the statutory language by explicitly asking him to "withdraw or vary" a relevant decision.

119. What we have in the correspondence is L'Estrange & Brett's letter of 31 August 2001, in reply to the Director's letter of 25 July 2001 (paragraphs 65 to 67 above). In that letter L'Estrange & Brett conclude:

> "We would wish you to address the above comments and to engage in an examination of the precise nature of the activities being exercised by North and West. We would also ask you to confirm that your response to our complaint that North and West is infringing the Chapter 2 prohibition of the Competition Act 1998 by abusing its dominant position is a decision of the Director General of Fair Trading."

120. Although loosely expressed, in our view a request "to address the above comments and to engage in an examination of the precise nature of the activities being exercised by North & West" is capable of being construed as an application "to withdraw or vary" a decision by the Director contained in the letter of 25 July 2001.

121. We then have L'Estrange & Brett's letter of 25 October 2001, in reply to the Director's letter of 21 September 2001. At the conclusion of their letter of 25 October 2001 L'Estrange & Brett say:

> "(6) As your decision is, in effect, a decision by the Director that the Chapter II prohibition, as detailed in the Act, has not been infringed, we believe it is a decision capable of appeal within sections 46 and 47 of the Act."

122. That letter of 25 October 2001 does not on its face contain any further request to "withdraw or vary" the Director's decision, so at first sight the request relied on can only be that contained in L'Estrange & Brett's letter of 25 July 2001.

123. We have come to the conclusion that we should not insist on too much formality as regards the section 47 procedure. Complainants may be unrepresented, or represented by those who (quite understandably) have had few or no encounters with this particular Act. While it is no doubt

preferable that matters are clearly set out, the Director has not taken a point on the wording of the correspondence in this case.

124. Not without some misgivings, we are prepared to find that L'Estrange & Brett's letter of 31 August 2001 constituted a request to withdraw or vary "a relevant decision" contained in the Director's letter of 25 July 2001. By necessary implication, in our view, that request was refused in the Director's letter of 21 September 2001, thus giving rise to a decision within the meaning of section 47(6) capable of being appealed by Bettercare to this Tribunal. On this analysis, by virtue of Rule 6(2) of the Tribunal Rules, Bettercare was obliged to appeal within two months of the notification of the letter of 21 September 2001, which was presumably received by L'Estrange & Brett shortly after that date. This appeal was lodged on 21 November 2001, and would therefore appear to be in time.

125. On the foregoing analysis the only breach of the formalities required by Rule 28 of the Director's Rules was the failure to provide the number of copies prescribed by Rule 28(3)(a) and, possibly, the failure to provide proof of L'Estrange & Brett's authority to act for Bettercare under Rule 28(3)(b). We do not regard those minor breaches as material for present purposes.

The section 46 point

126. Bettercare's alternative argument is that Bettercare is entitled to appeal directly to the Tribunal under section 46(1) as a person who is a party to an agreement in respect of which the Director has made a decision. The agreement relied on is Bettercare's agreement with North & West for the supply of residential and nursing home care services which is annexed to the application.

127. We reject that argument on two grounds. First, in our view section 46(1) of the Act links to section 46(3)(a) of the Act, that is to say section 46(1) of the Act deals with a decision as to the application to an agreement of the Chapter I prohibition, not a decision as to the application of the Chapter II prohibition, even if the alleged breach of the Chapter II prohibition also involves an agreement. Secondly, it is very difficult to say that on the facts of this case the Director has made any decision about a specific and identified agreement under section 46(1). What the Director was concerned with, and what the complaint related to, was conduct. It follows that the relevant provisions for the purposes of this case are section 46(2) and (3)(b), and not section 46(1) and (3)(a).

Conclusion

128. In the light of the foregoing, we unanimously hold that we should proceed with this appeal under section 47 of the Act. We will hear argument on what directions we should now make as regards the continuation of these proceedings, and on any other applications there may be.

Christopher Bellamy Michael Davey David Summers

Charles Dhanowa
Registrar Delivered in open court 26 March 2002