



Neutral Citation Number: [2012] EWHC 28 (Ch)

Case No: HC10C03303
HC11C01178

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2012

Before :

MR JUSTICE ROTH

Between :

ALSTOM TRANSPORT

Claimant

- and -

EUROSTAR INTERNATIONAL LIMITED

Defendant

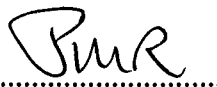
**Sarah Hannaford QC and Jessica Stephens (instructed by Hogan Lovells International
LLP) for the Claimant**

**Michael Bowsher QC and Ewan West (instructed by Burges Salmon LLP)
for the Defendant**

Hearing dates: 17, 18, 19 & 20 October 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.


.....

MR JUSTICE ROTH

Mr Justice Roth :

Introduction

1. The Defendant (“EIL”) operates a high-speed passenger rail service through the Channel Tunnel (“the Tunnel”) between London on the one side and Brussels and Paris on the other, with occasional extended services on the continent. In May 2009, EIL issued invitations to tender for a substantial and valuable contract for the design, supply and maintenance of a new generation of trains. In October 2010, EIL announced that Siemens PLC (“Siemens”) would be awarded the contract. The Claimant (“Alstom”), which supplied the trains currently used by EIL, was an unsuccessful tenderer. Alstom claims that the tender process conducted by EIL violates the EU procurement regime and this judgment is given after the trial of preliminary issues to determine whether that regime applies.
2. The proceedings have a somewhat complicated history. In the original action (Case no HC10 CO3303) Siemens was not originally a party but was subsequently joined. On 29 October 2010, after EIL had announced its decision that Siemens was the successful tenderer, Vos J refused Alstom’s application for an interim injunction to restrain EIL from entering into a binding contract with Siemens: see [2010] EWHC 2747 (Ch). For procedural reasons which it is unnecessary to go into, Alstom then commenced the present action, as fresh proceedings, seeking damages and a declaration of ineffectiveness regarding the contracts which EIL concluded with Siemens on 3 December 2010. On 13 July 2011, Mann J granted the Defendants’ application to strike out that part of the claim which sought a declaration of ineffectiveness: [2011] EWHC 1828 (Ch). Accordingly, the action proceeded as a claim for damages, which were sought only as against EIL. Although Siemens was still a defendant at the time of the trial of the preliminary issues and filed a defence concerning those issues, it took no part in the hearing before me. Subsequently, by order of Briggs J of 18 November 2011, Siemens ceased to be a party to these proceedings.
3. Alstom contends that EIL infringed the procurement rules in various respects. In summary, it claims that the technical specifications in the bidding process were insufficiently precise, and that the approach adopted by EIL and lack of information given to Alstom mean that the requirements of transparency and equal treatment that are fundamental to the procurement regime were breached. For further details, reference should be made to the judgment of Vos J in the related case, especially at [82] to [122]. Alstom’s primary claim is under the Utilities Contracts Regulations 2006 (“the UCR”) on the basis that EIL is a utility. But in case it should be held that EIL is not a utility within the terms of the UCR, the parties also seek clarification of EIL’s status under the Public Contracts Regulations 2006 (“the PCR”). The UCR and the PCR give effect to the EU regimes under, respectively, Directive 2004/17 and Directive 2004/18. It is common ground that the two sets of legislation are mutually exclusive, although some common issues arise under both.
4. EIL denies the alleged breaches but contends in any event that it is subject to neither procurement regime. On that basis, Mann J ordered the trial of preliminary issues, essentially to determine whether EIL comes within the scope of either procurement regime. The framing of those issues was revised and refined in the course of the

hearing, and there are now four issues which I have re-numbered for convenience as follows:

- “1. Is EIL a utility for the purpose of the Utilities Contracts Regulations 2006 and/or the Utilities Contracts Amendment Regulations 2009 when the provisions of the same are properly interpreted and/or disapplied (if and insofar as appropriate) in accordance with the wording and meaning of Directive 2004/17?
2. Is EIL a contracting authority for the purposes of the Public Contracts Regulations 2006 and/or the Public Contracts (Amendment) Regulations 2009 when the provisions of the same are properly interpreted and/or disapplied (if and insofar as appropriate) in accordance with the wording and meaning of Directive 2004/18?
3. In the event that it is determined that EIL is not a utility for the purposes of the Utilities Contracts Regulations 2006 and/or the Utilities Contracts (Amendment) Regulations 2009 in accordance with issue (1) above, was EIL a utility for the purposes of the Utilities Contracts Regulations 2006 at any time or times from the start of the procurement in January 2009 to the conclusion of the contract between EIL and Siemens on 3 December 2010?
4. In the event that it is determined in accordance with (3) above that EIL was a utility when it sought offers and/or until 31 August 2010, did either the Utilities Contracts Regulations 2006 and/or Utilities Contracts (Amendment) Regulations 2009 thereby apply to the procurement?”

Although the issues make separate reference to the 2009 amendment regulations, those regulations do not make any changes that are material to the questions raised and they do not require separate consideration.

5. The reduction in the number of preliminary issues from those ordered by Mann J reflects the fact that Alstom no longer pursues its pleaded contention that EIL is an emanation of the State. Accordingly, it is common ground that (a) Alstom has no direct claim under the EU directives but may claim only under domestic law, i.e. the implementing regulations; but (b) those regulations are to be interpreted in the light of the directives which they are intended to implement. How far the interpretative obligation in (b) goes is a matter of dispute in this case to which it will be necessary to return. But (a) reflects the position under Article 189 TFEU as regards the application of directives and that the doctrine of “direct effect” applies only, as it is generally described, ‘vertically’, that is to say in a claim against an emanation of the State (such that the State cannot derive an advantage from its failure to implement a directive) but not ‘horizontally’ as against private parties.

The Facts

6. The relevant facts for determination of the preliminary issues are not in dispute.
7. The Tunnel was constructed and brought into operation pursuant to the provisions of the Treaty of Canterbury concluded between the British and French governments in 1986, and of a concession agreement entered into on behalf of those governments in the same year with The Channel Tunnel Group Ltd and France-Manche SA ("the Concession Agreement"). The two concessionaires are both subsidiaries of Groupe Eurotunnel SA ("Eurotunnel"). Eurotunnel also itself operates the "Le Shuttle" service carrying vehicles and their passengers through the Tunnel.
8. Passenger train services through the Tunnel started on 14 November 1994. Those services are branded as "Eurostar" and were then operated by a consortium comprising Société Nationale des Chemins de fer Français ("SNCF", being the company operating French railways), Société Nationale des Chemins de fer Belges ("SNCB", being the company operating Belgian railways) and the company now called EIL which was then called European Passenger Services Ltd and was wholly owned by the British Railways Board ("BR").
9. For the purpose of Directive 91/440 on the development of the Community's railways, this consortium constituted an "international grouping" (or international railway grouping or "IRG") defined in Article 10 as:

"an association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States."

Until Directive 91/440 was amended with effect from 1 January 2010, under EU law only an IRG had a right of cross-border access to a national network for passenger rail transport.

10. On 1 June 1996, BR's interest in EIL was sold to London and Continental Railways Ltd ("LCR").
11. On 31 August 2010, a radical restructuring of EIL took place, referred to as "Futur Eurostar". EIL became a joint venture company involving SNCF and SNCB, and assumed the operation of the Eurostar service. Its shareholding was as follows: SNCF (and its subsidiary): 55%; LCR: 40%; and SNCB: 5%. Futur Eurostar reflected the legislative change whereby Art 10(1) of Directive 91/440 was repealed and it was no longer necessary for international rail services to be provided by an IRG. Save for a change in the way that the shares are held by SNCF's subsidiaries, this remains the ownership structure of EIL today.
12. EIL is an English company.
13. SNCF is a French company with public law status, wholly owned by the French State.
14. Since 6 June 2009, LCR has been wholly owned by the Secretary of State for Transport.
15. SNCB is a Belgian company with public law status, wholly owned by the Belgian State.

16. EIL shares access to the Tunnel with the operator of Le Shuttle, and to the British, French and Belgian rail infrastructure with other passenger operators providing domestic services or international services not passing through the Tunnel.
17. EIL's train operations through the Tunnel are subject to compliance with the safety and operating rules laid down by the Intergovernmental Commission to the Channel Tunnel ("the IGC"), which have the force of law in the UK in accordance with the Channel Tunnel (Safety) Order 2007.
18. EIL has a lease of some 33 years of a rail depot in England and of the business lounge at Ashford International station, which station it operates pursuant to a management agreement with the station owner. Otherwise, it does not own the railway infrastructure on which the Eurostar services operate but has access to that infrastructure pursuant to arrangements with the relevant infrastructure owners: Eurotunnel for the Tunnel; HS1 and Network Rail in England; Réseau Ferré de France in France; and Infrabel in Belgium.

The EU Merger Decision

19. The restructuring of EIL in August 2010 constituted a "concentration" within the EU merger control regime, and the proposed transaction was accordingly notified in advance to the European Commission. By a decision given on 17 June 2010 in Case Comp/M.5655 ("the Merger Decision") under Art 4 of the EU Merger Regulation, the Commission granted clearance to the concentration on the basis of commitments offered by the notifying parties that met the competition concerns to which the transaction gave rise.

The EU State aid decision

20. There have been a number of EU State aid decisions connected with the Tunnel and in respect of EIL. In particular, by decision of 13 May 2009 in Case N240/2008 ("the State Aid Decision"), the Commission approved prospectively the grant of substantial financial assistance by the UK government as part of the restructuring of EIL. That included the cancellation of the inter-company liability from EIL to LCR, cancellation of a UK Government loan to EIL and recapitalisation of EIL with new funding from LCR. These measures were intended to enable EIL to meet the investment requirements of the business, including the purchase of replacement rolling stock, so as "to put [EIL] on an equal footing with potential competitors": Decision, para 68. The Commission approved this package under Art 87(3)(c) EC [now Art 107(3)(c) TFEU] as restructuring aid in line with the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, OJ 2004 C244/2.

The procurement process

21. In January 2009, the procurement process for new high speed trains was commenced by the issue of a notice on the European Union portal, link-up system. On 15 May 2009, just after the issue of the State Aid Decision, invitations to negotiate ("ITNs") were sent to potential bidders in connection with the procurement, noting that EIL was operating the process on behalf of the combined Eurostar business (of which EIL, prior to the restructuring, was only a part). Alstom and Siemens were among those to receive an ITN.

22. On 30 October 2009, responses to the ITN were received from bidders.
23. On 8 December 2009, EIL sought best and final offers (“BAFOs”) from bidders and their BAFO responses were received by 29 January 2010.
24. On 21 April 2010, EIL wrote to bidders saying that although what it described as a “shortlisted bidder decision” could be made, contracts for the purchase of new rolling-stock could not be entered into until its corporate and operational restructuring had been completed. In line with that indication, on 27 May 2010, the decision was made to appoint Siemens as the preferred bidder, subject to completion of the restructuring.
25. On 18 August 2010, EIL entered into a preliminary agreement with Siemens, and following the completion of Futur Eurostar and the dismissal of the interim injunction application, contracts between EIL and Siemens were signed on 3 December 2010.

Future competition

26. The amendment to Directive 91/440 is part of the so-called Third Railway Package designed to further the liberalisation of railways within the EU. As mentioned above, it has opened up cross-border routes to railway undertakings that are not IRGs. Although EIL currently faces no competition to the Eurostar service, in August 2010 Deutsche Bahn announced its intention to launch a cross-Channel service and in July 2011 it submitted a formal application to the IGC for approval of its high-speed trains for services between St Pancras and (via Brussels) Amsterdam, Frankfurt and Cologne. It is anticipated that such a service may commence in 2013.

The Procurement Regime

27. The general purpose of the EU public procurement regime is to contribute to completion and operation of the internal market, so that the award of public contracts is not influenced by national preference but made on the basis of economic considerations. As stated by the European Court of Justice (“ECJ”) in Case C-18/01 *Korhonen* [2003] ECR I-5345 (at para 32):

“... the purpose of those directives is to avert both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by other than economic considerations.”

There is accordingly a certain irony to the present case in that the French government, through SNCF, has a significant ownership interest in EIL, but it is the disappointed French tenderer that brings this case alleging that the procurement rules were breached through lack of equal treatment in the way the contract was awarded to a German company. However, neither party suggested that this has any bearing on the determination of the legal issues.

28. Special procurement rules were adopted for the utilities sectors. Originally these were set out in Directive 90/531; now they are in Directive 2004/17 (hereafter, "Directive 17"). Outside the field of utilities, the general public procurement rules apply, which are now set out in Directive 2004/18 (hereafter, "Directive 18").
29. There are differences between the sectoral or utilities regime and the general regime. The general regime, which applies to a much wider range of bodies, is less flexible. This difference means that the field of application of the utilities regime is to be interpreted narrowly: Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, para 27. However, both regimes require that tenderers are treated equally, in a non-discriminatory manner. As already mentioned, in the United Kingdom, the utilities regime is implemented by the UCR and the general regime by the PCR. However, it is convenient to set out first the relevant EU provisions.

(1) *The utilities regime*

30. Two conditions have to be fulfilled before the utilities regime in Directive 17 will apply: (a) as regards status, and (b) as regards activity. Article 2(2) of the Directive provides:

"This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State."

31. Accordingly, there are three alternative criteria for the contracting entity to satisfy the status condition:
- i) that it is a "contracting authority";
 - ii) that it is a "public undertaking"; or
 - iii) that it pursues the requisite activities on the basis of the grant by a State authority of "special or exclusive rights".

Each of these three criteria receives a definition to which it will be necessary to return.

32. As stated in Art 2(2), the activity condition is set out in Arts 3 to 7, each covering a different sectoral field or fields. Art 5, concerning "Transport services", is the relevant field here. It provides:

"1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.”

(2) *The general regime*

33. The material differences between Directive 18 and Directive 17 for present purposes are that under Directive 18 there is no activity condition, but as regards status the general regime applies only to a “contracting authority”. However, the definition of “contracting authority” is the same in the two directives: Art 2(1)(a) of Directive 17 and Art 1(9) of Directive 18. Indeed, in the UK regulations, the UCR simply incorporates by reference the definition in the PCR.

The interpretation of the UK implementing legislation

34. Before turning to the detailed UK provisions, it is appropriate to consider the approach to be adopted to their interpretation.
35. As mentioned above, it is common ground that an implementing regulation is to be interpreted in the light of the directive which it is intended to implement. Moreover, it is well-established that such national legislation should receive a purposive rather than a literal construction in order to achieve the result pursued by the related directive. That has been repeatedly emphasised by the ECJ, notably in Case C-106/89 *Marleasing* [1990] ECR I-415, para 8. This interpretive obligation received further enunciation by the Grand Chamber in Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I8835, on a preliminary reference from the German court regarding the German legislation implementing Directive 93/104 (the Working Time Directive):

“111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).

113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC [authorities omitted].

114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it”

36. In the recent case of *R (Risk Management) v Brent LBC* [2011] UKSC 7, [2011] 2 AC 34, the Supreme Court held that “public contract” in the PCR was to be interpreted as incorporating the exemption read into Directive 18 by the ECJ and known (after the case in which it was so determined) as the *Teckal* exemption. In his judgment (with which Lords Walker, Brown and Dyson JJSC agreed), Lord Hope DPSC said (at [25]):

“I think that it would be wrong to apply a literal approach to the words and phrases used in it, such as in the definitions of “public contract” and “public service contract”. A purposive approach should be adopted. As Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 881 indicated, this means that regard must be had to the context in which the Regulations were made, to their subject matter and to their purpose. Would it be inconsistent with the achievement of that purpose if the *Teckal* exemption were not to be held to apply to them? Was this an exemption to which Parliament must have intended them to be subject? Having regard to the background of EU law against which the Regulations were made, the definitions in the Regulations can be taken to express the same idea as those in the Directive. Thus something which amounts to a contract in domestic law can nevertheless be held, without doing undue violence to the words of the Regulations, not to be a relevant contract for the purpose of the public procurement rules.”

37. Nonetheless, there are limits to how far a national court can go, as the ECJ recognises by its repeated articulation that the interpretative obligation applies “so far as possible.” Not only is the interpretative obligation as a matter of EU law similar to that under sect 3 of the Human Rights Act 1998 (“HRA”), but the Court of Appeal has held that, although the context is different, the same general approach should apply: see *R (IDT Card Services Ireland Ltd) v Customs and Excise Commissioners* [2006] EWCA Civ 29, [2006] STC 1252. Hence in that case, which concerned domestic legislation implementing an EC VAT directive, the judgments quote from the guidance given by the House of Lords as regards sect 3 HRA in *Ghaidan v Godin-*

Mendoza [2004] UKHL 30, [2004] 2 AC 557. In the latter case, Lord Nicholls in the leading opinion stated (at [32]-[33]):

“... the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of [the] legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, ‘go with the grain of the legislation’. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.”

38. Lord Steyn agreed with Lord Nicholls, noting the origin of section 3 in the *Marleasing* line of authority in EU law. And Lord Rodger, drawing on decisions of the House of Lords regarding EU law, said:

“121. For present purposes, it is sufficient to notice that cases such as *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is ‘amending’ the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its

terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

122. When Housman addressed the meeting of the Classical Association in Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect. For this reason, in the Community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed about its exact form. See, for example, Lord Keith of Kinkel and Lord Oliver of Aylmerton in *Pickstone v Freemans plc* [1989] AC 66, 112d, 126a-b."

39. However, in the present case, it was submitted for Alstom that when such a generous, purposive interpretation cannot achieve the same result as is laid down by the directive, the court should disapply the domestic legislation. As the skeleton argument of Ms Hannaford QC and Ms Stephens put it:

"... if it is not possible to interpret the Regulations in conformity with the Directive, the incompatible provisions must be disapplied and/or the Court must refrain from applying them."

That proposition was strongly resisted on behalf of EIL.

40. In support of its submission, Alstom referred to three decisions of the ECJ in procurement cases: Case C-327/00 *Santex* [2003] ECR I-1877; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415; and Case C-406/08 *Uniplex* [2010] ECR I-817.
41. *Santex* concerned the application of a limitation period under an Italian decree that would bar the claim of a disappointed tenderer seeking to challenge the award of a supply contract alleged to be in breach of the Public Procurement Remedies Directive 89/665. The Court stated:

“63. As is clear from the case-law of the Court, when applying domestic law the national court must, as far as is at all possible, interpret it in a way which accords with the requirements of Community law (see, in particular, Case C-165/91 *Van Munster* [1994] ECR I-4661, paragraph 34, and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39).

64. Where application in accordance with those requirements is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Community law (see, in particular, Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30, and *Engelbrecht*, paragraph 40).”

42. However, the two cases referred to in para 64 of the judgment were, respectively, a tax case challenging a duty imposed by the Spanish tax authorities (*Solred*) and a case concerning a decision of the Belgian National Pensions Office (*Engelbrecht*). Both those cases were therefore classic applications of the doctrine of vertical direct effect. Moreover, the Court’s statement was made in the context of Italian law which included a general legislative provision (art 5 of Law No 2248/1865) which enabled an Italian court to disapply a limitation period in a case of this kind. Hence, the judgment continued at para 65:

“It follows that, in circumstances such as those of the case in the main proceedings, it is for the referring court to ensure observance of the principle of effectiveness under Directive 89/665 by applying its national law in such a way as to enable a tenderer harmed by a decision of the contracting authority adopted in breach of Community law to safeguard the possibility of raising pleas in law alleging that breach in support of applications for review of other decisions of the contracting authority, by availing itself, where appropriate, of the possibility afforded, according to the referring court, by Article 5 of Law No 2248/1865 of disapplying the national rules governing such applications so far as limitation periods are concerned.”

Therefore the disapplication of the particular national law required by the ECJ was pursuant to an express provision of Italian law which enabled such a result to be achieved: see also the actual ruling of the ECJ at the conclusion of the judgment.

43. In *Lämmerzahl*, the decision challenged by the disappointed tenderer was that of a local authority (the city of Bremen). And *Uniplex*, which was a reference from the High Court, concerned the procurement procedure of the NHS Business Services Authority, which would clearly be regarded as an emanation of the State. Accordingly, the references in those two judgments to disapplication of non-conforming national law are in the context of obligations imposed by a directive on the State or its emanation, i.e. vertical direct effect. I therefore do not consider that *Santex*, *Lämmerzahl* or *Uniplex* establish the general proposition put forward by Alstom.
44. However, Alstom relied strongly on the relatively recent decision of the ECJ in Case C-555/07 *Kçükdeveci* [2010] ECR I-365, a Grand Chamber judgment in a case between individuals, which it was submitted has taken the law further. *Kçükdeveci* concerned a German law which provided that in calculating notice periods for dismissal, periods prior to the employee reaching the age of 25 were to be disregarded. In proceedings against her employer, the claimant challenged her dismissal on the grounds of insufficient notice, contending that these provisions regarding notice under the domestic law were contrary to the prohibition of discrimination on grounds of age in Directive 2000/78. The German court, in making a reference to the ECJ, concluded that it was impossible to interpret the German law so as to avoid this discriminatory provision. The ECJ stated in its judgment:
- “50. It must be recalled here that, ... Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, *Mangold*, paragraphs 74 to 76).
51. In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*, paragraph 77).”
45. This ruling in *Kçükdeveci* expressly follows the judgment of the ECJ in Case C-144/04 *Mangold* [2005] ECR I-9981, which also concerned Directive 2000/78 and age discrimination. These rulings appear to represent an erosion of the general principle that national courts do not have to disapply national law in a purely horizontal situation. *Mangold* has been subjected to strong criticism both academically (eg Craig, “The legal effect of Directives: policy, rules and exceptions” (2009) EL Rev 349) and by Advocates General in subsequent cases (eg Mazák AG in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 at [1320]-[138]). In her Opinion in Case C-427/06 *Bartsch* [2008] ECR I-7245, Sharpston AG referred to some of these criticisms and explained *Mangold* on the basis that it concerned the general principle of equality under Community law, to which Directive 2000/78 gave

expression, that was fundamental to the whole system of Community law and thus must be given effective protection: see at [32]-[40] and [69]-[72].

46. That explanation resonates with the Opinion of Bot AG in *Küçükdeveci* itself:

“85. ... I think it is perfectly logical that the Court considered in *Mangold* that the fact that the time-limit for the transposition of Directive 2000/78 had not expired could not undermine the effectiveness of the principle of non-discrimination on grounds of age and, in order to ensure that effectiveness, the national court had to disapply provisions of national law which were contrary to Community law. Moreover, the fact that the main proceedings were between private parties could not preclude the general principle of Community law in question from being relied on to exclude national legislation, since the Court has already on several occasions taken a more significant step by recognising that provisions of the Treaty containing specific expressions of the general principle of equal treatment and non-discrimination have horizontal direct effect.

86. The Court must now decide whether it wishes to maintain the same approach for situations which arose after the expiry of the time-limit for the transposition of Directive 2000/78. In my opinion, it should do so, because to adopt another position would depart from the logic which underlies *Mangold*.

87. In so far as Directive 2000/78 is intended to facilitate the specific application of the prohibition of age discrimination and, in particular, to improve judicial protection for workers who may have been wronged by a breach of that prohibition, it cannot, including – and all the more so – after the expiry of the period granted to the Member States for its transposition, affect the scope of that prohibition. It is difficult in that regard to imagine that the consequences of the primacy of Community law are weakened after the expiry of the time-limit for the transposition of Directive 2000/78. Most of all, it cannot be accepted that the protection of individuals against discrimination which is contrary to Community law is reduced after the expiry of that period even though the purpose of the rule in question is to increase their protection. To my mind, therefore, it should be possible to rely on Directive 2000/78 in proceedings between private parties in order to exclude a national provision which is contrary to Community law.

88. To adopt such an approach in the present case would not force the Court to reverse its earlier case-law concerning the absence of horizontal direct effect of directives. All that is at stake in the present case is the exclusion of a national provision contrary to Directive 2000/78, namely the last

sentence of Paragraph 622(2) of the BGB, to allow the national court to apply the remaining provisions of that paragraph, namely the periods of notice calculated on the basis of the length of the employment relationship. Directive 2000/78 is not therefore to be applied to independent private conduct not subject to any particular State rule, such as the decision of an employer to take on workers over the age of 45 or under the age of 35. Only that situation would call into question the appropriateness of recognising that the directive has genuine horizontal direct effect.

89. Furthermore, if the Court wishes to maintain its general unwillingness to disconnect 'substitution' direct effect from the right to plead the exclusion of national legislation, the specific nature of the directives intended to counteract discrimination allows it, in my view, to adopt a solution of more limited scope which, at the same time, has the merit of being consistent with the case-law it has developed in regard to the general principle of equal treatment and non-discrimination. From that point of view, it is because it implements that principle in regard to the prohibition of age discrimination that the right to plead Directive 2000/78 in proceedings between private parties is strengthened."

This Opinion of the Advocate General amplifies and is consistent with the statement in the judgment of the Court at para 51, quoted above, giving primacy over national law to "the principle of non-discrimination on grounds of age *as given expression in*" the directive, as opposed to the directive itself. Moreover, in para 27 of the judgment, the Court significantly stated:

"... it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether EU law precludes national legislation such as that at issue in the main proceedings."

47. Accordingly, while it appears that direct effect may be given as between private parties to the fundamental principle of non-discrimination against individuals found in the Treaty, including (at least to a limited extent) to the expression of that principle in directives, I do not regard *Kücükdeveci* (and *Mangold*, to which I was not specifically referred) as establishing a principle of broader application that would cast aside a substantial line of EU jurisprudence exemplified by *Pfeiffer*. In my judgment, there is no general requirement of EU law for a national court to disapply, in a claim against a private party, provisions of national law that are inconsistent with a directive. Were it otherwise, the distinction between vertical and horizontal direct effect would in practical terms be abolished, and the difference between directives and regulations that is expressed in Art 288 TFEU would be emasculated. I observe that such a result would also be contrary to the judgment of the Court of Appeal in *Churchill Insurance Co Ltd v Wilkinson* [2010] EWCA Civ 556, [2010] PIQR P15 (see at [14]), which was not cited in argument before me (although it appears that there the court's attention was not directed to *Kücükdeveci*).

48. Finally, although the procurement directives of course introduce an obligation of non-discrimination and equal treatment, they do so in the context of ensuring economic competition and upholding the single market, which is far removed from the concept of fundamental rights as considered in the *Mangold* and *Kçükdeveci* cases.

The activity condition

49. The UCR incorporates both the status condition and the activity condition in the definition of utility in reg 3(1):

“In these Regulations a utility is a relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part.”

50. Schedule 1 is divided into Categories corresponding to different utilities. Category 7 is “Transport” and Part Q within that category concerns rail transport. Column 2 specifies the activity as follows:

“The provision or operation of a network providing a service to the public in the field of transport by railway.”

A “network” is defined in reg. 3(2):

“network” in relation to a service in the field of transport, means a system operated in accordance with conditions laid down by or under the law in any part of England, Wales or Northern Ireland including such conditions as the routes to be served, the capacity to be made available and the frequency of the service;”

51. Accordingly, the activity condition for rail transport under the UCR can be stated as:

“the provision or operation of a system operated in accordance with conditions laid down by or under the law, including such conditions as the routes to be served, the capacity to be made available and the frequency of service, providing a service to the public in the field of transport by railway.”

52. Directive 17, by contrast, combines the activity condition for all transport services in a single formulation in Art 5: see para 32 above.

Does EIL satisfy the activity condition?

53. EIL submitted that it was not providing a “service to the public” within the terms of this condition. It argued that those words refer to the fulfilment of a public service obligation. Such an obligation does rest on the UK franchised rail operators, which as part of their franchises are subject to requirements regarding the particular services to be provided, including in general such matters as their frequency or capacity. EIL by contrast is what is described as an “open access” operator that provides the services which it chooses to run at its own commercial risk.

54. I do not accept EIL's submission. If the Directive meant to confine its application to transport undertakings to those which are subject to a public service obligation, it would have said so. On the contrary, I consider that the wording "service to the public" is used by way of distinction from the situation where an operator provides a service to only a limited class of persons, eg a railway carrying only freight, or the post office underground railway that operated in London until 2002. That is made clear by the Commission's 1988 Explanatory Memorandum to the Council accompanying the original proposal for a utilities directive, at para 63 of the supplement:

"With regard to those sectors where the supply or management of a network is the relevant activity for the purposes of this Directive, it is a common requirement that the network is used for providing a service to the public. This requirement is needed so as to limit the application of the Directive to entities having a genuine public utility function. Cases like those in the transport sector of a company owning a school-bus system should not be covered. It follows that 'to the public' means to the public at large, with no other limitations concerning the potential users of the transport service than those related to public order in general."

55. Accordingly, I find that EIL is and was providing a service to the public for the purpose of the activity condition by their operation of Eurostar. I should add that I derive no assistance on this point from the Council minutes of 5 March 2003 discussing the proposals for what became the two 2004 directives, to which I was referred on behalf of EIL, even if it were permissible to resort to those minutes as an aid to interpretation: see Case C-368/96 *R v The Medicines Control Agency, ex p Generics (UK) and others* [1998] ECR I - 7967, paras 26-27.
56. There is a difference between the UCR and Directive 17 regarding the meaning of a network. In the directive, art 5(1), second paragraph, is expressed as a deeming provision as regards the case where operating conditions are prescribed by a State authority: see para 32 above; whereas UCR reg 3(2) provides that this is an exhaustive definition. Thus art 5(1) would appear to indicate that a transport operator can provide a network even if operating conditions are not laid down by a competent authority. Further, there are indications that the second paragraph is included so as to cover services where there is no physical network, i.e. to encapsulate a 'virtual' network. Thus it brings bus services within the scope of the definition. See the Explanatory Memorandum, discussing the sectors to be covered by the proposed directive:

"394. The first category of situations covered are those in which a service is provided to the public through a technical network which, by its very existence, limits the scope for competition. Once one network is in place the prospects for competition through an alternative network or new entrants are in practice small. They are non-existent when the natural monopoly or oligopoly receives legal reinforcement through the grant of special or exclusive rights or through mechanisms of public authorization which exclude new entrants.

....

396. The second category of cases is in many ways analogous to the first: networks providing a service to the public in the field of transport. Indeed, when the service is provided by a single technical network such as a railway or a metro, the situation is exactly the same. However, in the transport field, the network concept needs to be somewhat broader to include also those systems in which the 'network' is not a technical system like a railway for trains or trams but, as in the case of a municipal bus service, a system of interconnecting routes along which vehicles pass in accordance with conditions laid down by public authorities. Where the State restricts access to such networks, the operating entities, whether they are public or private, are insulated from market forces and subject to State influence, not least as regards their procurement. Accordingly, the proposals cover entities providing services to the public in the field of transport by railway, tramway or trolleybus as well as bus services provided under operating conditions laid down by a public authority including conditions on the routes to be served."

57. Pursuant to art 8 of Directive 17, a "non-exhaustive list" of contracting entities within the meaning of the directive in the field of rail services is appended to the directive at Annex IV. Annex IV has been amended on a number of occasions. Although EIL is not included as an entry against the United Kingdom, since the list is non-exhaustive that in itself does not assist in determining this issue. But from those entities which are included it seems clear that rail transport undertakings within the scope of the directive, and therefore operating a "network", are not restricted to those providing infrastructure. For example, for Belgium, SNCB is listed as a contracting entity, although that the operation of the rail infrastructure in Belgium is undertaken by Infrabel, which is separately included: see, in the evidence of EIL, the first witness statement of Mr Brown, para 52(a) and the witness statement of Mr Jackson, para 40.
58. That the second paragraph of art 5(1) of Directive 17 is a deeming provision was not disputed between the parties. I agree that art 5(1) covers transport networks generally and that the second paragraph of that provision prescribes a sufficient but not a necessary condition to constitute a network. On that basis, reg 3(2) UCR, read literally, is narrower than art 5(1). But I accept Alstom's submission that the domestic provision should be interpreted purposively, and it may be said elastically, to achieve the same result. There is no indication in the UCR that it is seeking to narrow the definition. Thus in accordance with the general interpretative obligation discussed above, I consider that reg 3(2) should be construed as if it said that network "includes a system operated in accordance ..." instead of "means a system operated in accordance"
59. The difficulty, however, is then to determine what will constitute a network in the rail sector if there are no operating conditions of the kind set out in the deeming provision. Clearly, the companies furnishing the infrastructure will be providing a network. Eurotunnel and Railtrack plc, now Network Rail plc, are indeed listed as contracting

entities in Annex IV. But is any operator of train services along that infrastructure to be considered to be operating a network?

60. Article 5(1) states that the directive shall apply to activities relating to “the provision or operation of networks”. This makes clear that if one entity provides the original infrastructure, and a different entity is engaged to maintain it, both will be covered. However, I do not find that this formulation helps in determining whether the provider of a service along that infrastructure is also covered.

61. Although there is no definition of network in Directive 17, I consider that assistance can be derived from the two prior utilities directives, Directives 90/531 and 93/38. Those directives encompassed also telecommunications, a sector which was subsequently removed for reasons to which I shall return. For present purposes, the first and second utilities directives were in identical terms, but the internal numbering was slightly different and I shall refer for convenience to the second directive, Directive 93/38. Article 1 contains definitions, including the following:

“14. 'public telecommunications network' shall mean the public telecommunications infrastructure which enables signals to be conveyed between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

...

15. 'public telecommunications services' shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities;

'Telecommunications services' shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television;”

62. Article 2 specifies the relevant activities covered by the directive. Art 2(2)(c) concerning transport services is the same as Art 5(1) of Directive 17. But art 2(2)(d) states:

“the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.”

63. Accordingly, in the earlier utilities directives, from which Directive 17 is derived, an express distinction was drawn as regards telecommunications between the provision of a service *on* a network and the provision or operation of the network as such. For telecommunications, both aspects were classified as relevant activities whereas for transport only the provision or operation of the network was included. Given the juxtaposition of these sub-paragraphs, the distinction is clearly deliberate. I regard this as a powerful indication that the legislation did not intend to cover the operation

of a service on the rail infrastructure without more. Since the wording of the transport provision in Directive 17 is the same as in the two previous utilities directives, it is clearly to be construed the same way.

64. I also gain some assistance from Directive 2001/14 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. Although not concerned with public procurement, that directive in the field of rail transport includes a definition of network in art 2(i) as follows:

“network” means the entire railway infrastructure owned and/or managed by an infrastructure manager”.

65. In my judgment, in construing the concept of a railway “network” in art 5(1) of Directive 17, it is necessary to have regard to the purpose and policy underlying the sectoral public procurement regime. That regime is designed to apply in circumstances where undertakings face no, or only limited, competition. That is why it applies to infrastructure providers and operators. And that is why for bus service operators which may come within the second paragraph of art 5(1), there is the special provision in art 5(2) which excludes such operators where other entities are free to provide those services, either in the same area or in general, under the same conditions (i.e. where they are not shielded from competition): see art 2(4) of Directive 93/38. This rationale also explains the removal of telecommunications from the fields covered by the third utilities directive once it was considered that there was increasing potential for competition within the telecommunications field: see recital (5) of Directive 17.

66. The provision or operation of railway infrastructure accordingly comes within the scope of the concept of a network. By virtue of the deeming provision in art 5(1) second paragraph, a network here refers also to the operation of a railway service which is provided subject to legal requirements regarding such conditions as routes to be served and frequency of services. But an operator of a rail service alone that is conducted free from such constraints is not, in my view, an operator of a network within the terms of art 5(1). Such unrestricted commercial use of the infrastructure does not have the character of being protected from competition: competing operators may use the same infrastructure. Indeed, that is what will happen with the Tunnel, since Deutsche Bahn announced its intention to commence a rival service to Eurostar. In my view, EIL therefore does not operate a network, unless the deeming provisions in Art 5(1) second paragraph should be found to apply.

67. Although Alstom seeks to rely on the list of contracting entities in Annex IV to Directive 17, on the basis that some of them appear to be providers of only a rail service and do not own or operate the infrastructure, that does not advance the argument since those entities may be subject to the legal obligations that would bring them within the second paragraph of art 5(1). Indeed, if EIL is found not to be a network in the general sense, Alstom contends in the alternative that EIL meets the conditions of the deeming provision and so should be held to be operating a network on that basis.

68. Alstom submits that EIL is operated in accordance with conditions laid down under the law in reliance upon:

- i) the safety and other rules of the IGC (see para 17 above), such as the requirement that the trains use “concentrated power” and as regards maximum train length, which determined the type of trains that can be used on services through the Tunnel;
 - ii) various safety and other operating regulations, such as the Rail Vehicle Accessibility Regulations 1998, the Railways Infrastructure (Access and Management) Regulations 2005, the Railways (Licensing of Railway Undertakings) Regulations 2005, the Rail and Other Guided Transport Systems (Safety) Regulations 2006, which apply to the operation of the Eurostar service between St Pancras and the Tunnel.
69. However, I do not think that these are the kind of operating conditions referred to and illustrated in art 5(1), and thus in the definition of “network” in reg 3(1). The conditions here relied on by Alstom concern, in the first case, technical requirements relevant to the safety of the Tunnel, and in the second case, requirements for operating licences, interoperability and safety management systems. They are the kind of conditions that would apply to the operator of any rail service using the Tunnel, and in the second case of any public rail service in the UK. Bearing in mind that the terms of the Directive 17 are to be interpreted narrowly and having regard to the rationale of the utilities regime as discussed above, I consider that it would be wrong to interpret the second paragraph of art 5(1) in such a broad sense.
70. Accordingly, I conclude that although the definition of network in the UCR is to be interpreted so as to achieve consistency with Directive 17, the requirement to operate a network is not satisfied by EIL. I should add that there is no suggestion that there was any change in the relevant considerations for this issue over the period of the procurement process.
71. That is sufficient to dispose of the question of whether EIL was a utility for the purpose of the UCR. But in case I am wrong on that, I shall proceed to address the status condition on which I heard considerable argument. Indeed, the question whether EIL was a contracting authority arises under preliminary issue (2) and the PCR.

The status condition

72. As already noted, the sectoral procurement regime, both in Directive 17 and the UCR, establishes three alternative categories of entity that will satisfy the status requirement for its application. It is convenient to repeat them:
- i) “contracting authorities”;
 - ii) “public undertakings”; or
 - iii) entities which are neither contracting authorities nor public undertakings but which operate on the basis of the grant by a State authority of “special or exclusive rights” (“SER”).
73. In Directive 17, these categories are set out in art 2(2). In the UCR, this result is derived in more convoluted fashion from the requirement in reg 3(1) that a utility

must be a “relevant person specified in one of the Parts of Schedule 1”; there is then a list in Part Q of Schedule 1 which identifies various companies and authorities in the rail transport sector (including Eurotunnel and Network Rail) but includes also “[a]ny other relevant person”; which takes one back to the definition of “relevant person” in reg 3(2) that sets out the above three categories.

74. Alstom’s primary case is that EIL is a public undertaking; but in the alternative it submits that EIL is a contracting authority or operates on the basis of SER. Each of these terms receives a detailed definition and it is necessary to consider them separately.

(i) Contracting authority

75. Although not Alstom’s primary case, it is logical to consider first the question whether EIL is a contracting authority since the definition of contracting authority is relevant also to the definition of public undertaking.

76. Contracting authority is defined in art 2(1)(a) of Directive 17 as follows:

“‘Contracting authorities’ are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

‘A body governed by public law’ means any body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

- having legal personality and

- financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;”

77. By contrast, the UCR defines contracting authority at reg 2(1) by cross-reference to the PCR. The PCR at reg 3(1) sets out an extensive definition of “contracting authority“, in part by listing various bodies, that I reproduce as an appendix to this judgment. For immediate purposes, it is sufficient to note that the list includes “a Minister of the Crown”, “a government department”, “a local authority” (further defined by reference to authorities in, respectively, England, Wales, Scotland and Northern Ireland, at reg 3(2)-(5)), various other public bodies defined by reference to UK statutes, and at reg 3(1)(w):

“a corporation established, or a group of individuals appointed to act together, for the specific purpose of meeting needs in the

general interest, not having an industrial or commercial character, and—

(i) financed wholly or mainly by another contracting authority;

(ii) subject to management supervision by another contracting authority; or

(iii) more than half of the board of directors or members of which, or, in the case of a group of individuals, more than half of those individuals, are appointed by another contracting authority;”

78. The difference in approach between the UCR/PCR on the one hand and Directive 17 on the other is immediately obvious. The definition in Directive 17 applies to entities irrespective of the State concerned. Under the UK regime, only a body or authority within the UK can be a contracting authority.
79. Alstom submitted that EIL satisfies the three-fold test under Directive 17 of being a “body governed by public law” and thus a contracting authority on the basis that it:
- (a) is a body having legal personality; and
 - (b) is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and
 - (c) is subject to management supervision by other bodies subject to public law.
80. Criterion (a) is clearly satisfied and was not in dispute.
81. Criterion (b) itself incorporates a two-fold test: (i) that it is established to meet needs in the general interest, and (ii) that it does not have an industrial or commercial character. Although EIL sought to submit that it was not established to meet needs in the general interest, it is clear from the ECJ jurisprudence that this is a low threshold and in my view it is manifestly satisfied. For example, in *Korhonen* the ECJ held that the activities of a company which was engaged in a building project for the construction of office blocks in a town centre was meeting needs in the general interest for the purpose of this condition since:
- “Activities such as those carried on by Taitotalo in the case in the main proceedings may be regarded as meeting needs in the general interest, in that they are likely to give a stimulus to trade and the economic and social development of the local authority concerned, since the location of undertakings on the territory of a municipality often has favourable repercussions for that municipality in terms of creation of jobs, increase of tax revenue and improvement of the supply and demand of goods and services” (judgment, para 45).
82. The operation of the Eurostar service by EIL clearly serves a wider interest than simply that of EIL’s customers. Hence the State Aid Decision refers to the new high

speed link between London St Pancras and the Tunnel and the associated services as delivering “a wide range of economic and policy benefits”, including the making of an “important contribution to economic regeneration” (para 12). Aside from passengers using the service, the towns of Ashford and Ebbsfleet as intermediate stations on the Eurostar service have derived significant benefits, and hence there was strong local opposition when EIL proposed the curtailment of services through Ashford. In the end, Mr Bowsher QC for EIL accepted that his opposition to criterion (b) was more effectively directed at the second limb, i.e. “industrial or commercial character”.

83. As to that aspect, the judgment in *Korhonen* is particularly relevant and summarises the position derived from earlier cases. The ECJ there stated:

“47. According to settled case-law, needs in the general interest, not having an industrial or commercial character, within the meaning of ... the Community directives relating to the coordination of procedures for the award of public contracts are generally needs which are satisfied otherwise than by the availability of goods and services in the market place and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence (see, *inter alia*, *BFI Holding*, paras 50 and 51, *Agorà and Excelsior*, para 37, and *Adolf Truley*, para 50).

...

49. In particular, it must be ascertained whether the body in question carries on its activities in a situation of competition, since the existence of such competition may, as the Court has previously held, be an indication that a need in the general interest has an industrial or commercial character (see, to that effect, *BFI Holding*, paras 48 and 49).

50. However, it also follows from the wording of that judgment that the existence of significant competition does not of itself permit the conclusion that there is no need in the general interest not having an industrial or commercial character (see *Adolf Truley*, para 61). The same applies to the fact that the body in question aims specifically to meet the needs of commercial undertakings. Other factors must be taken into account before reaching such a conclusion, in particular the question of the conditions in which the body in question carries on its activities.

51. If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature. In such a case, the application of the Community directives relating to the coordination of procedures for the award of public contracts would not be necessary, moreover, because a body acting for

profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions which are not economically justified.”

84. Alstom submitted that in the high-speed cross-Channel rail passenger market, EIL does not face any competition. Only from 1 January 2010, when the amendment to Directive 91/440 came into effect, was the requirement removed that a service on that route would have to be operated by an IRG, and EIL still remains the only operator.
85. However, cross-Channel rail passenger services may not be the relevant market in competition terms. In its competition decision, *Eurotunnel (No 3)* [1995] 4 CMLR 801, at paras 64-66, the Commission concluded that there were distinct markets for time-sensitive business travellers and for leisure travellers. For the latter, road travel using the Shuttle through the Tunnel and sea transport were substitute modes of transport and thus formed part of the same market. This distinction is recognised in the more recent Merger Decision (see at para 18), which observes that air travel, in particular by low cost carriers, may also be a substitute for non-time sensitive, leisure travellers. Nonetheless, in the Merger Decision the Commission did not find it necessary to reach a concluded view as to whether other modes of transport formed part of the relevant market (see para 30). This was because even if other modes of transport were included, Eurostar held very high market shares of above (and possibly well above) 70% and was accordingly dominant on both the London-Paris and London-Brussels routes: para 34. That finding of dominance means that in the operation of Eurostar EIL can “behave to an appreciable extent independently of its competitors and customers”: Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 30.
86. Notwithstanding this finding in the Merger Decision, EIL emphasised that it is necessary to look forward: the market has been liberalised since 1 January 2010 and Deutsche Bahn has announced that it plans to start a service through the Tunnel from 2013. The procurement decision under challenge, to purchase a new generation of high-speed trains, was made in the light of such anticipated competition. I agree that it is necessary to look at the total picture in order to determine whether EIL’s activity in this regard is of an industrial or commercial character. Future competition is accordingly relevant. Although the Merger Decision identified high barriers to entry into this market, the extensive commitments offered by the parties, as amended in discussion with the Commission, were found to remove the competition concerns raised by the creation of the Futur Eurostar joint venture, namely that it would otherwise have been very difficult for third parties to offer cross-Channel high speed rail services. Those commitments were specifically designed to bring about a situation where such entry was a practicable, as well as a legal, possibility and the fact that Deutsche Bahn will be starting a service shows that the possibility will be realised.
87. Alstom submitted that EIL nonetheless continues to enjoy a privileged status, since under the 1987 usage contract with Eurotunnel (“the Usage Contract”), BR and SNCF were entitled to 50% of the capacity of the Tunnel rail link in each direction until 2052; and the function of carrying passengers as provided for in the Usage Contract was delegated by BR to EIL under a so-called Back-to-Back Agreement in 1994. However, pursuant to art 3 of Directive 2001/14, Eurotunnel as the infrastructure manager for the Tunnel, is required to publish, and keep up-to-date, a “network

statement” setting the conditions for access to its infrastructure. In its 2011 Network Statement, Eurotunnel records that railway undertakings established in EU Member States have access and transit rights through the Tunnel under fair and non-discriminatory conditions, for the purpose of providing, inter alia, international passenger transport services. It further states:

“Eurotunnel wishes to see a major development in freight and passenger train traffic between the UK and Continental Europe. The capacity available in the Tunnel allows for such development, in particular for trains which would operate in the Tunnel at a speed around 140km/h.”

The statement is indeed designed to inform potentially interested railway undertakings of the requirements and conditions for such access. Moreover, Eurotunnel’s CEO stated in July 2011 that even at a peak period there was approximately 30% spare capacity in the Tunnel.

88. Alstom further relied strongly on the facts that EIL was not operating profitably and that very substantial State aid had to be provided from the UK government to enable it to recapitalise for the restructuring, and indeed for it to afford the procurement of the next generation of trains. As at 31 December 2007, EIL had total net liabilities of £1.73 billion, which were forecast to rise to £1.86 billion by 31 December 2008. In the year ended 31 February 2009, EIL’s trading loss was about £190 million. That is a very significant figure in the context of a company with a registered share capital of £701 million. The State Aid Decision notably concluded, accepting the view put forward by the UK authorities:

“With the existing level of HS1 access charges¹ [EIL] is not a financially viable entity without State subsidy. [EIL] would probably not be able to stem its losses and continue trading, absent continuing financial support from the UK government.”
(para 183)

89. This raises the question whether the fact that an undertaking is able to continue trading only as a result of very substantial State aid precludes it from being of an industrial or commercial character within the terms of the procurement directives. So far as the researches of Counsel could establish, this is not an issue that has previously received judicial consideration. But in my view, that fact does not have this consequence. It is necessary to consider all the circumstances. The criterion looks to the “character” of the undertaking, not its profitability. The underlying rationale of this criterion is that it serves as an indication of whether the undertaking would be expected to take procurement decisions on economic grounds. Although EIL may only have been able to continue in business as a result of State aid, that aid was being given precisely in order to enable it to operate for the future as a commercial entity. It was restructuring aid and part of a package of measures designed to restore EIL’s long-term viability and make the company independently sustainable. That package

¹ The charges paid for use of the High Speed 1 link between St Pancras and the Tunnel, which was owned by the UK government through LCR and leased to HS1 Ltd. The State aid package involved also reducing the level of those charges. EIL had been able to pay those charges at their high level only through a loan from LCR supported by a government-backed guarantee.

further included a revised access charging system for HS1, reducing the charges so as to help attract new entrants to the market. And the UK government access charge guarantee to EIL was withdrawn. Indeed, the overall package involved a restructuring of LCR, separating its interest in Eurostar (through EIL) from the operation of the HS1 link, with the consequence that EIL acquired if anything more of an independent commercial character than beforehand, so that it could operate in a more competitive environment. As Mr Richard Brown, the chairman of EIL, explained in his evidence, describing the position prior to the restructuring:

“[EIL] was indeed loss-making for more or less all of its existence. It was expected to be loss making at the time of the refinancing of LCR, and effectively the losses were financed... out of the original government-backed – government guaranteed bonds that LCR issued.”

Then, with reference to the aims of the restructuring, he said:

“... an additional objective, as well as putting Eurostar on a firm financial footing – and I think the phrase “to make it viable and stand-alone, viable and fully commercial” etc, is used in various documents – the further objective was to open up High Speed 1 to make sure that other operators would be able to come in and operate on it, on a level playing field with [EIL], but that [EIL] was then able to compete with those on a level playing field. So there was a whole series of objectives in the restructuring, not just to sort out [EIL]’s balance sheet.”

I accept that as a fair and accurate summary of what happened, and indeed this evidence was not really challenged.

90. Moreover, the State aid was approved by the Commission under the “one time, last time” principle, as set out in the Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, at section 3.3. Save in exceptional circumstances for which the company is not responsible, no further rescue or restructuring aid is permitted in the next 10 years: point 73. After receipt of the State aid, it is clear that EIL was expected to operate going forward on a commercial basis. That was confirmed by Mr Brown’s evidence. EIL has no public service obligation: unlike the UK Franchised rail operators, it is not obliged to provide any particular level of service, capacity or frequency other than as a result of the contractual arrangements which it enters into, and it is run as a commercial entity. That includes having regard to its reputation and goodwill: like any company providing services to the public in a field which attracts attention, it sometimes responds to public and media pressure in its decision-making as regards the curtailment of its services, and I do not consider that this in any way lessens the commercial nature of its operation.
91. Taking all these factors into account, I have no doubt in concluding that at the time of the procurement procedure at issue, EIL was of a commercial character in the sense in which that expression is used in the Directives. Accordingly, EIL is not a “body governed by public law” and therefore does not satisfy the criteria for being a “contracting authority”.

