Professor Ian S. Forrester
General Court of the European Union
Luxembourg
Judge

The notion of relevant undertaking

Training of National Judges in EU Competition Law
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I. Scope of Art. 101 (1) and 102 TFEU

Core question: Do the EU competition law rules apply?

- Art. 101 (1) TFEU: Prohibition applies where **agreements between undertakings**, decisions by associations of undertakings and concerted practices which may **affect trade** and which have as their object or effect the **prevention, restriction or distortion of competition** within the internal market

  → Three questions: **EFFECT ON TRADE? EFFECT ON COMPETITION? WHO IS AFFECTED?**

- According to Art. 102 TFEU, the **abuse** by one or more undertakings **of a dominant position** within the internal market or a substantial part of it is incompatible with the internal market and **prohibited** in so far as it may **affect trade between member states**

I. Scope of Art. 101 (1) and 102 TFEU

→ **Unilateral conduct by a non-dominant company is not forbidden**

II. Who is included in undertakings?

- An undertaking could be
  - an individual, such as Reuter v BASF (scientist who wished to shorten a non-compete period), Union royale belge des sociétés de football association ASBL v Bosman (footballer who wanted to move to another club without the new club having to pay a transfer fee)
  - a private family company, such as Bulloch in DCL/Johnnie Walker v Commission
  - a big company such as AG, GmbH, Limited Company, SA, such as Microsoft, Apple, Bayer
  - a public undertaking, such as UEFA, Scottish Football Association, railway companies, postal operators e.g. Post Danmark and Deutsche Post, airports, religious schools
  - agricultural cooperatives, such as Dansk Landbrugs Grovvareselskab AmbA

  → Some are very clear, some are difficult to classify
- "Undertaking" as an actor - liability within a group of companies

II. Who is included in undertakings?

- The notion is not defined in the Treaty
  - Treaty of Rome, 1957: Creation of a general common market
  - *"Free and undistorted competition policy"*: To neutralize the temptations of economic power (monopolies, cartels, abuse of dominant position)
  - But: Articles are the (possibly hasty) result of a very difficult negotiation in 1956
  - Drafters probably did not fully realise the implications; UK asked unanswered questions about the meaning of new rules
  - For this reason, the CJUE has developed a definition which is based on a uniform concept of undertakings throughout EU competition law
- Intragroup agreements not caught
- Market integration is a goal unique to European competition law: a world first

III. Definition by case law

Judgment of 23 April 1991, *Höfner and Elser v Macrotron GmbH*, C-41/90:

Facts:

- The Oberlandesgericht Munich asked whether a monopoly on employment services granted to a public employment agency (*"Bundesanstalt für Arbeit"*) constitutes an abuse of a dominant position on the market
- Background: Höfner and Elser signed a recruitment contract with Macrotron. Following, H&E presented a candidate for the post of sales director. Macrotron did not appoint that candidate and refused to pay the fees. Macrotron argued that the contract was void since the *Bundesanstalt für Arbeit* has an exclusive right of employment procurement according to the German Law on the promotion of employment *("Arbeitsförderungsgesetz").* H&E raised EU competition law as a defence declaring that a public employment agency is subject to the prohibition contained in Art. 86 of the Treaty (now Art. 102 TFEU)

III. Definition by case law

Ruling:

- ***"In the context of competition law, the concept of an undertaking encompasses every <u>entity</u> engaged in an <u>economic activity</u>, <u>regardless of the legal status</u> of the entity and the way in which it is financed"*** (para. 21)
- *"The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment." (*para. 22*)*
- The debtors were not able to escape liability

Conclusion:

"Undertaking" is interpreted by reference to what it does, not its label !

→ See also *Société de vente de ciments v Kerpen & Kerpen*, C-319/82 (an obligation to use goods supplied for own needs and not to resell goods in a specific area was void; but the cement had to be paid for since not the whole contract was rendered void)

1. “entity“ / “entité” / “entidad” / “Einheit”

Judgment of 10 March 1992, *Shell International Chemical Company Ltd v Commission*, T-11/89:

Facts:

- The Commission fined fifteen producers of polypropylene for infringing Art. 85 (1) of the EC Treaty (now Art. 101 TFEU), including Shell Ltd
- The Commission concluded that those companies had regularly set target prices and developed them according to agreed percentage or tonnage targets
- Shell Ltd argued that it was itself neither a producer/supplier of polypropylene (its subsidiary companies were) nor that it was responsible for actions of its subsidiary companies, which were independent players; therefore it should not be the addressee of the Decision

1. “entity“ / “entité” / “entidad” / “Einheit”

Ruling:

- *“The concept of undertaking, […], must be understood as referring to an economic unit which consists of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of infringement of the kind referred to in that provision.”* (Opinion of Advocate General Vesterdorf)
- Appeal of Shell Ltd dismissed as it and its subsidiaries must be seen as one entity

Conclusion:

- One entity can be composed of individual natural or legal persons as well as groups of persons or companies
- The notion of undertaking is irrespective of the legal personality under national law

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a. Individuals, e.g. a bar or professional society

Judgment of 19 February 2002, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99:

Facts:

- Mr Wouters, a member of the Amsterdam Bar, informed the Rotterdam Bar's Supervisory Board about his intention to practice as "Arthur Andersen & Co., advocaten en belastingadviseurs" (tax consultants)
- However, the Dutch Bar prohibited its members from practising in full partnership with accountants
- Mr Wouters argued that this prohibition is not compatible with the freedom of establishment and the European rules on competition
- The Dutch Court referred the case to the CJEU and raised the question whether a partnership between members of the Bar and other professionals is to be regarded as an association of undertakings and therefore the EC Treaty rules on competition apply

a. Individuals, e.g. a bar or professional society

Ruling:

- *"the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed."* (paras 46)
- *"registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings […]."* (para. 49)
- *"it appears that a professional organisation such as the Bar of the Netherlands must be regarded as an association of undertakings […] where it adopts a regulation such as the 1993 Regulation. Such a regulation constitutes the expression of the intention of the delegates of the members of a profession that they should act in a particular manner in carrying on their economic activity."* (para. 64)
- Bar was seen as association of undertakings; nevertheless, Mr Wouters lost as bar was free to forbid such partnerships in order to ensure proper practice of the legal profession

Conclusion:

Individual natural persons can constitute an undertaking

→ See also *Arduino,* C-35/99 (Art. 85 of the EC Treaty does not preclude a Member State from adopting a regulation which approves a tariff fixing fees for members of the Bar)

b. Legal persons

An "entity" can include legal persons such as

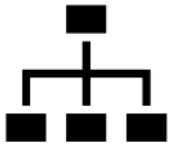
- companies and partnerships
- States
- public bodies, like healthcare, railway, broadcast, communication and postal providers

c. Corporate Groups and “decisive influence”

→ As said before, the term is decisive in the context of the allocation of liability of a company for their subsidiaries

→ The bigger the turnover of the guilty company, the bigger the fine

Judgment of 10 September 2009, *Akzo Nobel NV v Commission*, C-97/08 P:



Facts:

- The Commission found cartel activity agreements and concerted practices in the choline chloride sector
- The Commission concluded that Akzo Nobel’s subsidiaries lacked commercial autonomy and therefore addressed the decision to the parent

c. Corporate Groups and "decisive influence"

Ruling:

- *"It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market […]. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking […]."* (para. 58)
- *"The fact that the parent company which exercises decisive influence over its subsidiaries can be held jointly and severally liable for their cartel offences does not in any way constitute an exception to the principle of personal responsibility but is the expression of that very principle. That is because the parent company and the subsidiaries under its decisive influence are collectively an single undertaking for the purposes of competition law and responsible for that undertaking."* (para. 97)
- Appeal of Akzo Nobel dismissed as it has a decisive influence over its subsidiaries

c. Corporate Groups

Conclusion:

- A parent company may be held liable for the anticompetitive activity of its subsidiary even if the parent company itself was not party to the activity
- It is to be assumed that a parent company, which has a 100 per cent shareholding in its subsidiary, exercises a decisive influence
- Smaller shareholdings are often the subject of debate
- Compliance policy of the group “obey the law” does not affect the fine
- The question can make a difference of € 10,000,000’s

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2. “economic activity“

- Originally, the CJEU based a very broad understanding of this feature
- Creative attempts to extend the reach of the competition rules to situations where there is not normal competition
- Some restrictions have been imposed on pure demand activity and in the pursuit of social purposes (non-profit making)

a. Profit making

Judgment of 11 July 2006, *FENIN v Commission,* T-319/99*:*

Facts:

- FENIN, an association of distributors of medical equipment for hospitals in Spain, submitted a complaint to the Commission
- It accuses several organisations, which are responsible for the operation of the Spanish health system (SNS), to abuse a dominant position (systematically taking an average of 300 days to pay their debts to its members)
- The Commission noted that these organisations are not acting as undertakings and rejected the complaint; therefore, FENIN launched an action for annulment

a. Profit making

Ruling:

- *"an organisation which purchases goods – even in great quantity – not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market"* (para. 37)
- Appeal of FENIN dismissed
- Attempt to achieve political social revolution by use of the competition rules

Conclusion:

- A mere purchase constitutes an economic activity only if the product in demand is subsequently to be offered on the market as an economic activity
- Of course, if the purchasers had agreed between themselves to delay payment, the result would have been different

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→ See also *Automec v Commission,* C-41/89 (use of competition rules to change underlying regulatory framework)

b. Non-profit making

Judgment of 16 March 2004, *AOK-Bundesverband v Ichthyol-Gesellschaft Cordes*, C-355/01:

Facts:

- The Oberlandesgericht Düsseldorf addressed the CJEU with the question whether the German associations of sickness funds are to be classified as undertakings
- German employees are generally obliged to be insured by statutory sickness funds
- Those funds operate under the principle of solidarity; nevertheless, they compete with each other and private funds up to a limited extent
- (Unsuccessful) Attempt of private sector operator which intends to sell medicine products for higher prices

b. Non-profit making

Ruling:

- *"In the field of social security, the Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity. […] Their activity, based on the principle of national solidarity, is entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions."*
  (para. 47)

Conclusion:

- In principle, non-profit enterprises can be covered by the notion of undertaking
- However, the CJEU provides for a restriction for those actors who are active on the market <u>exclusively</u> for social or purely charitable purposes and therefore do not carry out any economic activity (→ lack of profit motive and the independence of benefits from the level of contributions)
- In the case, Art. 101 (1) did not apply

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c. States

Judgment of 19 January 1994, *SAT Fluggesellschaft mbH v Eurocontrol,* C-364/92:

Facts:

- The Belgian “Cour de Cassation” asked the CJEU whether Eurocontrol was an undertaking
- Eurocontrol was founded by several Member States to provide a common system for establishing and collecting route charges for flights within their airspace
- The dispute before the Belgian court concerned the refusal of the air navigation company SAT Fluggesellschaft mbH to pay its route charges
- SAT pleads that Eurocontrol abuses a dominant position

c. States

Ruling:

- *"Eurocontrol thus carries on, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety. Contrary to SAT's contention, Eurocontrol's collection of route charges, which gave rise to the dispute in the main proceedings, cannot be separated from the organization's other activates."* (para. 27-28)
- *"Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature […]."* (para. 30)

Conclusion:

A restriction is made for states carrying out sovereign measures !

3. “regardless of the legal status“

Judgment of 12 July 1984, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas*, C-170/83:

Facts:

- Hydrotherm concluded an agreement with Mr Andreoli and the firms he controlled (Compact and Officine Sant’Andrea) on an exclusive licence to distribute “Ghibli” and “Type S Series A” radiators; Hydrotherm agreed to place a firm order with Compact amounting to approx. DM 1.000.000
- Since Hydrotherm refused to buy more goods after buying to the value of DM 867.389.22, Compact terminated the contract and claimed damages on its own behalf and on behalf of Mr Andreoli and Officine Sant’Andrea
- Hydrotherm tried to escape liability for breach of contract by arguing that the agreement was void under Art. 85 EC Treaty (now Art. 101 TFEU) as the block exemption does not apply since Mr Andreoli and the firms he controlled were legally independent undertakings
- The Bundesgerichtshof asked the CJEU whether undertakings participating on one side of the contract form a single economic activity

3. “regardless of the legal status“

Ruling:

- *“an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons”* (para. 11)
- The agreement was valid as the block exemption regulation was applicable and therefore not Art. 85 EC Treaty (now Art. 101 TFEU)

Conclusion:

- A natural person, a limited partnership and another firm constituted a single economic unit when they were all controlled by the same natural person
- The notion is not necessarily synonymous with natural or legal personality
- The debtor had to pay

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IV. Conclusion

- For Art. 101 (1) and 102 TFEU to apply to a firm or a business,
  - label is unimportant
  - legal personality or status (individual natural persons, public and private legal persons and groups of persons) is unimportant
  - it has to be engaged in an economic activity
    - → Lucrative activity is necessary
    - → Limit: Exclusion of the prerogatives of public authority and purely social or purely demand activities (such as pension and social insurance schemes)
- The liability of an undertaking for its subsidiaries is well established in competition cases.
- Competition in a mixed economy is the goal.
- European competition law has become a world leader; over 100 countries have similar statutes
- Common sense is still relevant