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“The concept of an undertaking”

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Introduction

The scope of European Union competition law is limited to “undertakings” as seen in the articles 101, 102 and 106 TFEU. This essay examines the concept of an “undertaking”, and the boundaries in relation to activities that are normally run by state or delegated to private authorities. The first part of this essay consist of a analysis of the term “undertaking”, which includes a look into relevant case law and decisions to distinguish between what is in the scope of competition law and what is not.

What is an undertaking?

There is no definition of an “undertaking” in the Treaties, and therefore it is necessary to look into case law from courts and decisions by the commission, to define the borders of the term “undertaking”. In the case of *Höfner and Elser v Macrotron* a “*basic definition*”¹ was given by the European Court of Justice:

“in the context of competition law,... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entit and the way in which it is financed”²

This definition shows that the term “undertaking” is very wide, since neither the legal status of the entity and the way it is financed matters. Every entity engaged in an economic activity is an “undertaking”. Companies, funds, individuals and everything in between could be an “undertaking”. Case law shows that the entity does not have to be

¹ Graham, Cosmo (2010) “EU and UK competition law” (1st edition Pearson Education Limited, Essex 2010) p. 66

² Ibid. p 67 box 2.5

profit making or part of the private sector³. In the case of *Pavel Pavlov v Stichting Pensiofond Medische Specialisten* the European Court of Justice found that:

“any activity consisting in offering goods and services on a given market is an economic activity”⁴

This definition of an economic activity is understood as “*engaging in transactions on a market, that is, buying and selling goods and services, where the price is determined by the market*”⁵. It is not a simple distinction to make whether an entity is engaged in an economic activity, since the development in many member states has changed companies owned by the state with monopoly rights into private actors, and the fact that a wide number of activities normally run by state is now done by private actors. An example of this in England is the private providers of prisons⁶ and so is the case of *Diego Cali v SEPG*. The logic behind this approach to the interpretation of what an “undertaking” is that there must be space for public actors in the market not to be controlled by the European Union competition law.

Activities normally run by state

There is a general principle saying that certain activities run by the state or official authority on a private basis is not in the scope of the European Union competition law. The cases of *SAT v Eurocontrol* and *Diego Cali v SEPG* shows this principle. In the first case the European Court of Justice found that air-traffic control was an activity of state

³ Ibid. p. 67 footnote 16 with reference to European Commission, *Spanish Courier Services* [1990] OJ L233/19 and *Höfner and Elser v Macrotron*

⁴ Ibid. p. 67 box 2.5

⁵ Ibid. p. 67 with reference to Case C-35/96 *Commission v Italy* [1998] ECR I-3851 at para. 36

⁶ Ibid. p. 68

interest and not of “*an economic nature justifying control by competition law*”⁷, and therefore not an “undertaking”. In the Diego-case the European Court of Justice found that providing an anti-pollution surveillance activity was an activity of state interest, which therefore did not work on normal premises on the market and therefore not an “undertaking”. The two mentioned cases draw up the lines, but are both characterised by being private companies doing state-like activities. The more difficult cases, in relation to being an “undertaking” or not, are characterised by entities dealing with social or health activities.

Health and social services

The European courts have used the notion of solidarity as help to decide whether an entity is doing activity that is related to the state in a way so the entity is not an “undertaking”. In the case of *Pouchet and Pistre v AGF and Cancava* the European Court of Justice found that a sickness and maternity scheme was not an “undertaking”, since there were an element of redistribution in the scheme. The case of *FFSA v Ministère de l’Agriculture* showed that this was not the case, when an optional insurance scheme for farmers invests in financial products and the outcome to the members is dependent on the market. In this case the insurance scheme was found to be an “undertaking” competing with other insurance companies, because the element of solidarity was not strong enough. In *Albany International v Stichting Bedrijfspensioenfonds textielindustrie* the European Court of Justice found that a supplementary pension fund was an “undertaking”, even though the fund was non-profit-making and based on solidarity, because of the fund “*working on the basis of capitalisation and therefore the benefits depended on the financial results of investments*”⁸. In *FENIN v Commission* the European Court of Justice found that the

⁷ Ibid. p 68

⁸ Ibid. p. 70

Spanish health services was not an “undertaking”, because of it operated on the principle of solidarity on a free-for-all-scale paid by taxes. The General Court, held that “*purchasing goods, even in great quantities, did not itself, constitute activity on the market*”⁹, an approach the European Court of Justice followed. This illustrates the balance the court has to do dealing with these cases.

Conclusion

The concept of an “undertaking” plays a very important part in the competition law, since the definition is dealing with the member states right to regulate certain activities and on the other side the fulfilling of the central goals of competition law. The case law seems to be consistent with less uncertainty than earlier, making elements like whether something is compulsory, capitalised, how and what the contributors get important in relation to whether something is “solidarity” and not an “undertaking”. This uncertainty could be seen as a problem with the way the member states choose to give power to the European Union in Art. 101 and 102 TFEU, but also shows the strength of it; the European Court of Justice are able to deal with new structures and organisations across the member states to create one European market. The European Courts are careful not to increase the scope of the competition law, because some functions in a state is, in most member states, offered on terms that are different from the ones working in the market.

⁹ Ibid. p. 71

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