THE CONCEPT OF ‘UNDERTAKING’ UNDER EU AND MALTESE COMPETITION LAW

KATIA CACHIA

A thesis submitted in partial fulfillment of the requirements of the degree of LL.D

Faculty of Laws, University of Malta

May 2010
DECLARATION OF AUTHORSHIP

I, KATIA CACHIA, declare that this thesis entitled THE CONCEPT OF ‘UNDERTAKING’ UNDER EU AND MALTESE COMPETITION LAW and the work presented in it are my own. I confirm that:

· This work was done in partial fulfillment for the degree of LL.D at the Faculty of Laws of the University of Malta.

· Where any part of this thesis has previously been submitted for a degree or any other qualifications at this University or any other institution, this has been clearly stated.

· Where I have consulted the published work of others, this is always clearly attributed.

· Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work.

· I have acknowledged all sources used for the purpose of this work.

Signed: _____________________________

Date: ______________________________
ABSTRACT

Various entities perform a plethora of activities in everyday life. Whether these entities and their activities fall within the scope of EU competition rules depends on their characterization as ‘undertakings’. This thesis provides a comprehensive and detailed analysis of the notion of ‘undertaking’ within EU and Maltese competition law through European Commission decisions, the EU courts’ jurisprudence and the judgments of the Commission for Fair Trading in Malta. Alas, it was not possible to analyze the Office for Fair Competition decisions since they are not publicly published, albeit an effort was made to obtain some form of information. The innovations on the notion of ‘undertaking’ as well as the pitfalls and inadequacies have been clearly spelt out.

Since the EC Treaty, now the TFEU, provides no definition of what is meant by the word ‘undertaking’, the first chapter is devoted to a discussion on the origins of this important notion and on how the EU courts have construed the meaning of the same.

The main pointer to classify an entity as an ‘undertaking’ or otherwise is whether the entity performs an economic activity and this thesis dedicates a whole chapter on this important issue. The Commission and the EU courts’ approach towards the interpretation of the notion of ‘undertaking’ evolved throughout the years and this also transpires from the various cases mentioned throughout this thesis. While the EU courts have maintained a functional approach in the categorization of entities as ‘undertakings’, various Advocate Generals and practitioners have criticized this approach. Apart from discussing these criticisms, this thesis also goes through the various notices and guidelines issued by the European Commission in order to clarify this notion.

This thesis is geared towards various objectives. While trying to portray a complete picture of those entities which fall within the ambit of competition rules, it also recognizes those entities which pose problems in their characterization as ‘undertakings’. Hence, this thesis explains how certain entities are shielded from
the application of competition rules. This is seen through an analysis of the private and the public sphere and those ‘undertakings’ which form a single economic entity.

The above is also brought into discussion within a Maltese competition law context through judgments of the Malta’s Commission for Fair Trading; judgments which are closely based on European Commission decisions and the EU courts’ jurisprudence.

All in all the thesis should provide a useful analytical background on the notion of ‘undertaking’ and helps us to appreciate more the importance of this notion and the need for there to be a clear and consistent approach in identifying ‘undertakings’ as subjects of EU competition rules.
To my great and wonderful parents and my boyfriend Christian
TABLE OF CONTENTS

TABLE OF CASES .................................................................................................................. 11
TABLE OF LEGISLATION ....................................................................................................... 18
ACKNOWLEDGEMENTS ......................................................................................................... 21
LIST OF ABBREVIATIONS .................................................................................................... 22

INTRODUCTION .................................................................................................................... 24

CHAPTER I: THE FUNCTIONAL DEFINITION OF AN ‘UNDERTAKING’ .......... 27

A. Application of EU Competition rules to ‘undertakings’ .............................................. 27
B. Definition of an ‘Undertaking’: It’s Origins ................................................................. 28
   1. A definition throughout the Treaties ........................................................................ 28
   2. A definition throughout the CJ ............................................................................. 30
C. Towards a functional approach ..................................................................................... 33
   1. Legal Status is Irrelevant ....................................................................................... 33
   2. Profit-motive is Immaterial .................................................................................... 34
      (a). The General Rule ............................................................................................. 34
      (b). The Exception ................................................................................................. 36
   3. A Relative Concept ................................................................................................ 37
D. The end result ................................................................................................................. 40

CHAPTER II: PERFORMANCE OF AN ‘ECONOMIC ACTIVITY’ ................. 43

A. What is an ‘Economic Activity’? .................................................................................. 43
      (a). Offering of goods or services on the market .................................................... 43
      (b). Bearing an economic or financial risk .............................................................. 45
      (c). Remuneration .................................................................................................. 46
   2. Comparative criterion and Market participation .................................................... 47
B. Limiting the Spectrum of EU Competition Law .......................................................... 48
1. Employees.................................................................................................................. 48
2. Market Regulation ....................................................................................................... 49
3. Public Goods .................................................................................................................. 51
C. Services of General Economic Interest Exclusion .................................................. 53
   1. Definition ...................................................................................................................... 53
   2. Requirements ............................................................................................................... 54
      (a). Act of entrustment ................................................................................................. 54
      (b). Proportionality ........................................................................................................ 55
      (c). Development of trade should not be affected ....................................................... 56
      (d). A revenue-producing monopoly ........................................................................... 56
   3. The rationale behind the exclusion ............................................................................ 56
D. The ‘Solidarity’ Principle............................................................................................... 57
   1. What is ‘Solidarity’? .................................................................................................... 57
   2. Redistribution ............................................................................................................ 58
   3. Some Room for Competition: The AOK Bundesverband judgment ...................... 60
      (a). Towards a ‘Concrete’ Test .................................................................................... 60
      (b). Consequences of the ‘concrete’ test .................................................................... 63
E. Purchasing of Goods and Services: The FENIN Judgment ........................................ 65
   1. Upstream/Downstream Market Approach ............................................................... 65
   2. A Broader Application ............................................................................................... 67
   3. Comparative law ......................................................................................................... 68
      (a). Germany ................................................................................................................ 68
      (b). The Netherlands .................................................................................................... 69
      (c). United Kingdom .................................................................................................... 69

CHAPTER III: TYPES OF ‘UNDERTAKINGS’ AND ‘ASSOCIATIONS OF
UNDERTAKINGS’ .............................................................................................................. 71

A. Private Entities ............................................................................................................. 71
   1. Companies .................................................................................................................... 71
   2. Individuals – an element of autonomy ....................................................................... 72
      (a). Self-employed persons ......................................................................................... 72
3. The notion of an ‘auxiliary organ’ ................................................................. 110
4. Adverse effects ............................................................................................... 111
5. Divergences between parent/subsidiary and principal/agent scenarios .. 112
C. Firm-employee relationship ........................................................................... 113
D. Contractor and Sub-contractor .................................................................... 114
E. Consequences of the ‘Single Economic Entity’ Doctrine ........................... 116
   1. One party to the agreement ......................................................................... 116
   2. Competition rules may still apply ............................................................... 117
   3. Liability ........................................................................................................ 117
   4. The extraterritoriality principle .................................................................... 118
   5. Imposition of fines – the 10 per cent turnover .............................................. 119
   6. Action for damages – implications for jurisdictional issues ...................... 119
   7. Ensuring the correct payment of fines ........................................................ 119
F. Restructuring of Undertakings: liability on whom? ..................................... 119

CHAPTER V: THE MALTESE SITUATION ............................................................... 123

A. An Overview of Maltese Competition Law .................................................. 123
B. Judgments of the Commission for Fair Trading ........................................... 129
   1. The Office for Fair Competition ................................................................ 129
   2. The Commission for Fair Trading ............................................................... 130
   3. The relativity of the notion of ‘undertaking’ – Malta’s National Blood
      Transfusion Service Case ........................................................................... 131
   4. Single economic entities - GRTU case ....................................................... 133
   5. Public entities ............................................................................................... 134
      (a). Carmel Mifsud/Malta Transport Authority .......................................... 134
      (b). Spiteri-Garden of Eden/Malta Transport Authority ............................. 136
      (c). Bargain Holidays – European Air Bargains/Malta Tourism Authority ... 138
      (d). S&D Yachts Ltd .................................................................................... 139

CONCLUSION ........................................................................................................ 142

PERIODICAL LITERATURE AND ARTICLES .................................................. 149
# TABLE OF CASES

## Commission Decisions

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>OJ Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airport of Brussels</td>
<td>1995</td>
<td>L216/8</td>
</tr>
<tr>
<td>Aluminium Imports</td>
<td>1985</td>
<td>L92/1</td>
</tr>
<tr>
<td>Amministrazione Autonoma dei Monopoli di Stato</td>
<td>1998</td>
<td>L252/47</td>
</tr>
<tr>
<td>AROW/BNIC</td>
<td>1982</td>
<td>L379/1</td>
</tr>
<tr>
<td>Cartonboard</td>
<td>1994</td>
<td>L243/1</td>
</tr>
<tr>
<td>Cement</td>
<td>1994</td>
<td>L343/1</td>
</tr>
<tr>
<td>CNSD</td>
<td>1993</td>
<td>L203/27</td>
</tr>
<tr>
<td>COAPI</td>
<td>1995</td>
<td>L122/37</td>
</tr>
<tr>
<td>Deutsche Post AG</td>
<td>2001</td>
<td>L125/27</td>
</tr>
<tr>
<td>Deutsche Telekom AG</td>
<td>2003</td>
<td>L263/9</td>
</tr>
<tr>
<td>Distribution of Package Tours During the 1990 World Cup</td>
<td>1992</td>
<td>L326/31</td>
</tr>
<tr>
<td>French Beef</td>
<td>2003</td>
<td>L209/12</td>
</tr>
<tr>
<td>Ijsselcentrale</td>
<td>1991</td>
<td>L28/32</td>
</tr>
<tr>
<td>MCAA</td>
<td>2005</td>
<td>L353/12</td>
</tr>
<tr>
<td>NAVEWA/ANSEAU</td>
<td>1981</td>
<td>L167/39</td>
</tr>
<tr>
<td>Organic Peroxides</td>
<td>2005</td>
<td>C105/2</td>
</tr>
<tr>
<td>P&amp;I Clubs</td>
<td>1985</td>
<td>L376/2</td>
</tr>
<tr>
<td>Polypropylene</td>
<td>1986</td>
<td>L230/1</td>
</tr>
<tr>
<td>PVC</td>
<td>1989</td>
<td>L74/1</td>
</tr>
<tr>
<td>RAI/UNITEL</td>
<td>1978</td>
<td>L157/39</td>
</tr>
<tr>
<td>Raw Tobacco Italy</td>
<td>2005</td>
<td>L353/45</td>
</tr>
<tr>
<td>Raw Tobacco Spain</td>
<td>2004</td>
<td>C85/16</td>
</tr>
<tr>
<td>Spanish Courier Services</td>
<td>1990</td>
<td>L233/19</td>
</tr>
<tr>
<td>UEFA’s Broadcasting Regulations</td>
<td>2001</td>
<td>L171/12</td>
</tr>
<tr>
<td>Vaessen/Moris</td>
<td>1979</td>
<td>L19/32</td>
</tr>
</tbody>
</table>
Zinc phosphate [2003] OJ L153/1

General Court and Court of Justice

Aalborg Portland A/S and Others v Commission (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) [2004] ECR I-123
AEG – Telefunken AG v Commission (Case 107/82) [1983] ECR 3151
Ahmed Saeed (Case 66/86) [1989] ECR 803
Akzo Nobel NV and Others v Commission (Case C-97/08 P) [2009] ECR 000
Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Case C-67/96) [1999] ECR I-5751
AOK Bundesverband v Ichthyol-Gesellschaft Cordes (Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01) [2003] ECR I-2493
ASBL (Case 311/85) [1987] ECR 3801
Autorita’ Garante della Concorrenza e del Mercato v Ente tabacchi italiani – ETI SpA (Case C-280/06) [2007] ECR I-10893
Avebe (Case T-314/01) [2006] ECR II-3085
Banchero (Case C-387/93) [1995] ECR I-4663
Becu and Others (Case C-22/98) [1999] ECR I-5665
Béguelin Import Co. v S.A.G.L. Import Export (Case 22/71) [1971] ECR 949
Belgian State v René Humbel and Marie-Thérèse Edel (Case 263/86) [1988] ECR 5365
Brentjens (Joined Cases C-115/97 to C-117/97) [1999] ECR I-6025
Bureau national interprofessionnel du cognac v Guy Clair (Case 123/83) [1985] ECR 391
Centrafarm v Sterling (Case 15/74) [1974] ECR 1147
Christelle Deliège v ASBL Ligue francophone de judo and others (Case C-51/96 and C-191/97) [2000] ECR I-2549
Cisal di Battistello Venanzio & C. Sas v INAIL (Case C-218/00) [2002] ECR I-691
Commission v Italy (Case C-118/85) [1987] ECR 2599
Commission v Italy (Case C-35/96) [1998] ECR I-3851
Commission v Anic Partecipazioni SpA (Case C-49/92) [1999] ECR I-4125

Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission (Joined Cases 29/83 and 30/83) [1984] ECR 1679

Compañía española para la fabricación de aceros inoxidables SA (Acerinox) v Commission (Case C-57/02 P) [2005] ECR I-6689

Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA (Case C-217/05) [2006] ECR I-11987

Consten and Grundig v Commission (Joined Cases 56 and 58/64) [1966] ECR 299

Corinne Bodson v SA Pompes funèbres des régions libérées (Case 30/87) [1988] ECR 2479

Corsica Ferries France SA (Case C-266/96) [1998] ECR I-3949

Corsica Ferries Italia (Case C-18/93) [1994] ECR I-1783

DaimlerChrysler AG v Commission (Case T-325/01) [2005] ECR II-3319

Dansk Rørindustri and others v Commission (Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P) [2005] ECR I-5425

David Meca-Medina and Igor Majcen v Commission (Case C-519/04P) [2006] ECR I-6991

Deutsch Post AG (Joined Cases C-147/97 and C-148/97) [2000] ECR I-825

Diego Calì & Figli Srl v Servizi Ecologici del Porto di Genova SpA (SEPG) (Case C-343/95) [1997] ECR I-1547

Donà v Mantero (Case 13/76) [1976] ECR 1333

Drijvende Bokken (Case C-219/97) [1999] ECR I-6121

Dusseldorp (Case C-203/96) [1998] ECR II-229

Enichem v Commission (Case T-6/89) [1991] ECR II-1623

ERT and Others (Case C-260/89) [1991] ECR I-2925

Fédération Francaise des Sociétés d'Assurances (Case C-244/94) [1995] ECR I-4013

FENIN v Commission (Case C-205/03 P) [2006] ECR I-6295

FFSA v Commission (Case T-106/95) [1997] ECR II-229

Firma Ambulanz Glöckner v Landkreis Südwestpfalz (Case C-475/99) [2001] ECR I-8089

FNCCBV and Others v Commission (Joined Cases T-217/03 and T-245/03) [2006] ECR II-4987

FRUBO v Commission (Case 71/74) [1975] ECR 563
Heintz van Landewyck SARL and others v Commission (Joined Cases 209 to 215 and 218/78) [1980] ECR 3125


Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C.Sas (Case 170/83) [1984] ECR 2999

Imperial Chemical Industries Ltd v Commission (Case 48/69) [1972] ECR 619

Italy v Commission (Case 41/83) [1985] ECR 873

Job Centre coop. arl. (Case C-55/96) [1997] ECR I-7119

Klaus Höffner and Fritz Elser v Macrotron GmbH (Case C-41/90) [1991] ECR I-1979

Klöckner-Werke AG and Hoesch AG v High Authority (Joined Cases 17 and 20/61) [1962] ECR 325

Laurent Piau v Commission (Case T-193/02) [2005] ECR II-209

Meng (Case C-2/91) [1993] ECR I-5751

Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA (Case C-179/90) [1991] ECR I-5889

Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others (Case C-222/04) [2006] ECR I-289


MOTOE v Elliniko Dimosio (Case C-49/07) [2008] ECR I-4863

Municipality of Almelo and Others (Case C-393/92) [1994] ECR I-1477

Nungesser v Commission (Case C-258/78) [1982] ECR 2015

Paul Vandevenne and Others (Case C-7/90) [1991] ECR I-4371

Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten (Joined Cases C-180/98 to C-184/98) [2000] ECR I-6451

Poucet et Pistre v Assurance Générales de France (Joined Cases C-159/91 and C-160/91) [1993] ECR I-637

Procureur du Roi v Paul Corbeau (Case C-320/91) [1993] ECR I-2533

RTT v GB-Inno-BM SA (Case C-18/88) [1991] ECR I-5941

Sacchi (Case 155/73) [1974] ECR 409

SAT Fluggesellschaft v Eurocontrol (Case C-364/92) [1994] ECR I-43

SC Belasco and Others v Commission (Case C-246/86) [1989] ECR 2117

SELEX Sistemi Integrati SpA v Commission (Case T-155/04) [2006] ECR II-4797
SELEX Sistemi Integrati SpA v Commission (Case C-113/07 P) [2009] ECR 000
Snupat v High Authority (Joined Cases C-42 and 39/59) [1961] ECR 53
Sodemare v Regione Lombardia (Case C-70/95) [1997] ECR I-3395
Stora Kopparbergs Bergslags AB v Commission (Case C-286/98 P) [2000] ECR I-9925
Suiker Unie and Others v Commission (Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73) [1975] ECR 1663
Tokai Carbon Co. Ltd and Others v Commission (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03) [2005] ECR II-10
URSBF v Jean-Marc Bosman (Case C-415/93) [1995] ECR I-4921
Viho Europe BV v Commission (Case T-102/92) [1995] ECR II-17
Viho Europe BV v Commission (Case C-73/95 P) [1996] ECR I-5457
Walrave and Koch (Case 36/74) [1974] ECR 1405
Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Case C-309/99) [2002] ECR I-1577

Ireland

Ramadan Hemat v Medical Council [2006] IEHC 187

Netherlands

Zorgkantoren (AWBZ agencies) Decision of the Director General of the NMA (Case No. 181) (10th March 2000)

Brussels

Malta


Bargain Holidays Limited, European Air Bargains Limited (UK) and Malta Bargains Limited (UK) vs Malta Tourism Authority (Ilment Numru: 6/2006) (17th October 2005)


Complaint submitted by Vincent Farrugia as Director-General of GRTU in the name and on behalf of two members thereof namely Joseph Vella and Simon Diacono (31st July 1997)


United Kingdom

BetterCare Group Limited v Director of Fair Trading (Case 1006/2/1/01)

United States

United States v Cooper, 312 US 600 (1941)

TABLE OF LEGISLATION

Treaties

Treaty establishing the European Coal and Steel Community, ECSC Treaty
Treaty establishing the European Atomic Energy Community, EURATOM Treaty
Treaty establishing the European Economic Community, EEC Treaty

European Legislation

Regulations

Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1
Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1

Directives

Commission Directive (EC) 2006/111 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17
Decisions, Notices, Guidelines, Protocols and Recommendations

Commission Notice on exclusive dealing contracts with commercial agents [1962] OJ 139/2922


Commission Notice on Services of General Interest in Europe [2001] OJ C17/4


Protocol 22 concerning the definition of ‘undertaking’ and ‘turnover’ (Article 56) attached to the Agreement on the European Economic Area

United Kingdom Legislation


United States Legislation

Sherman Act 1890, ch.647, 26 Stat. 209, 15 U.S.C

Postal Reorganization Act, 1970
Maltese Legislation

‘FAIR TRADING, the next step forward ...’ Proposals for Legislative Reforms, issued with the Consumer Affairs and Competition Bills, November 1993

Competition Act 1995, Chapter 379 of the Laws of Malta

Parliamentary Reports, Parliamentary Sitting No. 356, 2 December 1994
ACKNOWLEDGEMENTS

I express sincere thanks to my tutor Prof Eugene Buttigieg for his guidance during the research and development of this thesis.

A note of appreciation also goes to Magistrate Dr. Silvio Meli for his willingness and thorough review of the draft copy of this thesis.

Grateful acknowledgment is made to all the authors and publishers of copyright material which appears in this thesis.

Thanks are also due to my two sisters Patricia and Marica and their families for always believing in me and giving me support throughout my studies.

A personal note of thanks is due to my boyfriend Christian for his constant support and encouragement in pursuing my studies.

Last but not least I am thankful to my parents Martha and Carmel for always being a motivation to pursue my studies since my first days of school. Without their encouragement, inestimable support and indefatigable good nature, especially when I over did it, the completion of this work would not have been possible in the first place. Thank you!
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>EURATOM</td>
<td>European Atomic Energy Community</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>CJ</td>
<td>Court of Justice</td>
</tr>
<tr>
<td>GC</td>
<td>General Court</td>
</tr>
<tr>
<td>ECLR</td>
<td>European Competition Law Review</td>
</tr>
<tr>
<td>ELRev</td>
<td>European Law Review</td>
</tr>
<tr>
<td>ELR</td>
<td>European Law Reporter</td>
</tr>
<tr>
<td>LIEI</td>
<td>Legal Issues of Economic Integration</td>
</tr>
<tr>
<td>ECR</td>
<td>European Court Reports</td>
</tr>
<tr>
<td>CCLP</td>
<td>Center for Competition Law and Policy</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal of the EU</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>CA</td>
<td>Competition Act</td>
</tr>
<tr>
<td>OFT</td>
<td>Office for Fair Trading</td>
</tr>
<tr>
<td>OFC</td>
<td>Office for Fair Competition</td>
</tr>
</tbody>
</table>
INTRODUCTION

Competition law has grown at a phenomenal rate in recent years due to the enormous changes in economic behaviour that have taken place throughout the world. The belief that competition amongst undertakings produces the best outcomes for society is based on economic theory that employs models of perfect competition and monopoly and concepts of welfare and efficiency. However, undertakings often engage themselves in practices which often result in anti-competitive effects with the result of distorting, restricting and/or preventing competition. To this extent, EU and Maltese competition law set out legal rules to encourage fair and effective competition between undertakings.

In reality, since this thesis was written after the Treaty of Lisbon entered into force to amend the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), reference is made to the new Articles of the TEC which was renamed to Treaty on the Functioning of the European Union (TFEU). Moreover, since the TFEU changed the name of the European Court of Justice (ECJ) and that of the Court of First Instance (CFI), this thesis will refer to them as the Court of Justice (CJ) and the General Court (GC) respectively. The above-mentioned rules are found in Articles 101 and 102 TFEU (ex Articles 81 and 82 of the EC Treaty) as well as in Articles 5 and 9 of Malta’s Competition Act (CA) (Chapter 379 of the Laws of Malta), the latter being closely based on the corresponding Articles 101 and 102 TFEU. Articles 101 TFEU and Article 5 of the CA prohibit restrictive agreements and concerted practices between ‘undertakings’ and ‘decisions of associations of undertakings’ while Article 102 TFEU and Article 9 of the CA prohibit the abuse of a dominant position by one or more ‘undertakings’.

2 Competition Act Chapter 379 of the Laws of Malta.
4 Article 106 (2) TFEU and Article 30 (2) of the CA.
In this context, ‘undertakings’ are the subjects of competition rules, however, a difficulty arises in assessing whether an entity is an ‘undertaking’ or otherwise. This difficulty originates from the fact that the TFEU provides no definition to the term ‘undertaking’ despite the fact that the European Coal and Steel Community (ECSC) Treaty and the European Atomic Energy Community (EURATOM) Treaty provided a definition of the same. Instead, it has been construed by the EU courts. However, the situation becomes more complicated since the EU courts adopted a broad approach such that it was held that ‘the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.’ Hence, Chapter 1 covers various concepts relating to the definition of ‘undertaking’ such as its origins, legal status, profit-motive and the relativity concept of the notion, which concepts are at the basis of a functional approach.

The key consideration in assessing whether an entity is an ‘undertaking’ in terms of law is whether it is engaged in an economic activity. Thus, the critical question would be what constitutes an economic activity? This is discussed in Chapter 2 which analyses the various characteristics of an ‘economic activity’ that the EU courts have broadly established. The discussion proceeds by identifying certain activities which are excluded specifically from the scope of this general principle due to their non-economic character. This is complemented by an analysis of certain entities which carry on services of a general economic interest. In a series of cases, the European Commission and the EU courts have been required to rule on cases involving social protection, in particular, the functioning of schemes which are involved in some form of social security. Thus, this chapter also analyses the recurring question which has arisen in these cases, namely, the impact of such characteristics on the classification or otherwise of the bodies involved as ‘undertakings’. An analysis of bodies engaging in purchasing activities and to what extent they would be subjected to competition rules follow, which is further discussed through a comparative analysis.

4 Article 106 (2) TFEU and Article 30 (2) of the CA.
The broad definition of an ‘undertaking’ that the EU courts adopted, brings into the ambit of EU competition law, all activities irrespective of whether they are performed by private entities or else by public entities. In effect, Chapter 3 examines those entities which function in the private sphere, particularly individuals, and entities which function in the public sphere, which include the State and its agencies. In this context, a distinction is brought about between activities flowing from State bodies’ sovereignty, better known as State’s imperium, which escape the application of competition rules, and activities having an economic character, which fall within the ambit of these rules. Article 101 TFEU does not only speak of ‘undertakings’ but also of decisions by ‘associations of undertakings’, hence this chapter covers also types of entities which can be regarded as ‘associations of undertakings’, in particular by examining the characteristics required to be considered as such.

An analysis of whether one or more entities form a single undertaking is also crucial in order to know which competition rules will apply and how they will apply. This is discussed in Chapter 4 which examines the ‘single economic entity’ doctrine, its consequences and implications.

All of the above is also discussed with reference to the Maltese situation in the light of the CA by means of Articles 5 and 9 which are modeled on Articles 101 and 102 TFEU respectively. In this regard, the discussion is brought forward by delving into the judgments of the Commission for Fair Trading and the continuing debates which are developing and taking place as to which bodies may qualify as ‘undertakings’.

The US approach portrays a different outlook vis-a'-vis certain concepts which are at the basis of the notion of ‘undertaking’. This is pointed out in the Conclusion which tries to enhance clarity and certainty on the interpretation of this notion.
CHAPTER I: THE FUNCTIONAL DEFINITION OF AN ‘UNDERTAKING’

A. Application of EU Competition rules to ‘undertakings’

Competition law is concerned with ensuring that undertakings operating in a free market economy do not restrict or distort competition.\(^5\) The fight against entities restricting or distorting competition is not only a continuous one but is also a fundamental principle in all EU Member States. Of the various measures adopted to fight such distortion, the best tool available is that adopted in the Treaty on the functioning of the European Union (TFEU).\(^6\) In order to increase competition in the market, Member States felt the need to create a Single Market in the interest of European consumers, as free competition law itself is seen as an essential element in the creation of the Single Market itself.

It is important to know who the subjects of these rules are, yet, from the very outset the nature of competition itself provides an answer to this issue:

Competition is basically the relationship between a number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers. Each undertaking having made a commercial decision to place its goods or services on the market, utilizing its production and distribution facilities, will by that act necessarily bring itself into a relationship of potential contention and rivalry with the other undertakings in the same geographical market whose limits may be a single shopping precinct, a city, a region, a country, a group of countries, the entire European Community or even the whole world.\(^7\)

Consequently, the nature of competition itself shows that ‘undertakings’ are at the very core of competition rules. As emphasized from the wording of the TFEU, competition rules apply to ‘undertakings’. Article 101 TFEU prohibits

restrictive agreements between ‘undertakings’ and ‘decisions of associations of undertakings’ and Article 102 TFEU prohibits the abuse of a dominant position by one or more ‘undertakings’. Although the Merger Regulation is not covered by this thesis, it is pertinent to point out that undertakings are also the focus in the latter Regulation since it controls concentrations between ‘undertakings’.

Undertakings are at the core jurisdictional element of competition rules. To determine the main criteria in this context one has to consider whether an entity is an ‘undertaking’ in terms of law. To this extent, it is of fundamental importance to define an ‘undertaking’ in order to establish whether competition rules are applicable to that entity or not. As a consequence, the extent of the meaning that has been attributed to this increasingly contested term is at the core of this work as some doubts still seem to require further clarifications.

B. Definition of an ‘Undertaking’: It’s Origins

1. A definition throughout the Treaties

This has always been an important discussion in EC competition law due to the fact that the EC Treaty, now the TFEU, provides no definition of what exactly constitutes an ‘undertaking’. As a result, this led the Court of Justice (CJ) to cease the opportunity to give what it deemed to be a proper direction to the Single Market strategy, by construing the meaning of the term through its case-law.

---

8 Article 101 TFEU: The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

9 Article 102 TFEU: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States.


12 The meaning given to the term ‘undertaking’ applies for the purposes of both Article 101 and Article 102 of the TFEU.
The very notion of ‘undertaking’ owes its origins from the very first significant step towards European integration, that is, the European Coal and Steel Community (ECSC) Treaty. Contrary to the EC Treaty, the ECSC Treaty defined the term ‘undertaking’ in Article 80 where it held:

For the purposes of this Treaty, “undertaking” means any undertaking engaged in production in the coal and steel industry within the territories referred in the first paragraph of Article 79, and also, for the purposes of Article 65 and 66 and of information required for their application and proceedings in connection with them, any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.\(^{13}\)

A few years later, the notion was also defined in the context of the European Atomic Energy Community (EURATOM) Treaty. Article 196 of this Treaty stated that:

‘For the purposes of this Treaty, save as otherwise provided therein: b) “undertaking” means any undertaking or institution which pursues all or any of its activities in the territories of Members States within the field specified in the relevant Chapter of this Treaty, whatever its public or private legal status’.\(^{14}\)

It clearly emerges that, the definition contained in the ECSC Treaty is more restrictive than the EURATOM Treaty. In fact, Article 80 of the ECSC Treaty speaks of ‘production’ and ‘distribution other than sale to domestic consumers or small craft industries’, while Article 196 of the EURATOM Treaty speaks of ‘any undertaking or institution which pursues all or any of its activities … whatever its public or private legal status’. The European Economic Community (EEC) Treaty\(^{15}\) adopted a different approach in this regard as, unlike its seminal predecessors, it provided no definition of the term ‘undertaking’. When these three treaties were consolidated to form the EU with the adoption of the Treaty on European Union (the Maastricht Treaty, 1992), the definition of ‘undertaking’ remained the same as

\(^{13}\) Treaty establishing the European Coal and Steel Community (ECSC Treaty) Art 80.
\(^{14}\) Treaty establishing the European Atomic Energy Community (EURATOM Treaty) Art 196.
\(^{15}\) Treaty establishing the European Economic Community (EEC Treaty), 1957.
it was under the EEC Treaty. To this extent, today, under the TFEU, there is no definition of this concept for the purposes of competition law and in the absence of this definition the CJ has taken it upon itself to interpret the term thereby providing a precise direction to operators in this specific field of activity.

This different outlook is highlighted in order to show that although from the very first development of European integration was felt the need to define the concept of ‘undertaking’, later legislative developments opted instead, to leave the issue to the fluid determination of the CJ which on the basis of experience could then direct European commercial activity towards a more profitable relation through curial interpretation.

2. A definition throughout the CJ

Notwithstanding that the ECSC and the EURATOM Treaties provided a definition of ‘undertaking’, when the CJ delivered judgments within the scope of the ECSC Treaty, instead of repeating the words of the definition contained in the Treaty, it opted to give a definition of its own. The very first definition of the term ‘undertaking’ given by the CJ was in the *Snupat v High Authority* wherein it held that:

> The concept of an undertaking within the meaning of the Treaty may be identified with that of a natural or legal person. Consequently, several companies each having distinct legal personality cannot constitute a single undertaking within the meaning of the Treaty, even if those companies display a high degree of economic integration.\(^\text{16}\)

In *Klöckner-Werke AG and Others*,\(^\text{17}\) the CJ confirmed the approach taken in the *Snupat* case by establishing similar criteria and adding an economic concept into the definition. The CJ held that:

> …an undertaking is constituted by a single organization of personal, tangible and intangible elements united in

---

\(^\text{16}\) *Joined cases C-42 & 39/59 Snupat v High Authority* [1961] ECR 53 para. 54.

\(^\text{17}\) *Joined cases 17 & 20/61 Klöckner-Werke AG and Hoesch AG v High Authority* [1962] ECR 325.
an autonomous legal entity, pursuing a given long-term economic aim.\textsuperscript{18} (emphasis added)

The very first definition of the term ‘undertaking’ given by the CJ in the context of the EC Treaty was in \textit{Hydrotherm v Compact}.\textsuperscript{19} In this case, the CJ opted to give a different direction than that adopted in terms of the ECSC Treaty and held that:

\begin{quote}
In competition law, the term “undertaking” must be understood as designating 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, natural or legal.\textsuperscript{20}
\end{quote}

This idea was further reiterated in 1991 in \textit{Höfner and Elser v Macrotron}.\textsuperscript{21} This definition still serves as a standard definition to which the Courts of Member States very often refer to when faced with cases dealing with the concept of ‘undertaking’. In the CJ’s words:

\begin{quote}
...the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.\textsuperscript{22}
\end{quote}

Years later, in \textit{Wouters v Algemene Raad van de Nederlandse Orde van Advocaten}, the CJ held that:

\begin{quote}
According to the case-law of the Court, the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority...\textsuperscript{23}
\end{quote}

\begin{flushright}
\textsuperscript{18} Ibid para. 341.
\textsuperscript{20} Ibid para. 11.
\textsuperscript{22} Ibid para. 21.
\end{flushright}
The CJ has also consistently held in its case-laws that: ‘…any activity consisting in offering goods or services on a given market is an economic activity’. 24

From the definitions given above, it follows that the undertaking must perform an economic activity in order for it to be caught by the competition rules contained in the TFEU. 25 Moreover, when the entity performs tasks of a public nature, connected with the exercise of public powers or in the exercise of official authority, it will not be deemed to be an ‘undertaking’ within the confines of competition rules and is immune from the application of the said rules. Therefore, entities engaged in economic activities must respect the principles of competition, whilst entities performing tasks in the public interest fall outside the scope of these rules.

The European Commission26 and the General Court (GC)27 had also given extensive consideration to the term ‘undertaking’ in their decisions. The CJ’s definition in Höfner, was also echoed by Article 1 of Protocol 22 attached to the agreement on the European Economic Area concerning the definition of ‘undertaking’ and ‘turnover’ (Article 56). It provides that, ‘for the purposes of the attribution of individual cases pursuant to Article 56 of the Agreement, an ‘undertaking’ shall be any entity carrying out activities of a commercial or economic nature’. 28

---

25 The concept of ‘economic activity’ will be discussed in further detail in Chapter 2.
26 In Polypropylene [1986] OJ L230/1 para. 99, the Commission stated that, ‘the subjects of EEC rules are undertakings, a concept which is not identical with the question of legal personality for the purposes of company law or fiscal law. The term ‘undertaking’ is not defined in the Treaty. It may, however, refer to any entity engaged in commercial activities’.
27 In Case T-6/89 Enichem v Commission [1991] ECR II-1623 para. 240, the General Court considered an ‘undertaking’ as ‘an economic entity made up of a combination of physical and human elements’.
28 Protocol 22 concerning the definition of ‘undertaking’ and ‘turnover’ (Article 56) attached to the Agreement on the European Economic Area, art.1.
C. Towards a Functional Approach

1. Legal Status is Irrelevant

In defining the concept of ‘undertaking’, the CJ made a shift in the criteria developed within the definition. Whereas under the ECSC Treaty the key element of an ‘undertaking’ was the legal status or the entity’s autonomy, nowadays, in terms of the TFEU, the CJ speaks of an ‘economic activity’. As a result, thanks to the functional approach adopted by the CJ, an activity pursuing an economic objective need not be exercised in a particular legal form. To this extent, in *Dansk Rørindustri and others v Commission*, the CJ held that:

> It follows clearly from … case-law that the concept of an undertaking for the purposes of the Treaty provisions on competition does not require that the economic unit concerned have legal personality.\(^{29}\)

Furthermore, an economic objective does not necessarily imply an intention to make profit. What is important is the activity or the function of the entity. Even the definition expounded by the CJ in *Höfner* clearly shows that the legal status of the entity is not taken into account when determining whether an entity is to be considered as an ‘undertaking’ or not. This implies that ‘every entity’, will be covered by competition rules. As a result, both the CJ and the Commission have held in a series of decisions that an undertaking could either be a physical person exercising an economic activity in his own name or under the name of an establishment, or a legal person or even, associations\(^{30}\) and professional bodies.\(^{31}\)

---

\(^{29}\) Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P & C-213/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425 para. 112.


Companies and partnerships, individuals and sporting bodies have been also classified as ‘undertakings’ for the purposes of competition rules.

Protection and Indemnity Clubs (P & I Clubs) were also held by the Commission to be ‘undertakings’ and therefore any agreement notified by them which constituted restrictions of competition, would be contrary to Article 101(1) TFEU.

The fact that ‘every entity’ is said to fall within the ambit of competition rules, brought about a situation where even the State have been held to be an ‘undertaking’ for the purposes of these rules. Consequently, a public employment agency engaged in employment procurement was classified as an ‘undertaking’ since it was engaged in activities of an economic nature. The same was held with regard to state-owned corporations, quasi-governmental bodies and foreign trade organizations. What is important is their engagement in an economic activity and not their legal personality. These issues will be discussed in detail in Chapter 3.

2. Profit-motive is Immaterial

(a). The General Rule

The general principle expounded by the CJ is that any activity should be considered as an economic activity, irrespective of its actual mode of financing. To this extent, an organization lacking a profit-motive or does not have an economic purpose does not mean that it is not an ‘undertaking’ provided always that it is

-----------------------------
35 Höfner (n 21)
engaged in a commercial or economic activity.\textsuperscript{39} In \textit{Van Landewyck v Commission},\textsuperscript{40} the CJ held that any entity engaged in a commercial activity is capable of falling within the definition of an ‘undertaking’, even in the absence of the pursuit of profit. In the CJ’s words:

\textit{…Article 85(1) also applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress. Since several manufacturers have expressly stated that they are complying with the provisions of the recommendation, it cannot escape Article 85 of the Treaty because it has been made by a non-profit making association.}\textsuperscript{41} (emphasis added)

The same can be said in relation to P & I clubs\textsuperscript{42}, in that though they are mutual non-profit making associations which provide certain types of marine insurance, they are still considered to be ‘undertakings’ for the purposes of competition rules.

The European Commission and the EU courts also ruled that sports activities are subject to Community provisions in so far as they engage in economic activities. If one considers the situation of football clubs, there is no doubt that they engage in economic activities, for instance when they sell tickets or transfer players, when they conclude advertising and sponsorship contracts or even when they sell broadcasting rights. The practice of football by football clubs was also considered to be an economic activity, even though they are non-profit based. This was the situation in \textit{Laurent Piau v Commission},\textsuperscript{43} where the GC ruled that football clubs are ‘undertakings’ and that national associations that group these clubs together are to be considered as ‘associations of undertakings’ for the purposes of Article 101 TFEU. In \textit{UEFA’s Broadcasting Regulations}, the Commission held that UEFA, the national associations and the members of football clubs are to be

\textsuperscript{39} Richard Whish, \textit{Competition Law} (6\textsuperscript{th} edn, OUP, Oxford 2009) p. 84.
\textsuperscript{40} Joined cases 209 to 215 & 218/78 Heintz van Landewyck SARL and others v Commission [1980] ECR 3125.
\textsuperscript{41} Ibid para. 88.
\textsuperscript{42} P & I Clubs (n 34).
\textsuperscript{43} Case T-193/02 Laurent Piau v Commission [2005] ECR II-209.
considered as ‘undertakings’ within the meaning of Article 101(1) TFEU, notwithstanding the fact that some of these entities are non-profit making bodies.\textsuperscript{44}

As Advocate General (AG) Lenz opined in \textit{URBSF v Bosman}, the size of the undertaking does not matter and the concept of ‘undertaking’ does not presuppose a profit-making intention.\textsuperscript{45}

\textit{(b). The Exception}

The interpretation given by the CJ, the GC and the Commission with regard to the financing of the entity, has far-reaching implications when it comes to the issue of certain entities, namely, social security systems. Although it is held that the profit-motive is irrelevant when establishing whether an entity is an ‘undertaking’ or otherwise, the CJ modified its earlier interpretation in a line of cases. For instance in the case \textit{Poucet et Pistre v Assurance Générales de France},\textsuperscript{46} it held that compulsory social security systems could not be considered as economic activities, because their financing was based on the principle of solidarity. The CJ held that:

Sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit making … Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Article 85 …\textsuperscript{47}

This is seen as an exception to the general rule, since in these types of systems, the way in which the entity is financed should not be ignored when determining the economic nature of the activity in question.

However, the CJ reaffirmed the general principle in \textit{Fédération Française des Sociétés d’Assurances}.\textsuperscript{48} In this case, it confirmed that a non-profit making organization which manages an old-age insurance intended to supplement a basic

\begin{flushright}
\textsuperscript{44} UEFA’s Broadcasting Regulations [2001] OJ L171/12 para. 47.
\textsuperscript{46} Joined cases C-159/91 & C-160/91 \textit{Poucet et Pistre v Assurance Générales de France} [1993] ECR I- 637.
\textsuperscript{47} Ibid para. 18-19.
\textsuperscript{48} Case C-244/94 \textit{Fédération Française des Sociétés d’Assurances} [1995] ECR I-4013.
\end{flushright}
compulsory scheme is an ‘undertaking’ for the purposes of competition rules. The CJ upheld that even though the organization is non-profit making, it does not deprive the activity which it carries on of its economic character. The CJ ruled on similar grounds in Albany International BV v SBT that a pension fund which has been entrusted with the management of a supplementary pension scheme, fell within the meaning of the concept of an ‘undertaking’. Moreover, it held that the fact that the fund is non-profit making and that it pursues a social objective, it does not mean that the fund is deprived of its status as an ‘undertaking’ within the meaning of the competition rules of the Treaty.

To this extent, it is shown that the CJ was contradictory when ruling on the financing of the entity. If one has to follow this contradiction adopted by the CJ, one can conclude that for entities not being part of the social security system, the way of financing the activity is not important. On the other hand, the way in which the entity is financed is to be taken into account in a line of cases, namely, when the entity in question fulfill an exclusively social function carrying out an activity which is based on the principle of solidarity; a concept which will be further discussed in Chapter 2.

3. A Relative Concept

Since, the focus is on the function of the entity, there could be situations where an entity may be characterized as an ‘undertaking’ in respect of some of its functions but not when carrying others. This leads to the conclusion that the concept of an ‘undertaking’ is a relative concept and therefore when an entity is engaged in a particular activity, that ‘activity’ has to be identified in a proper manner. To this extent, in Albany, AG Jacobs opined that ‘...the notion of ‘undertaking’ is relative and has to be established in concreto with regard to the specific activity under scrutiny’. Therefore, as AG Jacobs again opined in Firma Ambulanz Glöckner v Landkreis Südwestpfalz, ‘...the notion of undertaking is a

49 Ibid para. 21-22.
51 Ibid para. 85.
52 Albany (n 50) AG Jacobs Opinion para. 207.
relative concept in the sense that a given entity might be regarded as an ‘undertaking’ for one part of its activities while the rest fall outside the competition rules.’

This reasoning is better illustrated in *SELEX Sistemi Integrati SpA v Commission*, concerning the European Organization for the Safety of Air Navigation, better known as Eurocontrol. The question was whether Eurocontrol activities, namely, standardization, research and development and assistance to the national administrations, were economic activities thereby constituting an ‘undertaking’. The Commission based its reasoning by referring to a previous decision by the CJ in *SAT Fluggesellschaft v Eurocontrol*, wherein the CJ held:

> 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 justifying the application of the Treaty rules of competition. Accordingly, an international organization such as Eurocontrol does not constitute an undertaking subject to the provisions of Article 82…

Therefore, in *SELEX Sistemi Integrati SpA*, the Commission argued that Eurocontrol was not an ‘undertaking’ for the purposes of Community competition law. On the other hand the GC held that:

> …since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority … the various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic.

---

56 *SELEX* (n 54) para. 54.
To this extent, the GC held that some of Eurocontrol’s activities, namely standardization and research and development were not economic activities, whereas technical assistance to national administrations amounted to an economic activity. As a consequence, the GC concluded that despite the general wording adopted in SAT Fluggesellschaft, Eurocontrol could not be precluded from being regarded as an ‘undertaking’ in relation to those activities having an economic character.

This reasoning was not supported by the CJ to the effect that it argued that assistance to national administrations could not be separated from Eurocontrol’s task of airspace management and development of air safety. It continued to hold that assistance provided by Eurocontrol is optional and that only certain Members States have recourse to, thus, it cannot alter the nature of its activity.\textsuperscript{57} In dismissing the appeal, the CJ concluded that the GC was wrong in arguing that technical assistance to national administrations amounted to an economic activity. On this basis, the CJ held that when assisting national administration, Eurocontrol was not an ‘undertaking’ within the meaning of Article 102 TFEU.

The classification of an ‘undertaking’ as a relative concept was also tackled by the Brussels Court of Appeal in a preliminary ruling in the case International Gemological Institute v Hoge Raad voor Diamant,\textsuperscript{58} when the International Gemological Institute filed a claim for injunction before the Antwerp Court complaining alleged unfair trade practices and abuse of dominant position by the Diamond High Council. The question was whether the Diamond High Council was an ‘undertaking’ for the purposes of competition rules. This High Council consists of several departments within a single entity, one of them determining activities carried out by the Diamond Office. These activities constitute a form of police control over the diamond sector, attributed to it by the Government. However, there are other activities which are not public duties but services offered on the market and therefore are economic activities such as the certification and training services.

\textsuperscript{57} Case C-113/07 P SELEX Sistemi Integrati SpA v Commission [2009] para. 76-79.

\textsuperscript{58} Brussels Court of Appeal, 31 January 2006, case no. A.R. 2004/MR/1.
As a result, the Brussels Court of Appeal concluded that the Diamond High Council should not be considered as an ‘undertaking’ when carrying out public duties and therefore is outside the ambit of competition rules as far as those activities are concerned. On the other hand, when acting in a commercial context, it qualifies as an ‘undertaking’ that will need to comply with the competition rules. To this extent, the Brussels Court of Appeal confirmed the functional interpretation of the notion of ‘undertaking’ by stressing that it is a relative concept in the sense that a given entity might be regarded as an ‘undertaking’ for one part of its activities while the rest fall outside the competition rules.⁵⁹

From all this, one can conclude that each activity, if it can be severed from those in which the entity engages as a public authority, must be assessed separately with a view to establish whether or not it is of an economic nature.

D. The End Result

Despite the fact that the CJ construed a definition as to the meaning of an ‘undertaking’, problems still arise since it imposed a broad definition enabling the Union to maximise its competence over all markets falling within the parameters of the Treaty. This broad definition led to inconsistencies making the application of competition rules more difficult to interpret, such as already discussed, the issue of profit-motive. Therefore, though the CJ has given a functional approach to the term ‘undertaking’ in order to ensure that competition rules apply to those entities engaged in activities of an economic character, the fact that the definition is expounded in a broad manner, still brings uncertainties when determining the applicability of competition rules to such entities, particularly where agreements are entered into by organs of Member States or by entities entrusted by Member States with regulatory or other functions. Since the broad definition includes any natural or legal person carrying on some kind of economic activity including the State, the question that arises is whether the agreements entered into by the

---

⁵⁹ Peggy Valcke, *The Brussels Court of Appeal confirms the functional interpretation of the notion of ‘undertaking’ stressing that it is a relative concept (International Gemmological Institute)*, 31 January 2006, e-Competitions, no.20868.
organs of the Member States fall within the remit of the competition rules under the TFEU. Many have thought that since the CJ provided us with a standard definition of an 'undertaking', competition law is going to be applied in a clear and predictable manner. However, due to the broad interpretation of this notion, problems continued to exist and therefore, there is still the need to clarify certain concepts that find themselves within the meaning of this term. Accordingly, the purpose of this thesis is to try to show the unresolved problems that the CJ still goes through when faced with the issue of applicability of competition rules to ‘undertakings’.

The broad definition shows that the core addressees of the TFEU are not the entities but rather the activities. To such extent, that is why it is deemed to be a functional approach rather than an institutional approach. AG Jacobs commented on this functional approach in *AOK Bundesverband v Ichthyol-Gesellschaft Cordes*, wherein he wrote that:

...the Court’s general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it … Provided that an activity is of an economic character, those engaged in it will be subject to Community competition law.

This leads to a situation where the end result of a functional approach goes well beyond the irrelevancy of the legal status of the entity. Since the definition is based on ‘economic activity’ and therefore it is that activity that determines when competition rules apply to an entity or otherwise, the functional approach results in a situation where the relevant question is not who is an undertaking but what is economic activity. To this extent, amongst the difficulties of a broad definition of

---

60 Whish (n 39) p.82-83.
an ‘undertaking’, there is the issue of what is precisely covered by an ‘economic activity’. This important criterion is going to be the subject of the next chapter.
CHAPTER II: PERFORMANCE OF AN ‘ECONOMIC ACTIVITY’

A. What is an ‘Economic Activity’?

1. Characteristics of an ‘Economic Activity’: an ‘Abstract’ Test

As already established, the only driving force in determining whether an entity is an ‘undertaking’ or otherwise, is its engagement in an economic activity. This led the CJ to establish those circumstances under which an activity is to be considered economic. In doing so, the CJ had to provide us with a definition of economic activity establishing in broad terms how economic activity is to be determined. Synthetically, it established that this is an activity that can generate ‘actual or potential competition’ on the market establishing an abstract test that features in many of the Court’s case-law. The elements established by the CJ’s case-law in this regard may be summarized as follows.

(a). Offering of goods or services on the market

The first characteristic of an ‘economic activity’ established by the CJ is that there must be an ‘activity consisting in the offering of goods and services on a given market’. Commission v Italy\(^63\) served as the foremost beacon from which the Commission and the Court established the limits of defining the concept under review. This case concerned the “Amministrazione Autonoma dei Monopoli di Stato” (AAMS) which manufactured and sold tobacco. The AAMS failed to comply with Commission Directive 80/723/EEC.\(^64\) Despite the fact that the Italian Government argued that AAMS did not have to comply with the Directive since it was part of the State, the CJ concluded that AAMS was a public undertaking since:

\(^{63}\) Case C-118/85 Commission v Italy [1987] ECR 2599.
… [it] exercises an economic activity in as much as it offers goods and services on the market in the manufactured tobacco sector.\(^\text{65}\) (emphasis added).

In applying this characteristic, the CJ determined that when undertakings offered goods or services that could potentially be provided on the market, it had jurisdiction over the issue. This reasoning was repeated in subsequent case-law, for instance, in Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten, the CJ applied an ‘abstract’ test when considering self-employed medical specialists as ‘undertakings’ since they provide services on a market, namely, specialist medical services.\(^\text{66}\) In the case Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze SpA and Others\(^\text{67}\), an issue arose as to whether banking foundations perform an economic activity. Here, the various tasks and activities of banking foundations were examined, namely, the management of controlling shareholders and activities carried out directly by banking foundations in the realization of their public interest and social assistance aims fell within the jurisdiction of the CJ and EU competition law.

Interestingly, in his opinion, AG Jacobs argued that on a strict interpretation of case-law, the management of controlling shareholders cannot be equated with the ‘offering of goods or services on the market’ therefore they do not constitute an economic activity for the purposes of competition law rules. This was also agreed by the Commission and the defendants during the main proceedings. However, AG Jacobs goes well beyond that interpretation since he agreed with the Italian Government’s observations, namely that:

an entity should qualify as an undertaking not only when it offer goods and services on the market but also when it carries out other activities which are economic in

---

\(^{65}\) Commission v Italy (n 63) para. 3.


nature and which could lead to distortions in a market where competition exists.  

The Italian Government observed that a competitive market for controlling shareholdings in banking companies exists, for instance, banking foundations could sell their controlling shareholding in one assignee bank to acquire new ones in another. To such extent, this could lead to distortions of competition if they collude with other undertakings to alter the price of their controlling shareholdings.  

However, the CJ took a two-way interpretation with respect to the management of controlling shareholders since it concluded that:

the mere fact of holding shares, even controlling shareholdings, is insufficient to characterize as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member ... On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof, must be regarded as taking part in an economic activity ... and must therefore be regarded as an undertaking ...  

Both the AG and the CJ concluded that in pursuing their public interest and social assistance aims, banking foundations may engage in activities entailing the offering of goods or services on markets where competition exists, notwithstanding the fact that the offer of goods or services is made without a profit motive.  

(b). Bearing an economic or financial risk

Another essential characteristic of the concept of ‘economic activity’ is that the entity must bear an economic or financial risk. In the Pavlov case, it was held that given that self-employed medical specialists bear the financial risks of

---

68 Ministero dell’Economia e delle Finanze (n 67) AG Jacobs Opinion para. 78.
69 Ibid. para. 79.
70 Ministero dell’Economia e delle Finanze (n 67) para. 111-112.
71 Ibid para. 122-123.
72 Pavel Pavlov (n 66) para. 75-76.
exercising their profession, they must be classified as ‘undertakings’. Without the element of risk, the activity cannot be considered as an economic one. In Poucet and Pestre, the CJ concluded that ‘those in surplus contribute to the financing of those with structural financial difficulties’, thereby leading to a situation where the individual entities providing social insurance did not bear the risk failure. The absence of risk was also one of the reasons why the sickness funds in AOK Bundesverband v Ichthyol-Gesellschaft Cordes were not seen as engaging in economic activities. In this case, the CJ concluded that:

…the sickness funds are joined together in a type of community … which enables equalization … between the sickness funds whose health expenditure is lowest and those which insure costly risks and whose expenditure connected with those risks is highest.

On the other hand, members of a Bar who offered, for a fee, services in the form of legal assistance, were considered to perform an economic activity in that ‘they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves’.

(c). Remuneration

As already shown in Höfner, the German Employment Office was qualified by the CJ as an ‘undertaking’ because it deemed that public procurement activities were of an economic character. The CJ said that:

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.\textsuperscript{77}

This line of reasoning is the juridical basis of the third characteristic of an ‘economic activity’, that is, the potential to make profit. To this extent, AG Jacobs argued that:

In assessing whether an activity is economic in character, the basic test appears to … be whether it could, at least in principle, be carried on by a private undertaking in order to make profits.\textsuperscript{78}

Therefore, what we have here is not a requirement to make profit, neither the requirement to have a profit-making motive, but that at least a potential exists to make profit from that activity. Again, the CJ in \textit{Höfner} shows that the best way to identify whether activities can be carried out to make profits is to look at the market either in the particular territory, Member State or a third state.\textsuperscript{79} In this case, though the Federal Office for Employment provided recruitment services free of charge such that it did not profit from the goods and services offered on the market, still there was the potential to make profit from that activity, since, 72 per cent of vacancies were filled by a grey market of between 700 and 800 private recruitment consultants in an industry worth between €383 million and €614 million.\textsuperscript{80} As a result, both the AG and the CJ considered recruitment consultancy as an economic activity, thereby classifying the Federal Office for Employment as an ‘undertaking’.

\textbf{2. Comparative criterion and Market participation}

The ‘abstract’ approach adopted by the CJ, results in the concurrent application of two tests; the comparative criterion and the market participation tests. The reasoning adopted in \textit{Höfner} shows that the comparative criterion test focuses on whether or not the activity is capable of being performed by private operators in order to determine if that activity is economic in nature. Similarly, in \textit{Firma Ambulanz Glöckner v Landkreis Südwestpfalz}, public health organizations

\textsuperscript{78} AOK Bundesverband (n 75) AG Jacobs Opinion para. 28.
\textsuperscript{79} Odudu (n 74) p. 36.
\textsuperscript{80} Ibid and \textit{Höfner} (n 77) AG Jacobs Opinion para. 14.
providing services in the market for emergency and ambulance services were held to be ‘undertakings’ subject to competition rules on the basis that ‘such activities have not always been, and are not necessarily, carried out by public authorities’.\(^\text{81}\) According to AG Maduro, the ‘comparative criterion test would enable any activity to be included within the scope of competition law since almost all activities are capable of being carried out by private operators’.\(^\text{82}\)

Therefore, this led the CJ to delimit the scope of such a test and apply the market participation test. Under the market participation test, it is the fact that those activities are actually carried on in a Member State under market conditions which determines the application of competition rules. To this effect, the CJ in Höfner has shown itself willing to recognize the economic nature of the activity engaged in by the Federal Office for Employment where the Member State allows private undertakings to participate in the same relevant market.

B. Limiting the Spectrum of EU Competition Law

The broad definition of the notion of ‘economic activity’ led the CJ to develop various exclusionary limitations or carve-outs. To this extent, it considers certain activities as being unable to fulfill the above-mentioned characteristic features in order for them to be seen as carrying out economic activities.

1. Employees

The most debatable argument that emerges from the CJ’s case-law is whether employees can be classified as carrying out economic activities. The first issue to identify is whether they offer goods or services to the market place. In this respect, AG Jacobs argued that employees offer labour against remuneration, an activity similar to the sale of goods or the provision of services.\(^\text{83}\) Consequently, one might argue that they should be regarded as ‘undertakings’ for the purposes of

\(^{81}\) Firma Ambulanz Glöckner (n 66) para. 20.  
\(^{82}\) Case C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission [2006] ECR I-6295, AG Maduro Opinion para. 12.  
competition rules. However, AG Jacobs opined that it is not possible to include employees within the ambit of these rules, since the law itself applies to economic actors engaged in the supply of goods or services. To this effect, he was of the opinion that ‘dependant labour is by its very nature the opposite of the independent exercise of an economic or commercial activity.’\textsuperscript{84}

The element of risk is another issue which has been put into practice when determining whether employees were to be regarded as engaging in an economic activity. Since ‘employees normally do not bear the direct commercial risk of a given transaction’,\textsuperscript{85} they were considered not to be engaged in an economic activity. Again in AG Jacobs words:

Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of an employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services …\textsuperscript{86}

The concept of employees and their relationship with their employer will be examined in further detail in Chapters 3 and 4.

2. \textit{Market Regulation}

Market Regulation is another type of activity that is incapable of offering goods or services on the market. The general principle is that, even if the State controls those entities which are fully involved in market regulation, they would still be subject to competition rules. What matters is the activity that they carry out. The CJ consistently held that ‘bodies that exercise an activity typical of a public authority … do not constitute undertakings and are not therefore subject to the Community rules on competition’.\textsuperscript{87} For instance, in \textit{Corinne Bodson v SA Pompes funèbres des régions libérées}, French law required the regional authorities to

\textsuperscript{84} Ibid para. 215.  
\textsuperscript{85} Ibid  
\textsuperscript{86} Ibid  
regulate the provision of various aspects of funeral services. A number of concessions were granted to various authorities in order to carry out funeral services in their particular region. In deciding whether there was an abuse of a dominant position on part of the defendants, the CJ concluded that the regional authorities were not carrying out activities of an economic nature but rather they were carrying out a regulatory function and therefore it was not an ‘undertaking’ in terms of law. Therefore, case-law establishes that where public bodies exercise State authority, they will fall outside the scope of competition rules so long as they do not participate or compete in the market since regulation involves the exercise of official authority rather than an economic activity.

However, there are a number of judgments which differ from this line of reasoning. For instance, in Pavlov, the CJ argued that the fact that a professional organization is governed by public law statute does not preclude the application of competition rules. This was reaffirmed by the CJ in Wouters, wherein it concluded that the Bar of Netherlands acts as the regulatory body of a profession, the practice of which constitutes an economic activity.

The Irish High Court also shows an examination of the interaction between competition law provisions and regulatory bodies in the case of Ramadan Hemat v Medical Council. In this case, the complainant, a medical practitioner, circulated an advertisement which allegedly breached a guide to ethical conduct and behaviour issued by the Irish Medical Council. As a result, the plaintiff was duly sanctioned by the Council. The plaintiff argued that the Council was an ‘undertaking’ (or an ‘association of undertakings’) and that certain provisions of the guide were contrary to the Irish Competition Act 2002 and to certain Articles of the EC Treaty. To this effect, the plaintiff cited Wouters in order to show that the Medical Council, composed of individual practitioners, was carrying out an economic activity. However, the Medical Council counter-argued that it acted in the

---

89 Pavel Pavlov (n 66) para. 85.
90 Wouters (n 76) para. 58.
public interest and that these economic consequences could also flow from Governmental decisions. Referring to CJ’s case-law, the Irish High Court identified certain criteria and concluded that where a body exercises powers which are typically those of a public authority or which fall within the essential functions of the State, the body will not be deemed to be an ‘undertaking’.\(^92\) In fact, the High Court was satisfied that the Council was serving a public interest and found that the Medical Council was exercising State powers on an executive basis due to the fact that the State retained authority over the training and practice of practitioners, concluding that the Medical Council was under a statutory obligation to publish the contested guidelines and it had not acted *ultra vires* in so doing.

Critics however, argue that statutes having anti-competitive effects should be subjected to EU competition law and therefore regulatory bodies should fall within the ambit of competition law, at least on a case by case basis.\(^93\)

### 3. Public Goods

These pose a particular problem since they may be rendered available in the market but without attracting a profit. In *Poucet and Pistre*, AG Tesauro opined that an activity is not economic when the task can only be performed by or on behalf of a public body’.\(^94\) In this regard, Okeoghene Odudu,\(^95\) mentions two characteristics that make profit impossible when providing public goods. Firstly is that these goods are *‘non-rivalrous’* in consumption, meaning that once they are produced, an infinite number of consumers can enjoy the good without the increased production cost or diminished enjoyment by other consumers.\(^96\) Secondly, the benefits are *‘non-excludable’*, meaning that individuals benefit regardless of whether they pay for the good or service.\(^97\) This second characteristic is reflected in various Court’s
jurisprudence. For instance, in SAT Fluggesellschaft mbH v Eurocontrol, the CJ argued that ‘air navigation control is a supervisory activity intended to ensure public safety’,\(^{98}\) thereby accepting that air navigation control is a public good. Moreover, the CJ concluded that air navigation control is provided ‘even where the owner of the aircraft has not paid the route charges owed to Eurocontrol’.\(^{99}\)

For a service to function effectively, it is necessary to provide the service irrespective of whether the recipients have paid for it or not. In SAT Fluggesellschaft, this led the CJ to conclude that air navigation control activities are typically those of a public authority and therefore they are not of an economic nature justifying the application of the Treaty rules of competition.

Similarly, in Diego Cali & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG), the CJ held that:

> The anti-pollution surveillance for which SEPG was responsible … is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.\(^{100}\)

Notwithstanding this, certain judgments have classified various activities of port authorities as being of economic import, such as piloting services in the Port of Genova,\(^{101}\) thereby attracting EU competition rules. This seems to be a distinction between two sets of behavioural situations, one dealing with acts of imperium and the other of an economic nature.

\(^{99}\) Ibid para. 25.
\(^{100}\) Diego Cali (n 87) para. 22.
C. Services of General Economic Interest Exclusion

1. Definition

At times, certain entities fall within the spectrum of competition law, however, they may be exempted not because they lack certain characteristics of an ‘economic activity’ but because the services that they carry are of a ‘general economic interest’. This exclusion is found in Article 106(2) TFEU (formerly 86(2) of the EC Treaty) which provides that:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.\(^\text{102}\)

The term ‘services of general economic interest’ is not defined in the Treaty, however, it has been defined in the Notice on services of general interest as ‘market services which the Member States subject to specific public service obligations by virtue of a general interest criterion’.\(^\text{103}\) Postal services, telecommunication services, gas, electricity, services in the transport sector and treatment of waste material are seen as conventional utilities which could be covered by this exclusion. Accordingly, in the *Ahmed Saeed*\(^\text{104}\) case, the CJ concluded that airlines which were required by the public authorities to operate on non-commercial routes were ‘undertakings’ entrusted with a service of ‘general economic interest’. Similarly, in the *Corsica Ferries*\(^\text{105}\) case, the CJ argued that mooring operations were services of ‘general economic interest’.

---

\(^{102}\) Article 106(2) EC.

\(^{103}\) Commission Communication on services of general interest in Europe [2001] OJ C17/4 Annex II.


\(^{105}\) Case C-266/96 *Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop and Others* [1998] ECR I-3949.
It has also been submitted that the phrase ‘general economic interest’ can be linked with the notion of ‘public interest’. To such an extent, in Dusseldorp, AG Jacobs argued that ‘the reason for the assignment of particular tasks to undertakings is often that the tasks need to be undertaken in the public interest but might not be undertaken, usually for economic reasons, if the service were to be left in the private sector’. In practice, as held in Fédération Française des Sociétés d’Assurances v Commission, Member States have a wide discretion in defining the scope of what they consider to be services of general economic interest.

2. Requirements

Article 106(2) TFEU provides no clear-cut definition of the types of entities which benefit from this exclusion. However, it provides certain requirements that have to be met in order for an undertaking to fall within this exemption.

(a). Act of entrustment

It follows from the wording of the Treaty that an undertaking can only claim the applicability of the exception if it has been entrusted with the performance of a ‘service of general economic interest’. The act of entrustment may be by way of a legal provision or some other public legal instrument. The undertaking may also be entrusted through a license governed by public law as happened in Municipality of Almelo and Others v NV Energiebedrijf IJsselmij, wherein the CJ argued that in ensuring the supply of electricity in part of the national territory, the state-owned regional electricity distribution company Energiebedrijf IJsselmij though being granted a non-exclusive license governed by public law, it had been entrusted with the operation of a service of general economic interest.

(b). Proportionality

The Treaty provides that even if an undertaking is entrusted with a service of a general economic interest, in order for it to be exempted, it still has to show that, compliance with the Treaty rules would ‘obstruct the performance’ of its tasks. Thus, this exemption only applies to the extent that this is strictly necessary for performing the functions of the services of general economic interest concerned.

To this end, it introduces an element of proportionality. In its earlier judgments, the CJ took a strict interpretation on what would be an obstruction of the performance of the undertaking’s tasks. As a result, in Höfner, the CJ found that the German Employment Office remained subject to the competition rules ‘unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties’. \(^{109}\) Moreover, in British Telecommunications, the CJ held that Italy had failed to prove that the application of the competition rules to British Telecom would prejudice the accomplishment of the latter’s tasks. \(^{110}\)

Later, in Corbeau, the CJ changed its approach to the extent that it concluded that the Belgian post office was an ‘undertaking’ entrusted with a ‘general interest’ service and accepted that some restriction of competition might be necessary to achieve market equilibrium. \(^{111}\) Another case where the restriction was considered necessary is Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH, wherein the CJ considered that the grant by a Member State to its postal operators of a statutory right to charge internal postage on items of so called-remail, was justified under Article 106(2) TFEU. \(^{112}\) In Albany, the CJ also considered that Article 106(2) TFEU justified the exclusive rights of a pension fund to manage supplementary pensions.
in a particular sector, the reason being, that otherwise, ‘young people in good health engaged in non-dangerous activities’ would leave the scheme.\textsuperscript{113}

Thus, critics argue that the proportionality test involves three steps: firstly, there has to be a causal link between the measure and the objective of general interest; secondly, the restrictions caused by the measure are balanced by the benefits obtained in terms of the general interest; and thirdly, the objective cannot be achieved by less restrictive means.\textsuperscript{114}

\textbf{(c). Development of trade should not be affected}

Another requirement the undertakings should satisfy in order for the exception to apply is that the development of trade should not be affected to such an extent as would be contrary to the interests of the Union. However, critics argue that some effect on trade is necessary and accepted consequence derived from the existence of the exception itself.\textsuperscript{115}

\textbf{(d). A revenue-producing monopoly}

The exclusion contained in Article 106(2) TFEU also allows for tasks entrusted to undertakings which have the character of a revenue-producing monopoly to be excluded from the ambit of competition rules. A revenue-producing monopoly must also show that the application of such rules would obstruct the performance, in law or in fact, of the particular tasks assigned to it. Since very few monopolies are established with the objective of raising revenue for the State, the revenue-producing monopoly exclusion has hardly ever been applied by the Commission or the EU courts.

\textbf{3. The rationale behind the exclusion}

Public interest and market freedom are at the basis of the exclusion contained in Article 106(2) TFEU since restrictions on competition can be imposed

\textsuperscript{113} \textit{Albany} (n 83) para. 108.
\textsuperscript{114} Wolf Sauter, ‘Services of general economic interest and universal service in EU law’ (2008) 33 ELRev 186.
\textsuperscript{115} Victoria Louri, “‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules” (2002) 29 LIEI 169.
to the benefit of undertakings charged with services of a general economic interest to the extent that they perform their tasks in the public interest. Thus, the main reason for the exception is the search for equilibrium between public interests which are deemed worth of protection at Union level and the interests of the Union that the laws concerning competition be respected and that the unity of the Internal Market be preserved.

D. The ‘Solidarity’ Principle

1. What is ‘Solidarity’?

The CJ introduced a special category of entities to which EU competition rules have no effect to a certain extent. This category involves those entities which are founded on the basis of ‘solidarity’. AG Fennelly has defined the notion of ‘solidarity’ in *Sodemare v Regione Lombardia* as ‘the inherently uncommercial act of involuntary subsidization of one social group by another’.\(^{116}\) This is why, in a line of cases, the CJ has confirmed that EU competition rules do not apply to:

\[
\text{...organizations involved in the management of the public social security system [since they] fulfill an exclusively social function ... based on the principle of national solidarity...}^{117}
\]

To this effect, the CJ decided to exclude health, pension and other insurance services from the ambit of competition rules by holding that they are not undertakings in the first place. As a result:

\[
\text{...the existence of systems of social provision established by Member States on the basis of the principle of solidarity does not constitute, as such, an economic activity, so that any inherent consequent restriction on the free movement of goods, services or persons does not attract the application of the Treaty provisions.}^{118}
\]

---

\(^{116}\) Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395, AG Opinion Fennelly para. 29.

\(^{117}\) *Poucet et Pistre* (n 73) para. 18.

\(^{118}\) *Sodemare* (n 116).
2. Redistribution

The principle of solidarity has at its basis the element of redistribution. In the landmark case of *Poucet and Pistre*, the CJ argued that:

Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.\(^{119}\)

Here, the CJ did not consider compulsory old-age insurance scheme and compulsory sickness and maternity insurance scheme for self-employed persons to be ‘undertakings’, since they were based on compulsory affiliation. The CJ found that they were fulfilling an exclusively social function, their activity was based on the principle of national solidarity, they were non-profit making and the benefits paid out, being statutory benefits, bore no relation to the amount of contributions. Accordingly, they were classified as not pursuing an economic activity.

The CJ reiterated this approach in *Cisal di Battistello v INAIL*, where it concluded that the relevant insurance scheme fulfilled an exclusively social function and as such it could not be regarded as an ‘undertaking’ within the meaning of competition rules.\(^{120}\)

Both compulsory affiliation and the absence of link between contributions and benefits are two core elements of redistribution. On a strict interpretation of case-law, these two elements present a situation where there will be no possibility that profit can be made from the activity in question. In *Cisal di Battistello*, profits could not be made since insurance benefits were paid irrespective of fault and irrespective of the fact that insurance contributions had not been paid.\(^{121}\) Holding otherwise would go against the Court’s general principle that the mode of financing

\(^{119}\) *Poucet et Pistre* (n 73) para. 10.

\(^{120}\) Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v INAIL* [2002] ECR I-691 para 44.

\(^{121}\) Ibid para. 35-36. In Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43 profits could not be made as air traffic navigation services had to be provided even when customers had not paid for the services.
of the entity is irrelevant when establishing whether an entity is an ‘undertaking’ or otherwise.

Conforming to its general principle, the CJ reached a different conclusion in a line of cases, however, based on the same line of reasoning adopted in the above-mentioned cases. For instance in *Fédération Française des Sociétés d’Assurances*, the CJ concluded that irrespective of the fact that the scheme in question pursued a social objective and lacked any profit-motive, the Federation was still an ‘undertaking’ since the degree of solidarity reflected in such a case cannot deprive the activity carried on by the body managing the scheme of its economic character.122 Similarly, in *Brentjens*123 and in *Drijvende Bokken*,124 the CJ held that the pension fund was entrusted with the management of supplementary pension scheme, the membership of which was compulsory. It also operated on the principle of capitalisation and was a non-profit making body pursuing a social objective. To such an extent it led to various manifestations of solidarity, however, the CJ concluded that it was insufficient to shelter the schemes from the supervision of competition law.125

In assessing whether these relevant social entities are to perform an economic activity in order to be considered ‘undertakings’ in terms of law, the CJ seems to have arrived at conflicting conclusions in relation to the same aspects. It seems it has rendered itself open to the criticism of leading to lack of clarity and of certainty in the interpretation of the rules under review.

---

125 See also, *Albany* (n 83) para. 84-87 and *Pavel Pavlov* (n 66) para. 114-116.
3. **Some Room for Competition: The AOK Bundesverband judgment**

(a). **Towards a ‘Concrete’ Test**

Seeking the balance between healthcare requirements and competition rules is a central issue emanating from competition law case-law. Thus, one has to examine to what extent the special features of health care may be taken into account in applying competition rules in this sector. *AOK Bundesverband and Others*,\(^{126}\) not only builds on existing case-law but it also introduces the concept of ‘competition’ in determining the existence of an economic activity. As a result, in the field of social security, the CJ deviates from its usual approach which is based on the ‘abstract’ test and instead applies what has been termed the ‘concrete’ test. In applying a concrete test, the CJ determines how much room the national law leaves for competition in the implementation of the social security concerned and whether or not the principle of solidarity plays an important role in the system.

When a social security system is based on the principle of solidarity, such bodies will not be considered to be pursuing an economic activity. On the other hand, if the national legislator chooses to introduce a mix between competition and solidarity, then those bodies will be considered as pursuing an economic activity and thus can be classified as ‘undertakings’ for the purposes of competition rules. The question to be addressed is whether elements of competition or elements of solidarity prevail. Competition and solidarity are here to be seen as two sides of the same coin.\(^{127}\)

The CJ’s reasoning in the *AOK* judgment was based on the principles laid down in previous case-law. These include, the absence of profit making, the issue of funds which are compelled by law to offer identical obligatory benefits the provision of which is independent of the amount of contributions and the fact that the principle of national solidarity was evidenced by the mechanism equalizing the

---

\(^{126}\) *AOK Bundesverband* (n 75).

\(^{127}\) Somaya Belhaj and Johan W. van de Gronden, ‘Some Room For Competition Does Not Make a Sickness Fund an Undertaking. Is EC Competition Law Applicable to the Health Care Sector? (Joined Cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK) [2004] ECLR 684.
risk structure.\textsuperscript{128} To such extent, the main conclusion of the CJ was that the German sickness funds are not ‘undertakings’ within the scope of competition rules.

Of particular interest in this case was the notion of ‘competition’. The CJ concluded that there was no competition between the funds and among the funds and private insurers regarding the granting of the obligatory statutory benefits in respect of treatment or medicinal products which constitute their main function.\textsuperscript{129} Furthermore it argued that:

The latitude available to the sickness funds when setting the contribution rate and their freedom to engage in some competition with one another in order to attract members does not call this analysis into question. As is apparent from the observations submitted to the Court, the legislature introduced an element of competition with regard to contributions in order to encourage the sickness funds to operate in accordance with principles of sound management, that is to say in the most effective and least costly manner possible, in the interests of the proper functioning of the German social security system. Pursuit of that objective does not in any way change the nature of the sickness funds’ activity.\textsuperscript{130}

To this extent, critics argue that the CJ might have contradicted itself in concluding that the German sickness funds are not in competition with each other as regards the obligatory statutory benefits and that when setting the contribution rate, they do compete with other German sickness funds to attract members.\textsuperscript{131} The conclusion adopted by the CJ also seems to be inconsistent with other judgments that classified social security schemes as ‘undertakings’ in which the national legislator has opted for a mix between competition and solidarity.\textsuperscript{132}

\begin{footnotesize}
\begin{enumerate}
\item[128] Poucet et Pistre (n 73) para 51-53.
\item[129] Ibid para 54.
\item[130] Ibid para 56.
\item[131] Somaya Belhaj and Johan W. van de Gronden (n 127) p.684.
\item[132] Case C-244/94 Fédération Française des Sociétés d’Assurances [1995] ECR I-4013 and Joined cases C-115/97 to C-117/97 Brentjens’ Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen [1999] ECR I-6025 classified pension funds as undertakings since they competed with life insurance companies when providing supplementary pensions schemes.
\end{enumerate}
\end{footnotesize}
The AOK judgment introduces an element of ‘quantification’ and of ‘qualification’ in analyzing the concept of ‘competition’ in this context. With respect to the first element of ‘quantification’, according to the CJ, the existence of “some competition” does not automatically turn a non-economic activity into an economic one. With respect to the second criterion of ‘quantification’, again according to the CJ, if “some competition” is introduced to encourage cost-effectiveness and efficiency, it does not change the nature of the non-economic activities in the system. This led to critics to argue that the reasoning adopted in the AOK judgment is inconsistent with legal doctrine regarding competition law since improving efficiency results in the maximization of consumer welfare and the achievement of the optimal allocation of resources. Unfortunately, these results did not impress the CJ since it concluded that the German health care scheme contained too little room for competition.

AG Jacobs’ opinion also gave rise to certain important points with respect to social security schemes. As his point of departure, he uses an ‘abstract’ test by stating that:

In assessing whether an activity is economic in character, the basic test appears to … be whether it could, at least in principle, be carried on by a private undertaking in order to make profits. However, he realized that in the field of social security, a more elaborate set of criteria is to be taken into account and accordingly he applies the ‘concrete’ test. Surprisingly, the AG concluded that the sickness funds in the German system were ‘undertakings’ for a number of reasons. First of all, he argued that they determine the level of the contribution to be paid by the insured persons. Secondly, that there is some potential for the funds to compete in terms of the services which they offer and thirdly sickness funds and private health insurers are clearly in competition with one another for the business of those employees who are not

---

133 Somaya Belhaj and Johan W. van de Gronden (n 127) p. 684-685.
134 AOK Bundesverband (n 75) AG Jacobs Opinion para. 27.
135 Ibid para. 38.
136 Ibid para. 40.
obliged to take out statutory health insurance.\textsuperscript{137} Thus, in applying the ‘concrete’ test, the AG found that besides being based on the principle of solidarity, elements of competition were permitted in the German system leading to the application of the competition rules.

However, AG Jacobs still found the possibility of defending the German sickness funds within the context of Article 106(2) TFEU which speaks about ‘services of general economic interest’. He sees that German sickness funds satisfy the requirements needed to benefit from such an exclusion since the funds are charged with a service of a general economic interest and that the setting of fixed amounts is necessary in order to allow them to perform correctly their general interest task. Moreover, the mere fact that the function of setting fixed prices could be entrusted to the Federal Government is not sufficient to show that the mechanisms was manifestly disproportionate.\textsuperscript{138} Thus, he found no violation of EU competition rules based on a justification of Article 106(2) TFEU.

To this effect, one might argue that in reaching the same conclusion that there is no violation of EU competition law in the behaviour of these sickness funds, the CJ and AG Jacobs approached the situation differently and with contradictory legal arguments. Whilst, AG Jacobs applies a “justification approach” basing his arguments on the ‘services of general economic interest’ exclusion found in Article 106(2) TFEU, the CJ rejected the application of competition law in the first place, on the basis of a “competition law approach”. Thus, instead of assessing the nature of these services and whether they are of a general economic interest and as such justified under Article 106(2) TFEU, the CJ excludes them altogether from the ambit of competition law.

\textit{(b). Consequences of the ‘concrete’ test}

The application of the ‘concrete’ test results in a situation where providers and insurers in the health care sector are approached in a different manner. The

\textsuperscript{137} Ibid para. 41.
\textsuperscript{138} Ibid para 87-96.
raison d’être is that, in applying an ‘abstract’ test to consider whether an activity may be potentially provided on the market, health care providers, such as doctors and ambulances are to abide by competition rules. On the other hand, in applying the ‘concrete’ test, the CJ arrived to a conclusion that health insurers, who are the natural business partners of health care providers, do not seem to have an obligation to abide by such rules.\textsuperscript{139}

Moreover, in applying the ‘concrete’ test, the CJ is relying on what the national legislator’s wishes are. If the national legislator opts to introduce an element of competition in its social security system, competition rules will apply. On the other hand, if the national legislator wishes not to introduce competition in its social security system, the social entities in question will not be caught by the competition rules. This may amount to divergent EU competition law assessments in various Members States. Unfortunately, this can be seen as a drawback, since the differences in the interpretation and application of competition law by the European judicial authorities including the opinions of Advocates General, will go against the idea of a single European integration.

In scrutinizing how much room is left for competition in social security systems, the CJ implicitly states that there has to be more than just “some” competition. However, the CJ did not specify what it meant by “some” competition and therefore it did not establish when such a boundary is crossed\textsuperscript{140} in order to classify the system in question as an economic one. As a result, this leads to uncertainties and ambiguities to the concept of ‘economic activity’ which is a key element in defining the scope of competition law.

\textsuperscript{139} Somaya Belhaj and Johan W. van de Gronden (n 127) p.685.
E. Purchasing of Goods and Services: The FENIN Judgment

1. Upstream/Downstream Market Approach

FENIN v Commission\textsuperscript{141} is the first case which addresses the economic relationship between providers of healthcare services and producers of medical goods and services. Prior to the FENIN judgment, the issue revolved around the relationship between the providers of healthcare services and members of national health systems. In this case, FENIN, an association of the majority of undertakings which market medical goods and equipment in Spain, launched a complaint before the Commission against entities that operate the Spanish national health system (SNS) arguing that SNS was guilty of abusing its dominant position under Article 102 TFEU in delaying their payment to FENIN for the purchased goods and equipment. The main question in FENIN was, whether the purchase of medical goods by the entities of the Spanish national health system (SNS), amounted to an economic activity for the purposes of competition law. In determining this issue, the CJ took a two-step approach. First it had to establish whether the entities of the SNS were engaged in an economic activity when supplying healthcare services to the persons covered by the SNS scheme. Secondly, it needed to determine whether there was a link between the supply of such services and the purchase of goods required to supply those services; better known as the upstream/downstream market approach.

With respect to the first question, the CJ applied the set of criteria used in past judgments dealing with the health and social security sector.\textsuperscript{142} As a result, it concluded that SNS operated on the basis of the principle of solidarity as it was funded by social security contributions and other State funding and provided services free of charge to its members.\textsuperscript{143} Thus, the entities operating the SNS were not seen as pursuing an economic activity and as such the CJ concluded that they did not fall within the ambit of competition law.

\textsuperscript{141} FENIN (n 82).
\textsuperscript{143} FENIN (n 82) para. 8.
Following such a conclusion, in dealing with the second question of whether the activity of purchasing goods and equipment constitutes an economic activity, the CJ confirmed the Commission’s and the GC’s view that a purchasing activity is only subject to competition law if it is undertaken for an economic purpose, such as supply of goods or services in a market, rather than for a purely social purpose. Confirming the GC’s arguments, the CJ concluded that:

…it is the activity consisting in offering goods and services on a given market that is the characteristic of an economic activity … not the business of purchasing as such. …there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity … the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.144

As a consequence, an organization 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. Summarizing the Commission’s argument the CJ argued that ‘it is the act of placing goods or services on a given market which characterizes the concept of economic activity and not purchasing activity as such’.

Since the CJ adopted a functional approach in its case-law, an important issue which needs considerable interpretation is, what would be the position when some or a small portion of goods are used in connection with an economic activity. AG Maduro recognized this issue in his Opinion arguing that organizations that carry on a mixture of economic and non-economic activities are subject to competition rules in respect of their economic activities otherwise it would go against the functional approach. However, this position had not been considered

by the CJ, thus one hopes that further clarification on this point will be provided in future judgments.

Following this judgment, one may conclude that where the downstream activity of an entity does not consist of the offering of goods and services as part of an economic activity, then the activity of purchasing these goods and services will also be considered non-economic, thus outside the ambit of competition rules. One might argue that this can be seen as a drawback, since, companies compelled to deal with such entities will be deprived of important legal protection.

2. A Broader Application

The judgment in FENIN extends the application of the previous case-law to activities on upstream markets.145 The principles developed in the FENIN judgment should not be restricted to the healthcare sector however they could be applied in a broader context such that they can have implications in other sectors as well. For instance, they can be applied in public services sectors as well as in public entities in general such as education services in publicly funded system, police and security services or services provided by local authorities.146

Nevertheless, though the principle adopted in the FENIN judgment is seen as a novel aspect to other sectors in EU competition law, no particular reasons were given by the GC and the CJ in arriving at their conclusion. This principle therefore calls for further elaboration. In his article on purchasing care, Dr. J. W. van de Gronden argues that the reason for not qualifying entities such as the SNS as ‘undertakings’ in respect of their purchasing activities,

‘may be found in the negligible commercial interest these bodies have in relation to the transactions they conclude on the purchasing market, given the fact that their insurance activities are wholly governed by the principle of solidarity … It is not the possible influence on the supply side by a “purchasing entity”, but the

---

potential interest this “entity” may derive from this purchase on a selling market, which would seem to be the decisive factor in determining the nature of the purchasing activities.\(^\text{147}\)

The ruling in FENIN was also transposed in *SELEX Sistemi Integrati SpA v Commission*, in that the GC argued that though Eurocontrol acquired goods and services on the market, the fact that the purchasers of technical standardization services were Contracting States in their capacity as air traffic control authorities, did not mean that standardization services, for which such goods and services were acquired, should be regarded as economic activities. It reiterated the approach that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.\(^\text{148}\)

3. *Comparative law.*

The issue of whether competition law should be applied to the purchasing of care, have been dealt with in various cases in national courts.

(a). *Germany*

Contrary to the reasoning adopted in FENIN, German courts have consistently held that competition law applies to the purchases of public entities even if the subsequent use of the purchased goods is non-economic. In the German system it has since been the prevailing view that the State, State bodies and municipalities perform an economic activity when they acquire goods or services … and thus are subject to competition law. In particular, the entities which run the public-and solidarity-based-health care system are subject to competition law when they purchase goods, acquire medical services or boycott suppliers.\(^\text{149}\)

\(^{147}\) Dr. J. W van de Gronden, ‘Purchasing Care: Economic Activity or Service of General (Economic) Interest?’ [2004] ECLR 92.

\(^{148}\) Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* [2006] ECR II-4797 para. 17. This was confirmed on appeal by the Court of Justice in Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission* [2009].

(b). The Netherlands

In its decision Ontheffingsaanvraag Zorgkantoren,\textsuperscript{150} the Dutch Competition Authority found that the public insurance scheme was based on the principle of solidarity and thus the implementation of this national insurance cannot be considered as an economic activity. However, the agencies managing the public insurance scheme were considered to be ‘undertakings’ when purchasing services from other providers. Contrary to what was stated in the FENIN judgment, the Dutch Competition Authority dissociated the act of purchasing goods and services (an economic activity) from their subsequent use in providing health services (a non-economic activity).\textsuperscript{151}

(c). United Kingdom

The UK also took an interesting approach in the case BetterCare Group Limited v Director General of Fair Trading\textsuperscript{152} where it rejected the argument that purchase without resale should not be regarded as an economic activity. The Competition Commission Appeal Tribunal (CCAT) held that:

…we do not accept the Director’s argument that North & West is not an undertaking because the simple act of purchasing without resale is not an ‘economic activity’. We are not concerned in this case with, for example, a simple purchase for household needs by a consumer … [but] we are concerned here with the widespread making of commercial contracts in the context of a policy of contracting out pursued by North & West.\textsuperscript{153}

After the rulings in FENIN and Bettercare, the Office for Fair Trading (OFT) published a policy note\textsuperscript{154} in order to provide guidance in those situations where questions arise as to whether a public body engaging in purchasing activities should be considered as an ‘undertaking’ or not. To such an extent, the OFT

\begin{itemize}
\item \textsuperscript{150} Decision of the Director General of the NMa of 10\textsuperscript{th} March 2000 in Case No. 181 Zorgkantoren (AWBZ agencies).
\item \textsuperscript{151} Markus Krajewski and Martin Farley (n 146) p.123.
\item \textsuperscript{152} BetterCare Group Limited v. Director of Fair Trading (Case 1006/2/1/01).
\item \textsuperscript{153} Ibid para. 264.
\end{itemize}
argued that ‘it is likely to close cases concerning public bodies that are engaged only in purchasing in a particular market and not involved in the direct provision of any goods or services in that market or a related market, on the grounds that such bodies are not ‘undertakings’ for the purposes of the Competition Act 98’.155 Moreover, it argued that ‘for the time being, the OFT is unlikely, in the absence of exceptional circumstances, to take forward cases concerning public bodies which are engaged in a mixture of purchasing and direct provision of goods and services for non economic purposes, for example purposes which are purely social, environmental or national security related’.156

The diverging views adopted by national competition authorities and European judicial authorities in determining whether purchasing of care should be considered as economic, shows that there is the need for a more consistent approach when discussing the health care sector.

This chapter showed that in providing doctrines and concepts in order to assess whether an entity is to be classified as an ‘undertaking’ in terms of law, the CJ had to examine certain categories which pose problems in their characterization of pursuing an economic activity. On the other hand, there are certain entities pursuing economic activities fully subject to competition law. Nevertheless, since there is no uniform interpretation of what constitutes an ‘undertaking’, there are doubts and uncertainties creating exceptions to the general rule that competition law applies to all types of undertakings; all this being the subject of the next chapter.

155 Ibid p.1
156 Ibid.
CHAPTER III: TYPES OF ‘UNDERTAKINGS’ AND ‘ASSOCIATIONS OF UNDERTAKINGS’

A. Private Entities

The functional approach adopted by the CJ provides a means of allocating functions to the public or private sphere so that the appropriate Treaty rules can be applied. The broad definition of an ‘undertaking’ brings into the ambit of EU competition law all activities, whether they are performed by private or public entities. Nevertheless, since the definition lacks some form of precision, specific categories of entities require further analysis in order to show to what extent they fall within the spectrum of EU competition rules. This section will deal with entities which function in the private sphere.

1. Companies

The fact that the Treaties provide no definition of the notion of ‘undertaking’, led to Member States to use different words in order to define it in their respective language. Practically, they use words like ‘business’, ‘enterprise’, ‘company’, or ‘firm’ which are seen as another mode to express the notion of ‘undertaking’. Therefore, these different versions show that, primarily, companies are to be considered as ‘undertakings’ within the ambit of EU competition rules. However, since the functional approach provides a situation where legal personality is irrelevant, companies should not be automatically considered as ‘undertakings’ simply because of their status as companies. As a result, if a company does not pursue economic activities, it will not be classified as an ‘undertaking’ in terms of law. In Diego Calì & Figli v Servizi Ecologici del Porto di Genova, a private company protecting the environment in maritime areas, was held by the CJ as

---


71
performing tasks in the public interest rather than engaging in commercial activities. To such extent, it was concluded that it was not an ‘undertaking’.

2. **Individuals – an element of autonomy**

In *Vandevenne and Others*, the CJ argued that:

…the expression “undertaking” … refers to an *autonomous natural or legal person*, irrespective of legal form, regularly carrying on a transport business and empowered to organize and control the work of drivers and crew members.\(^{160}\) (emphasis added)

Therefore, an entity engaged in an economic activity is to have a certain degree of autonomy in order for it to be classified as an ‘undertaking’. As will be seen, in emphasizing this autonomous element, case-law shows that certain individuals are excluded from the application of EU competition rules since they lack a certain degree of independence. Conversely, others were seen to be ‘undertakings’ since they act in business activities in their own right.

(a). **Self-employed persons**

Individuals that commercially exploit their goods, services or intellectual property rights, on their own account, are considered to be ‘undertakings’, for the purposes of competition rules. The European Commission and the CJ concluded that professions are ‘undertakings’ within the meaning of Article 101 TFEU, since they engage in economic activities. For instance, in *RAI/Unitel*,\(^{161}\) the Commission concluded that a world-class opera singer was to be treated as an ‘undertaking’.

As far as legal services are concerned, lawyers have been held to be ‘undertakings’ for the purposes of EU competition rules. It has been argued that they carry on economic activities, since they

‘…offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions,

---


contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves.\footnote{Case C-309/99, Wouters v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577, para. 48.}

Furthermore, the Commission classified customs agents as ‘undertakings’ since they performed economic activities on a given market for remuneration and therefore competition rules applied. It argued that:

The fact that the business occupation of a customs agent is viewed under Italian law as a liberal profession is not inconsistent with the fact that customs agents are undertakings engaged in an economic activity...\footnote{CNSD (IV/33.407) Recital 40 of Commission Decision 93/438/EEC [1993] OJ L203/27.}

In Pavel Pavlov and Others, the CJ argued that self-employed medical specialists are to be classified as ‘undertakings’ since they ‘provide, in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.’\footnote{Joined cases C-180/98 to C-184/98 Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451 para.76.} Furthermore ‘the complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion’.\footnote{Ibid para 77.}

Farmers and slaughterers were also classified as ‘undertakings’ for the purposes of EU competition rules since farmers produce goods and offer them for sale in return for payment and slaughterers perform for gain the service of slaughtering animals, and offer the products of their work for sale.\footnote{French Beef [2003] OJ L209/12; Joined Cases T-217/03 and T-245/03 FNCBV and Others v Commission [2006] ECR II-4987.}
Interestingly, the Commission has also found that an individual qualified as an ‘undertaking’ in his capacity as a controlling shareholder. In *Reuter/BASF*, the Commission held that:

Dr Reuter is also to be regarded as an undertaking for the purpose of Article 85 [101], since he engages in an economic activity through those firms of the Elastomer group which remain under his control, by exploiting the results of his own research and as commercial adviser to third parties.167

Similarly, in *Vaessen/Moris*, the Commission found that an inventor who may enter into anti-competitive agreements with respect to the exploitation of his invention was an ‘undertaking’ since he exploited his invention commercially through his company and in this way he carried on the business of an undertaking.168

However, in *HFB Holding v Commission*169 an issue arose as to whether the mere fact of controlling a company can be considered as being a sufficient economic activity to help determine that an individual may constitute an ‘undertaking’. According to the Commission, four companies were directly or indirectly, under the control of the same individual, Mr. Henss, and therefore they could be considered as a ‘single economic entity’ for the purposes of competition rules.170 This was denied by the applicants on the fact that Mr. Henss had subscribed the majority of the capital in only two of the four companies, while he was not a member of the remaining two companies. They also maintained that Mr Henss could not, as a shareholder, be considered as an ‘undertaking’ within the meaning of Article 101(1) TFEU. The GC rejected these submissions and found that the Commission was right in considering that the four companies constituted a ‘single economic entity’. Unfortunately, the GC left unanswered the issue whether

---

170 The concept of ‘single economic entity’ will be considered in detail in Chapter 4.
and under what circumstances the holding of controlling stake in a company may be considered as sufficient to qualify the holder as an ‘undertaking’ in terms of law.

To this end, case-law shows that natural persons who carry on an economic activity with a sufficient degree of autonomy can be considered as ‘undertakings’ within the meaning of EU competition rules. As a result, one could argue that even an individual sportsman or team sportsmen could fall within the spectrum of these rules particularly when they negotiate the terms of their contracts, the renewal of their contracts or their transfers since they would be acting on their own right protecting their own interests. However, one should not over generalize this line of reasoning because one always has to keep in mind the decisive criterion of an ‘undertaking’, that is, the economic nature of the activity in question.

(b). Employees

The question of whether employees should be considered as ‘undertakings’ for the purposes of competition rules formed the central issue in the Becu proceedings, where the question of whether or not dockers were ‘undertakings’ became controversial. The CJ here concluded that:

... the employment relationship which recognized dockers have with the undertakings for which they perform work is characterized by the fact that they perform the work in question for and under the direction of each of those undertakings ... Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute ‘undertakings’ within the meaning of Community competition law.

---

171 Louri (n 158) p.151. In Case 36-74, Walrave and Koch v Association Union Cycliste internationale, [1974] ECR 1405 para. 4, Case C-415/93, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman and Others [1995] ECR I-4921 para. 73 it was argued that ‘it should be noted, as a preliminary point, that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty’.


In the *Albany* case, AG Jacobs raised the question of how employees should be regarded as ‘undertakings’ simply because they offer services in respect of remuneration; an activity clearly of an economic nature similar to the sale of goods. He argued that to include an ‘employee’ within the scope of the term ‘undertaking’ would mean exceeding the limits which its wording imposes.\(^{174}\) Furthermore he argued that since competition rules apply to independent economic actors on the markets for goods or services, employees should not fall within the spectrum of these rules in particular because:

Dependent labor is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community or national law.\(^{175}\)

Hence, on a strict interpretation of case-law, since employees are not considered to be an autonomous entity and they do not bear the consequences of the financial risks involved in the exercise of their activities, they cannot be classified as ‘undertakings’ for the purposes of EU competition rules. They may however be considered to form part of their employer’s undertaking within which they form an economic unit.

In arriving to a conclusion that competition rules should not apply to employees, the CJ focused on the nature of employment contracts. It did not hold that employees could never be ‘undertakings’. Indeed, if employees act for and on behalf of a company, they may be considered as part of that entity thereby escaping the rules on competition. However, if employees act outside the employment relationship and act solely for their own interests, then they should be


\(^{175}\) Ibid para. 215.
treated as an ‘undertaking’, as they would be carrying out an independent economic activity. When employees work together as part of a team, they are to be considered as part of the same unit. Otherwise, they are to be treated as an ‘undertaking’ and would therefore be fully subject to EU competition rules.

(c). Employers

Employers may also be considered as ‘undertakings’ when they engage in economic activities on different markets for goods and services and may therefore fall within the ambit of competition rules. In this respect, AG Jacobs’ Opinion in the Albany case is of relevance. He argued that in order to be able to produce goods or services, employers engage employees. Thus, employing persons is an inherent part of their main economic activities.\(^{176}\)

However, the Netherlands Government contended that employers participating in collective bargaining on wages or working conditions are not engaged in an economic activity; rather they are engaged in a social activity. In that regard, they cannot be classified as ‘undertakings’. AG Jacobs did not support this conclusion and he argued that the fact that employers engage in collective bargaining on working conditions, wages or pensions is not only motivated by social considerations but involves also economic motives such as the ‘prevention of costly labour conflicts, lower transaction costs through a collective and rule-based negotiation process, and greater planning certainty and transparency in the field of production costs’.\(^{177}\) Furthermore he argues that:

... an undertaking’s economic success on the national or international markets for goods and services will depend on its ability to conclude an optimal collective agreement with its employees, which will affect its cost structure. Negotiation with employees is therefore part and parcel of its economic activity on the markets and cannot be artificially segregated.\(^{178}\)

\(^{176}\) Albany (n 174) AG Jacobs Opinion para.228-229.  
\(^{177}\) Ibid para.232.  
\(^{178}\) Ibid para.233.
Finally, AG Jacobs implies that in collective bargaining, each side would be defending its interests. In other words, employees try to secure a maximum of social advantages whilst the employers try to defend the economic interests of the undertakings involved. Therefore, it would ‘not even be desirable that employers should be affected by other than economic considerations’. As a result, employers are considered to be ‘undertakings’ even when they are engaged in collective bargaining.

(d). Agents

In parallel with employees, there are commercial agents who negotiate transactions on behalf of their principal, either in his own name or in the name of the principal. To such an extent, the relationship between the principal and his agent falls outside the ambit of EU competition rules since the agent lacks the independence in making decisions and therefore is not considered as an ‘undertaking’ in his own right. For instance, in Suiker Unie, the CJ held that where:

…an agent works for his principal he can in principle be regarded as an auxiliary organ forming an integral part of the latter’s undertaking bound to carry out the principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking.

The concept of agents and their relationship with their principal is dealt with in further detail in Chapter 4.

(e). Consumers

The activities performed by individuals that simply fall within the individual’s personal sphere do not fall within the ambit of EU competition rules. This principle was highlighted again by AG Jacobs, in his Opinion in the Pavlov case, where he argued that:

\[^{179}\text{Ibid para.234.}\]
\[^{180}\text{Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 Coöperatieve Vereniging “Suiker Unie” UA and others v Commission [1975] ECR 1663 para.539.}\]
Where natural persons are classified as undertakings it is ... correct to distinguish between activities related to their economic sphere and activities related to their personal sphere. Contrary to legal persons who do not have a private life, natural persons may act in their capacity as undertakings or in their capacity as final consumers. Since Article 85 [Article 101] et seq. of the Treaty apply only to undertakings, natural persons acting in the latter quality are sheltered from the competition rules.\textsuperscript{181}

Interestingly, he compared two important scenarios such that for example when professionals agree to organize a holiday or to buy opera tickets, they fall outside the ambit of competition rules. On the other hand, when doctors buy medical equipment or lawyers rent offices, they are engaged in activities related to their professional activity and therefore in that respect competition rules apply.\textsuperscript{182}

Consequently, a contract between a firm and a consumer is not covered by EU competition rules since a consumer does not carry out an economic activity. Nevertheless, contracts concluded with consumers may pose problems if they contain clauses which raise competition concerns. For instance, contracts with consumers often include 'English clauses' whereby a seller commits to match any competitive offer, in return for the consumer's commitment to report any better offer.

In general terms, the above categories synthetically show that natural persons engaging in business activities can be regarded as 'undertakings' to the extent that they take on financial risks indicative of a genuine exercise of trade. Moreover, in order for EU competition rules to apply, their activities have to be related to their professional activity rather than activities of final consumption.\textsuperscript{183}

\textsuperscript{181} Pavel Pavlov (n 164) AG Jacobs Opinion para.115.
\textsuperscript{182} Ibid.
\textsuperscript{183} Louri (n 158).
B. Public Entities – State bodies acting on the market

1. The exercise of imperium and economic activity

Public entities can act on the market like private entities. As a result, their actions might lead to competition concerns. The broad definition of an ‘undertaking’ covers every entity, whether private or public, including the State and its agencies, when they exercise commercial activities. In this way, when assessing the activities of State bodies, the Court insisted on the distinction between the role of the State as public authority, exercising imperium, and its other functions. This distinction flows from the recognition that

...the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods or services on the market.184

Therefore, the State and its bodies can have a two fold capacity, that is, they are capable of performing activities flowing from their sovereignty (State’s imperium), which escape the application of competition rules, and they might also carry on economic activities, which fall within the ambit of these rules. Hence, it is important to distinguish between these two kinds of State’s activities since it is the decisive factor for the application of EU competition rules.

Accordingly, ‘the Treaty rules on competition do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority’.185 For instance, in Corinne Bodson v SA Pompes funèbres des régions libérées,186 a concession contract concluded between a French municipality and a provider of funeral services did not fall within the ambit of competition rules since, in granting such a concession, a municipality is acting in its public authority and therefore is not engaged in an economic activity. Furthermore,

---

185 Wouters (n 162) para.57.
in *Banchero*, the ECJ concluded that the authorization of the opening of tobacco outlets ‘amounts in effect to the exercise of a State right and not an economic activity *stricto sensu*’.\(^{187}\)

In addition, a European Organisation for the Safety Air Navigation (Eurocontrol) charged with collecting route charges from users of air navigations services on behalf of the States that created it, was found by the CJ not to act as an ‘undertaking’ since it was vested with rights which derogated from ordinary law and are typically only enjoyed by a public authority.\(^{188}\) Likewise, anti-pollution surveillance services were found by the CJ to form part of the essential functions of the State. The CJ argued that a private company engaged in these services in the port of Genoa was not acting as an ‘undertaking’ when discharging that particular responsibility.\(^{189}\)

Conversely, public bodies performing economic activities of an industrial or commercial nature have to comply with competition rules, unless they are justified by Article 106(2) TFEU which provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to competition rules only in so far as the application of the rules does not obstruct the performance of the tasks assigned to them. To this end, it is necessary to draw a distinction between public authority functions and activities which serve the general economic interest. In this regard, Alexander Winterstein holds that:

> Whereas the exercise of *imperium* can by definition never be an economic activity, activities which serve the general *economic* interest are, by virtue of Article 90(2) [Article 106(2)], subject to the competition rules unless and to the extent to which it is shown that their

\(^{187}\) Case C-387/93 *Criminal proceedings against Giorgio Domingo Banchero* [1995] ECR I-4663 para.49.

\(^{188}\) See Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43. See also A. Winterstein (n 184) p.325.

\(^{189}\) *Diego Calì* (n 159).
application is incompatible with the discharge of their particular tasks.\textsuperscript{190} Accordingly, different categories of public entities need to be analyzed in order to identify whether they can be considered as ‘public undertakings’ falling within the scope of EU competition rules or else public authorities exercising their regulatory powers escaping these rules.

2. \textit{The State}

The basis of EU competition policy is the establishment of a system ensuring that competition in the internal market is not distorted. Thus, even States are bound to respect competition rules. Nevertheless, they cannot be subject to EU competition rules when they exercise their \textit{imperium} since in this area they face neither actual nor potential competition by private companies.\textsuperscript{191} Of particular interest is the Commission Notice on Services of General Interest in which it was held that:

\begin{quote}
…matters which are intrinsically prerogatives of the States ... are excluded from the application of competition and internal market rules.\textsuperscript{192}
\end{quote}

Hence, in order to determine the application of EU competition rules in relation to States, ‘it is important to consider the activities exercised by the State and to determine the category to which those activities belong’.\textsuperscript{193} Particularly, a question arises as to whether the State is to be considered as an ‘undertaking’ when being directly party to a commercial agreement with another undertaking. In this regard, relying on the broad definition of an ‘undertaking’, the answer would be in the affirmative since the definition covers every entity engaged in commercial or economic activities.

\textsuperscript{190} A. Winterstein, (n 184) p.327.
\textsuperscript{191} Louri (n 158) p.161.
\textsuperscript{192} Commission Notice on Services of General Interest in Europe [2001] OJ C17/4 para.28.
\textsuperscript{193} Case 118/85 \textit{Commission v. Italy} [1987] ECR 2599 para.7.
3. Statutory bodies

On reaffirming the broad definition of ‘undertaking’ the CJ deems statutory bodies as ‘undertakings’ in so far as they engage in commercial or economic activities. For instance, in the Spanish Courier Services case, the Commission argued that:

The Post Office is a body which does not have an independent legal personality but forms part of the general administration of the Spanish State, through the Postal Administration … In as much as the Post Office is providing services on the market it is an undertaking within the meaning of Article 90(1) [Article 101(1) TFEU] of the EEC Treaty.\textsuperscript{194}

Furthermore, in the Airport of Brussels case, the Commission concluded that a public body entrusted by the State with the management of the Brussels National Airport and with the safety of air transport is an ‘undertaking’ in so far as the construction, development, maintenance and exploitation of the airport is concerned.\textsuperscript{195}

In addition, the CJ ruled that employment procurement activities were of an economic nature and thus fall within the scope of EU competition rules. As a result, the CJ found the German Employment Office, a public body entrusted with the right to act as an intermediary between employers and persons seeking employment, to be an ‘undertaking’.\textsuperscript{196} Similarly, in Job Centre coop. arl., the CJ concluded that the fact that the placement of employees is normally entrusted to public offices cannot affect the economic nature of such activities therefore public placement offices may be classified as an ‘undertaking’ irrespective of the fact that they are non-profit making and based on the principle of national solidarity.\textsuperscript{197}

\textsuperscript{194} Spanish Courier Services [1990] OJ L233/19 pt.II para.5-6.
\textsuperscript{197} Case C-55/96 Job Centre coop. arl. [1997] ECR I-7119 para.22-25.
4. Regional and local authorities

Like statutory bodies regional and local authorities are considered by the Commission and the CJ to be ‘undertakings’ for a similar reason and therefore fall under competition law. In NAVEWA/ANSEAU\(^{198}\), water supply companies and services affiliated to ANSEAU were considered to be ‘undertakings’ and therefore were held liable for an infringement of Article 101 (1) TFEU.

This reasoning goes against what is stated in Article 2(1a) of Directive 2000/52 EC, namely that “public authorities’ means all public authorities, including the State and regional, local and all other territorial authorities”.\(^{199}\) Hence, it classifies regional and local authorities as ‘public authorities’ rather than ‘public undertakings’. Likewise, French communes were classified by the CJ to be ‘public authorities’ rather than ‘public undertakings’, thus fell outside the scope of EU competition rules.\(^{200}\)

5. International organizations

In principle, EU competition law applies to international organizations in so far as their specific activities are of an economic nature. However, the rule is that ‘international organizations are associations of States involved in regulatory activities and not the direct exercise of economic activities’.\(^{201}\) This reasoning finds support in SAT Fluggesellschaft mbH v Eurocontrol\(^{202}\) wherein the CJ held that air navigation was a State function so that fees charged by Eurocontrol could not be attacked under competition rules. Hence, it found that the international organization was to be regarded as public authority acting in the exercise of its powers.


\(^{200}\) Bodson (n 186).

\(^{201}\) J.L. Buendia, Exclusive Rights and State Monopolies under EC Law-Article 86(Formerly Article 90) of the EC Treaty (OUP, Oxford 1999) p.133. See also Louri (n 158) p.163.

\(^{202}\) SAT Fluggesellschaft (n 188).
This reasoning was reaffirmed by the Commission in *SELEX Sistemi Integrati SpA v Commission*,\(^{203}\) where the Commission maintained that the activities carried by Eurocontrol were sovereign functions, hence, they were not covered by competition rules. Nevertheless, on rejecting the generalized application of its holding in the *SAT Fluggesellschaft* case, in the *SELEX* case, the GC defined certain activities of Eurocontrol, in particular assistance to national administrations, as economic since they could be offered on a hypothetical market by private entities and therefore could not be put on an equal level with Eurocontrol’s public powers.

Thus, the test appeared to be whether the entity was competing with private sector firms in providing that service.

Subsequently, the CJ overturned the approach taken by the GC and concluded that since assistance to national administrations ‘form an essential part of Eurocontrol’s institutional objectives, they are not, in any event, acts of commercial nature’.\(^{204}\)

This differentiation in the GC and the CJ’s ruling, brought about various criticisms. Some critics focused on the important function of services of general economic interest and therefore preferred the CJ’s approach.\(^{205}\) Others criticized the latter’s approach on the fact that:

...this type of public commercial activities has a significant potential to distort competition ... Consequently, the current jurisprudential approach to the economic activities of the public sector from a competition standpoint neglects an important sector of activity (that of the market behaviour of the public

---

\(^{203}\) Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* [2006] ECR II-4797

\(^{204}\) Case C-113/07P *SELEX Sistemi Integrati SpA v Commission* [2009] para.60.

\(^{205}\) Jean-Philippe Kovar, ‘Notion of economic activity: The ECJ confirms the cases law Eurocontrol and Fenin on the notion of economic activities and the qualification of the purchase act (Selex Sistemi Integrati – Eurocontrol)’ *Concurrences* [2009] 212-213.
buyer) and gives way to undeterred competition-
distorting public procurement practices.\textsuperscript{206}

Thus, they viewed the \textit{SELEX} ruling as another legal construction shielding
public entities from the application of EU competition rules.\textsuperscript{207}

In this case, the general immunity of Eurocontrol under public international
law from the application of EU competition law was not considered by the CJ.
Alternatively, the CJ focused on particular activities of the entity to determine
whether they are of an economic nature or not. This implies that the status of the
organization should be considered in relation to the activities that it undertakes in
each and every case. Consequently, the CJ remained in line with the principle
developed in previous case-law, namely that, EU competition law applies to public
bodies, including international organizations, provided that they engage in activities
of an economic nature.

6. \textit{State-owned companies}

Article 345 TFEU (ex Article 295 of the EC Treaty) provides that ‘the
Treaties shall in no way prejudice the rules in Member States governing the system
of property ownership’. This shows that Member States have the right to govern
certain enterprises rendering them to be ‘public undertakings’ (state-owned
companies). When it comes to State-owned companies, Member States still have
the obligation not to adopt legislative measures which could endanger the
effectiveness of the Treaty otherwise they would be in violation of competition
rules.

The application of EU competition law to ‘public undertakings’ is also shown
from the wording of Article 106 TFEU, however, it does not define these any
further. To this extent, a reference has to be made to the \textit{Transparency Directive},
in which a ‘public undertaking’ is defined as:

\textsuperscript{206} Albert Sánchez Graells, ‘Distortions of Competition Generated by the Public (Power) Buyer: A Perceived
\textsuperscript{207} Alexandr Svetlicinii, Florence, ‘Back to the Basics: Concepts of Undertaking and Economic Activity in the
\textit{SELEX} Judgment (SELEX Sistemi Integrati Spa v Commission, ECJ (Second Chamber), Judgment of 26 March
any undertaking over which the public authorities may exercise directly or indirectly, a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.208

This definition covers a wide range of bodies engaged in public economic activity since its key concept is control by the State.209 For instance in the Sacchi210 case, the Italian Broadcasting Authority, RAI, was found by the CJ to be a ‘public undertaking’ since it was under the control of a State holding company, IRI. The Commission has on several occasions intervened against State-owned companies abusing their dominant position on the internal market. The Deutsche Post211 case and the Deutschce Telekom’s212 case are two landmark cases wherein competition rules were applied to traditional utilities sectors. Since these sectors are often subject to sectoral regulation, it does not shield them from their responsibility under competition law.

In addition, competition rules apply also to what is known as ‘privileged undertakings’. These are entities which are granted certain special or exclusive rights by the State. In the ERT213 case, Greece had created a situation in which the broadcaster ERT would be led to infringe the competition rules by virtue of a discriminatory policy in favour of its own broadcasting arm. This led to the Greek radio and television company to be challenged. Furthermore, in RTT v. GB-Inno-BM SA, the CJ held that the Belgian national telephone company should be examined under competition law since it was a ‘privileged undertaking’.214

---

209 Louri (n 158) p.166.
7. The Education System

The subject of education, in particular universities raises important concerns for the application of EU competition rules. The general rule is that the distinction between public or private universities leaves no effect in the application of these rules since the functional approach adopted by the CJ considers the status of the entity as immaterial. Therefore, what matters is to determine whether education is a service of an economic nature.

In this context, in Humbel and Edel, the CJ argued that the establishment and maintenance of a public education system belongs to the duties of the State towards its citizens and that in fulfilling this duty, the State is:

…not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields …

Therefore, it follows, that activities within the public education system, in particular if it is compulsory, cannot be classified as economic activities.

Of particular interest is the fact that services provided by public universities may also be classified as services of economic nature, since they ‘face actual or potential competition’ by private universities. This would be in line with the approach taken by the CJ in giving a definition of an ‘undertaking’, namely that, education ‘has not always been, and is not necessarily’, carried out by public universities. In this regard, the conclusion would be that public universities could be considered as ‘undertakings’ within the scope of EU competition rules, however, since they are providing a service in the public interest, they might be exempted under Article 106(2) TFEU as operating services of a general economic interest.

In the light of the above, the correlation between activities that a public body pursues and the achievement of its public aims, continue to play a significant role

216 Louri (n 158) p.165.
217 Höfner (n 196) para.22.
in a functional assessment as to whether these activities are to be considered as economic activities and therefore justifying the application of EU competition rules.

C. ‘Associations of Undertakings’

Article 101 TFEU is not only applicable to agreements and concerted practices between ‘undertakings’ but also to decisions by ‘associations of undertakings’. The raison d’être is to enable ‘those applying Article 81(1) [101(1)] to hold associations liable for the anti-competitive behaviour of their members’.  

To this extent, Article 101 (1) TFEU not only covers agreements and concerted practices between ‘undertakings’ but also institutionalized forms of cooperation where economic operators act through a collective structure or a common body.

Since the concept of ‘association of undertakings’ is not defined in the Treaty, a question arises as to what requirements are needed in order for a body to be classified as such. In this regard, AG Léger’s Opinion is of relevance, since he argued that, ‘an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general.’

Moreover, as will be seen, an ‘association of undertakings’ could also be a body set up by statute with public functions, so long as it represents the trading interests of the members. Thus, a public law status of a national body does not preclude the application of Article 101.

It is important to acknowledge that there are different forms of associations operating in every sector of the market and to this end, the aim of this section is to identify which associations are considered to be ‘undertakings’ themselves or ‘associations of undertakings’ and as such within the ambit of the competition rules. Indeed, an association need not be an ‘undertaking’, yet, it will still fall under Article 101 TFEU as an ‘association of undertakings’.

---

219 Wouters (n 162) AG Léger Opinion para.61.
220 Ibid. para.61.
1. **Trade Unions**

As outlined earlier, EU competition rules do not generally apply to employees since they are not considered to be ‘undertakings’. Likewise, one may conclude that a trade union, which represents employees, cannot qualify as an ‘association of undertakings’. Yet, if circumstances so warrant, it is possible for a trade union to be classified as an ‘undertaking’ in its own right. Of particular interest in this context is AG Jacobs Opinion in the *Albany* case. The AG made a distinction such that he argued that:

> …an association can act either in its own right, independent to a certain extent of the will of its members, or merely as an executive organ of an agreement between its members. In the former case its behaviour is attributable to the association itself, in the latter case the members are responsible for the activity.\(^{221}\)

He proceeded to argue that:

> With regard to trade union activities one has therefore to proceed in two steps: first, one has to ask whether a certain activity is attributable to the trade union itself and if so, secondly, whether that activity is of an economic nature.\(^{222}\)

In this case, trade unions were engaged in collective bargaining with employers on pensions for employees of the sector, thus they were acting as agent for employees and not in their own right. To this extent, they were not acting as ‘undertakings’ in terms of law.

Accordingly, a trade union which in itself is engaged in an economic activity and not as an ‘executive organ’ of the will of its members is to be considered as an ‘undertaking’ within the ambit of EU competition rules. Moreover, a trade union will

---

\(^{221}\) *Albany* (n 174) AG Jacobs Opinion para.222.

\(^{222}\) Ibid para.225.
be categorized as an ‘association of undertakings’ even if it is only representing the agreements between its members when the latter are ‘undertakings’ themselves.

2. **Trade Associations**

Trade associations may provide a forum of competitors in a particular industry to get together and to discuss matters which may be to their mutual interest. Such associations may therefore be a perfect vehicle through which undertakings coordinate their action.\(^{223}\) As an ‘association’, a trade association is an ‘association of undertakings’ and is therefore subject to EU competition rules. A trade association may also be held to be an ‘undertaking’ when it carries on economic activities in its own right.

The issue of responsibility is an important issue in this regard to such an extent that, in *SC Belasco and Others v. Commission*,\(^ {224}\) the CJ approved the Commission’s decision to fine both the association and its members. Similarly, in *Cartonboard*\(^ {225}\) members were held to be jointly and severally liable with the Finnish board mills association. Moreover, in the *Cement*\(^ {226}\) case, the Commission attributed responsibility on the members of an association for the reason that membership in a trade association implies cooperation within the framework of the association’s activities. Yet, the Commission may still impose fines on the trade association itself shielding its members from the competition rules.

In addition, the Commission concluded that EU competition rules apply to trade associations that can impose regulatory measures,\(^ {227}\) whilst the CJ argued


\(^{224}\) Case C-246/86 *SC Belasco and Others v Commission* [1989] ECR 2117.

\(^{225}\) *Cartonboard* [1994] OJ L243/1


\(^{227}\) *AROW/BNIC* [1982] OJ L379/1 para.50-51.
that though they are not expressly mentioned, agreements between trade associations could also fall within the ambit of EU competition rules.\footnote{228 Case 71-74 Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit "Frubo" v Commission of the European Communities and Vereniging de Fruitunie [1975] ECR 563 para.28-30.}

3. \textit{Professional Associations}

As already explained, professionals can be regarded as ‘undertakings’ for the application of competition rules. By the same token, professional associations are to be considered as ‘associations of undertakings’. However, professional associations can involve different degrees of intervention from public authorities making it doubtful, as whether they are to be considered as ‘associations of undertakings’, since EU competition rules ‘relate only to the conduct of undertakings and do not cover measures adopted by Member States, by legislation, or regulations’.\footnote{229 Case C-2/91 Criminal proceedings against Wolf W. Meng [1993] ECR I-5751 para.14.}

In \textit{BNIC v. Clair},\footnote{230 Case 123/83 Bureau national interprofessionnel du cognac v Guy Clair [1985] ECR 391.} the CJ concluded that BNIC was an ‘association of undertakings’ even though under French law it had a public law status. Moreover, in the \textit{COAPI}\footnote{231 \textit{COAPI} [1995] OJ L122/37.} case, the Commission held that the Spanish association of industrial property agents is an ‘association of undertakings’, notwithstanding the fact that the COAPI constitutes a corporate entity governed by public law and is entrusted with regulatory functions under Spanish law. Similarly, in \textit{Commission v Italy}, the CJ held that:

\begin{quote}
...
...it must be borne in mind that the public law status of a national body such as the CNSD does not preclude the application of Article 85 [Article 101 TFEU] of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. Accordingly, the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are
\end{quote}
irrelevant as far as the applicability of the Community rules on competition ... are concerned... 

As a result, the CNSD was considered to be an ‘association of undertakings’ even though it had the status of a public body formed under Italian law. Thus, the legal status of the association is irrelevant for the application of EU competition rules.

With specific reference to the legal profession, it was argued that in adopting the regulatory rules, the Bar of Netherlands was neither fulfilling a social function based on the principle of solidarity, nor exercising powers which are typically those of a public authority. Rather it was acting as the regulatory body of a profession, the practice of which constitutes an economic activity. Thus, it was concluded that the Bar of Netherlands must be regarded as an ‘association of undertakings’ when adopting a regulation such as one which prohibited certain multi-disciplinary partnerships.

Furthermore, the CJ held that a professional body may escape the qualification as ‘association of undertakings’ when:

...a Member State...is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.

This shows that the professional association will not qualify as an ‘association of undertakings’ when the delegated authority can be exercised only to implement carefully defined public-interest criteria.

---

233 The same was held in Pavel Pavlov (n 164) para.85.
234 Wouters (n 162).
235 Ibid. para.68.
In the Commission Report on Competition in Professional Services,\textsuperscript{236} it is stated that in order to escape the qualification of ‘association of undertakings’, a professional body should comply with both conditions of being composed of a majority of representatives of the public authorities and being bound to observe pre-defined public interest criteria. This was also confirmed by AG Léger in the \textit{Wouters} case.\textsuperscript{237}

Another important observation is the issue of liability, since, there exists the distinction between measures adopted by professional associations and therefore which are self-regulatory and legislative or regulatory instruments in which the government is involved. Case-law established that EU competition rules apply only to autonomous conduct by undertakings and not to state legislation or regulation, thus if the conduct is required by a legislation or regulation of a Member State, which legislation prevents competition in the market concerned, the association of undertaking would escape liability from these rules. Nevertheless, if the association prevents or restricts competition in the market through its own conduct, albeit there being a legislation which leaves open the possibility of some kind of competition in the same market, the association of undertakings would be liable under EU competition rules.

Consequently, in the light of the above, professional associations can be classified as ‘associations of undertakings’ falling within the scope of EU competition rules. It is also submitted that, by analogy to the case-law of trade unions, professional associations could also qualify as ‘undertakings’ in their own right when they engage in economic activities.\textsuperscript{238}

4. \textit{Sporting bodies}

The importance of the application of EU competition rules to the sport sector has increased due to the growing economic significance of professional sport, in

\textsuperscript{237} \textit{Wouters} (n 162), AG Léger Opinion para.84.
\textsuperscript{238} Louri (n 158) p.156.
particular that of football. Moreover, ‘the increase in salaries and transfer fees of professional sportsmen, the rise in the value of broadcasting rights and an increase in sponsorship and advertising costs,\textsuperscript{239} led the Commission and the CJ to deal with a number of competition cases in this sector.

In \textit{Walrave and Koch}\textsuperscript{240} the CJ argued that sport is subject to competition rules in so far as it constitutes an economic activity. However, there are distinctive features of sports that set it apart from other economic activities; activities which are worth to consider for the application of competition law in this sector. To this extent, the Commission and the CJ had to take into consideration the following aspects, namely, the interdependence between competing adversaries, the need to ensure uncertainty as to the result and the fulfillment of important educational, public health, social, cultural and recreational functions.\textsuperscript{241}

Thus, sport organizations which adopt restrictive practices having a significant economic impact and which are not acceptable with regard to the specific objectives of sport, are to be held liable under competition rules. In \textit{Distribution of Package Tours during the 1990 World Cup}\textsuperscript{242} case, the Commission held that FIFA (international football federation), FIGC (the Italian football association) and the local organizing body were ‘undertakings’ to the extent that they carry out economic activities. As a result, they were found to have infringed EU competition rules on the basis that they prohibited the sale of tickets for package tours, thus making it impossible for other tour operators and travel agencies to find adequate sources of supply.

\textsuperscript{239} J-F. Pons, ‘Sport and European Competition Policy’, 1999 Fordham Corp. L. Inst. P.76 (B. Hawk, ed.).
\textsuperscript{240} Case C-36/74 \textit{Walrave and Koch v Association Union Cycliste Internationale} [1974] ECR 1405. See also Case 13/76 \textit{Donà v Mantero} [1976] ECR 1333.
\textsuperscript{241} Philip Kienapfel and Andreas Stein, “The application of Articles 81 and 82 EC in the sport sector” (2007) 3 Competition Policy Newsletter p.6.
\textsuperscript{242} \textit{Distribution of Package Tours During the 1990 World Cup} [1992] OJ L326/31. Similarly, in 1998 Football World Cup [2000] OJ L5/55, the Commission found the CFO (Comite Francais d’Organisation) as an ‘undertaking’ in terms of law.
The Commission’s approach was also accepted in the *Deliège* case, wherein the professional activity of judokas was considered to be an economic activity, thus subject to the EU competition rules.

Furthermore, in the *Piau* case, the GC accepted that as a grouping of clubs, national football associations are ‘associations of undertakings’ in terms of EU competition rules. In addition, the associations carry out certain economic activities on their own, such as the sale of broadcasting rights or collecting revenues from sporting events, which, according to the GC makes them ‘undertakings’ just like football clubs. This in turn makes FIFA, a grouping and emanation of national football associations, subject to Article 101 TFEU as an ‘association of undertakings’.

In addition the mere fact that a rule is ‘purely sporting’ in nature, does not have the effect of removing from the scope of competition rules, sport associations adopting the rule in question. This argument was brought forward by the CJ in *Meca-Medina and Majcen v Commission* wherein it considered the exclusion *a priori* of the anti-doping rules from the scope of the competition rules by the GC due to their purely sporting nature, as an error of law that entailed the annulment of the GC’s judgment. In this context, the CJ argued that:

> If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty.

Consequently, this judgment has added that no category of ‘purely sporting rules’ exists that is shielded from the application of EU competition rules. Alternatively, it must be determined on a case-by-case basis as to whether the conditions of the Treaty are met.

---

246 Ibid para.28.
In the light of the above, case-law demonstrates that sporting bodies meet the criteria to be classified as ‘undertakings’ or ‘associations of undertakings’ in so far as they pursue an economic activity. As a result, in as far as they exercise economic activities they need to ensure for themselves that they comply with EU competition rules.

As already established in this chapter, entities falling within the public and the private sphere receive different treatment in so far as the applicability of EU competition rules are concerned. This differentiation is ‘justified by the presumption underlying rules of the private sphere that its occupants are self-interested and the presumption underlying rules of the public sphere that its occupants operate in pursuit of the public interest’.

A particular question arises as to whether Treaty rules should apply to all types of practices, thus removing the distinction between the public and the private sphere. However, it has been established that knowledge of the public/private divide in the Treaty and of the necessity, difficulty, and consequences of maintaining its existence, are central and essential to understanding the task the Court is engaged in when determining the addressees of EU competition rules.

Yet, the purpose of the concept of ‘undertaking’ is not only that of identifying different categories of entities to which EU competition rules apply, but is also that of establishing the boundaries of an ‘undertaking’ and the identification of those entities to which a certain behaviour is attributable. This will be focused upon in the next chapter.

---

247 Odudu (n 157) p.55.
248 Ibid.
CHAPTER IV: THE ‘SINGLE ECONOMIC ENTITY’ DOCTRINE: DELINEATING THE BOUNDARIES OF AN ‘UNDERTAKING’

A. The Parent and Subsidiary

The concept of ‘undertaking’ revolves around another important area, namely, that of delineating its boundaries. The purpose is first, to determine the application of EU competition rules, particularly Article 101 TFEU, to different types of undertakings and secondly, to identify the group of natural and legal persons to whom infringements of EU competition rules by the undertakings concerned can be attributed. However, since Article 101 TFEU only applies to agreements between undertakings, it does not apply to agreements between persons or companies belonging to the same undertaking. Consequently, this chapter aims to identify those entities to which Article 101 TFEU does not apply since they form a ‘single economic entity’ and therefore their agreements cannot be regarded as agreements between undertakings. To this extent, they escape the prohibition in Article 101(1) TFEU. Indeed, the ‘single economic entity’ doctrine applies to different categories; the first to consider is the parent-subsidiary scenario.

1. The general principle

Companies having the status of parent and subsidiary may constitute separate legal entities. However, in Consten and Grundig v Commission, the CJ argued that Article 101 TFEU intended to ‘leave untouched the internal organization of an undertaking’.249 Therefore, an agreement between a parent and its subsidiary will not fall within the ambit of Article 101 since the subsidiary does not necessarily determine autonomously its conduct on the market but it applies instructions received from the parent company. To this end, a parent company and its subsidiary constitute a ‘single economic entity’. This rationale was better highlighted in Centrafarm v Sterling, wherein the CJ concluded that:

Article 85 [Article 101 TFEU] … is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.250

2. Essential Characteristics

Thus, according to the CJ, a contract between a parent company and its subsidiary may fall short of Article 101 TFEU since the subsidiary has no freedom to take decisions regarding the market conduct. This reasoning presupposes essential characteristics for a parent and subsidiary to be considered as a ‘single economic entity’.

(a). Undertakings belonging to the same concern

First, the undertakings must belong to the same concern. This was examined in the IJsselcentrale decision,251 wherein four electricity generators concluded an agreement with a joint venture company they had set up together. The electricity generators argued that they, ‘together form an economic unit, because they are components in ‘one indivisible public electricity supply system’’. This argument was not accepted by the Commission since the four participants did not belong to a single group of companies and each generating company determined its own conduct independently.252

(b). A status of parent and subsidiary

Another essential characteristic in this context is that the entities have to have the status of a parent and a subsidiary. In other words, there must be a

hierarchal relationship which enables the parent to give instructions to the subsidiary in question.\textsuperscript{253}

\begin{quote}
(c). \textit{A decisive influence: the issue of control}

The undertakings must form an economic unit within which the subsidiary in question has no real freedom to determine its course of action on the market. This is another important requirement which revolves around the issue of control where the subsidiary will have no real independence in terms of its commercial decision making. To this extent, in \textit{Béguelin Import Co. v S.A.G.L. Import Export}, the CJ held that Article 101 TFEU would not apply to an agreement between a parent and its subsidiary ‘which, although having separate legal personality, enjoys no economic independence’.\textsuperscript{254} Thus, it is a question of examining the real economic relationship between them and not the legal relationship, to the extent that, if the parent controls the subsidiary, the latter has no decisional autonomy and they are considered to be a ‘single economic entity’. On the other hand, if a company, though it is called a subsidiary, has autonomy in its decision making, then they are really two separate undertakings and would fall within the scope of Article 101 TFEU. However, before one may conclude that these undertakings are a ‘single economic entity’, one must question what type of control the parent exercises over the subsidiary.

In this regard, neither the Commission nor the CJ have to establish that the parent influenced the actual decision of either to participate in a cartel or even that the parent knew that the cartel was going on. Alternatively, one must show that there is a decisive influence by the parent on the subsidiary. In \textit{AEG-Telefunken AG v Commission},\textsuperscript{255} the CJ held that where the parent holds 100 per cent of the shares in the subsidiary then there is the presumption that the parent company exercises decisive influence over the conduct of its subsidiary. The landmark case

\footnotesize
\begin{itemize}
\item \textsuperscript{254} Case 22/71 \textit{Béguelin Import Co. v S.A.G.L. Import Export} [1971] ECR 949 para.8.
\item \textsuperscript{255} Case 107/82 \textit{Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission} [1983] ECR 3151.
\end{itemize}
In this context, is *Viho v Commission*.\(^{256}\) In this case, Parker Pen controlled 100 per cent of the subsidiaries and directed their sales and marketing activities. Viho, a wholesaler of office equipment, lodged a complaint against Parker, in which it claimed that Parker’s distribution policy, whereby it required its subsidiaries to restrict the distribution of Parker products to their allocated territories, constituted an infringement of Article 101 TFEU. The Commission rejected Viho’s complaint and found that Article 101 TFEU had no application to this allocation of tasks within the Parker Pen group, since the subsidiaries carried out instructions issued to them by their parent company controlling them.\(^{257}\) The GC and the CJ upheld the Commission’s decision. However, the CJ concluded that:

...such unilateral conduct could fall under Article 86 of the Treaty [Article 102 TFEU] if the conditions for its application ... were fulfilled.\(^{258}\)

This ruling shows that the existence of a ‘single economic entity’ shall be presumed where the parent company holds 100 per cent of its subsidiaries. However, this does not prevent Article 102 TFEU from applying as when the parent and its subsidiary are in a dominant position, their concerted action would amount to an abuse of dominance and will therefore be caught by Article 102 TFEU. Hence, this does not mean that one will escape EU competition rules through setting up subsidiaries.

3. **Liability of parent for the conduct of subsidiary**

The attribution of liability for EU competition law infringements is an essential part of the European Commission’s enforcement policy. Historically, the Commission has attributed EU competition law infringements only to natural or legal persons. It could be argued that natural and legal persons should only be liable for the infringements in which they have participated. However, under existing case-law, the Commission was entitled to attribute liability for an


\(^{258}\) Ibid para.17.
infringement to a legal entity that has not committed it. In this respect, various elements have been taken into account by the Commission when deciding as to whether to attribute liability to parent companies for infringements by their subsidiaries such as the shareholding the parent company has in its subsidiary, the composition of the board of directors and the extent to which the parent influences the policy of the subsidiary. Indeed, the main test is whether the subsidiary has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by the parent company.\textsuperscript{259}

To this end, the first important element to consider for the parent company to be held liable is that it would be sufficient for the parent company to have exerted a decisive control over the subsidiary’s conduct on the market and not over the infringement itself. However, if the Commission finds evidence that the parent company gave instructions relating to the infringement committed by the subsidiary, it will no longer be necessary to examine whether the parent company exercised a decisive influence. For instance, in \textit{Imperial Chemical Industries Ltd. v Commission}, the CJ argued that if the Commission found instructions from the parent company regarding one of three price increases in a row, it can be presumed, in the absence of evidence to the contrary, that the subsidiaries had been instructed likewise in relation to the other increases.\textsuperscript{260}

Another essential element is the 100 per cent shareholding presumption. Consequently, where a parent company wholly owns a subsidiary, it is presumed that, at the time of the infringement, the parent company was able to exercise decisive influence on the subsidiary. Thus, it is then up to the parent company to rebut that presumption by adducing evidence to establish that its subsidiary was independent. However, in \textit{Stora Kopparbergs Bergslags AB v Commission}, AG Mischo suggested that one cannot fully rely on the 100 per cent shareholding


\textsuperscript{260} Case 48/69 \textit{Imperial Chemical Industries Ltd. v Commission} [1972] ECR 619 paras.137-139.
presumption but must present at least further indicia that the parent company did actually exercise decisive influence on its subsidiary.\(^{261}\)

Conversely, in *Tokai Carbon Co. Ltd and Others v Commission*, the GC argued that the Commission can generally presume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company ‘without needing to check whether the parent company has in fact exercised that power’.\(^{262}\) Hence, it could be argued that further indicia are not required for the 100 per cent shareholding presumption to apply.

The main pointer in this context is the *Akzo Nobel*\(^{263}\) case. The CJ referred to the *Stora* case, wherein it argued that:

...while it is true that [in] *Stora* the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, ... the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning and not to make the application of the presumption ... subject to the production of additional indicia relating to the actual exercise of influence by the parent company.\(^{264}\)

Thus, the last word of the CJ on this issue was that, the fact that a parent company and its subsidiary constitute a ‘single undertaking’ enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement. To hold the parent company liable it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to create a rebuttable presumption that the parent company exercises a decisive influence over the

---


\(^{262}\) Joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd and Others v Commission* [2005] ECR II-10 paras.59-60.

\(^{263}\) Case C-97/08 P *Akzo Nobel NV and Others v Commission* [2009] ECR 000

\(^{264}\) Ibid para.62.
commercial policy of the subsidiary. Hence, no other elements are necessary to establish the presumption.

Nevertheless, a question arises as to whether the above-mentioned presumption is limited to 100 per cent control. This is exemplified in a number of judgments. In *Imperial Chemical Industries Ltd. v Commission*, the CJ concluded that a company was able to exercise decisive influence over the policy of the subsidiaries since:

> It is well known that at the time the applicant held all or at any rate the majority of the shares in those subsidiaries ... and in fact used this power upon the occasion of the three price increases in question.\(^\text{265}\)

In the *MCAA* decision, the Commission attributed liability to Elf Aquitaine for the conduct of its 98 per cent owned subsidiary.\(^\text{266}\) Moreover, in the *Avebe* case, the GC held that the fact that two parent companies, each held a 50 per cent stake in a subsidiary is sufficient to establish the presumption that each parent company in fact exercised a decisive influence over its subsidiary’s conduct.\(^\text{267}\) Hence, these rulings suggest that the presumption should not only depend on the fact that the subsidiary is wholly owned by the parent company, but rather on whether the latter has an apparent control over the former.

Conversely, the presumption would not apply to a situation where minority shareholdings are involved. However, minority shareholdings might be held to have sufficient control over the subsidiary. Under the EC Merger Regulation, a minority shareholder that would have the ‘possibility of exercising decisive influence’ over the affairs of another undertaking would have sufficient control for there to be a concentration.\(^\text{268}\) Nevertheless, there is not yet a legal basis to explain whether this

\(^{265}\) *ICI* (n 260) paras.136-137.
\(^{266}\) *MCAA* [2005] OJ L353/12.
\(^{268}\) Article 3(2) of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1 which says that: Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of
reasoning should be applied to the ‘single economic entity’ doctrine under Article 101 TFEU.

Unfortunately, a certain degree of incoherence emerges in the Commission’s policy since the Commission does not seem to apply the presumption systematically. This uncertainty is demonstrated in a number of judgments, for instance, in the Organic Peroxides case, the Commission did not find Elf Aquitaine, a parent company, liable for an infringement by its subsidiary, whereas the same parent company was found liable for the conduct of the same subsidiary in identical situations in the MCAA decision. By the same token, in Raw Tobacco Italy, the Commission concluded that the parent company, “Universal”, of its wholly owned subsidiary, “Deltafina”, met the requirements for the attribution of liability to the parent company, whereas, in the Raw Tobacco Spain case, the Commission found that “Universal” was not liable for a similar infringement by the same subsidiary, “Deltafina”.

In this respect, according to AG Léger:

…the imputation of responsibility for the infringement to the parent company should merely be a straightforward option available to the Commission. Any other solution would be tantamount to depriving the Commission of the considerable degree of latitude which the legislature and the Community judicature have recognized in its favour in relation to fines.

However, critics argue that it would be prudent to invoke the presumption systematically in order to enhance clarity and avoid unjustified differences in

---

270 MCAA (n 266).
treatment between different undertakings,\textsuperscript{274} as the principle of certainty of the law should be adhered to.

4. Adverse effects

Critics pronounce various adverse effects of protecting an agreement between a parent company and its subsidiary. The first being that the attainment of a single market through the integration of firms could be threatened, since the ‘single economic entity’ doctrine allows firms to impose absolute territorial protection. Secondly, this safe harbour benefits large undertakings more than small or medium-sized enterprises, since the latter are less likely to have the resources to enable them to operate a subsidiary.\textsuperscript{275}\hspace{1em} In addition, it could be argued that even though a parent company and its subsidiary are part of the same corporate group, an agreement between them may still be capable of distorting competition as well as having an adverse effect on other Treaty objectives.

B. The Principal and Agent

1. The 1962 Notice

An agent is usually charged with introducing customers to his principal’s business or negotiating and contracting with customers on the principal’s behalf. As a result, the relationship between the principal and his agent falls outside the ambit of Article 101 TFEU since the agent is not considered as an ‘undertaking’ in his own right due to his lack of independence in the decision-making process. In addition, though the principal and the agent are two distinct legal entities, they are considered to be part of the same economic unit, if certain conditions are fulfilled.

To this extent, the 1962 Notice on exclusive dealing contracts with commercial agents implied that the assumption of risk was the decisive factor to identify whether the principal and his agent formed a ‘single economic entity’.\textsuperscript{276}

\textsuperscript{274} Aitor Montesa and Angel Givaja (n 259) p.565-566.
\textsuperscript{275} Townley (n 253) p.18.
\textsuperscript{276} In point I of Notice on exclusive dealing contracts with commercial agents [1962] OJ 139/2922 it is held that ‘[t]he Commission regards as the decisive criterion which distinguishes the commercial agent from the
Consequently, following this Notice, the European Commission established the principle that the relationship between a principal and his agent could escape Article 101 TFEU depending on whether or not the agent had to bear economic risks. The risk criterion was later expounded by the CJ such that it argued that an agent can lose his character as an independent trader only if he does not bear any of the risks resulting from the contracts negotiated on behalf of the principal. However, the CJ added another element to the extent that it argued that since the agent works for his principal he can be regarded as an auxiliary organ forming an integral part of the latter’s undertaking.

In effect, if these two conditions are fulfilled, the agent does not enjoy any commercial autonomy and thus forms an ‘economic unit’ with the principal. Thus, the Court mentioned other factors which seemed to confuse matters as they did not tally with what the 1962 Notice established.

2. *The New Approach: the risk factor*

The new approach under the Guidelines on Vertical Restraints defines an agency agreement as one which covers a:

...situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal for the purchase of goods or services by the principal or sale of goods or services supplied by the principal.

---

280 Ibid para.12.
This Notice aims to clarify the scope of agency relationship by assuming that ‘the determining factor in assessing whether Article 81(1) [Article 101 (1) TFEU] is applicable is the financial or commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent by the principal’. 281

The Notice also distinguishes between genuine and non-genuine agency agreements; a distinction which is further emphasized by the identification of two types of financial or commercial risks. The first type of risk is that ‘which is directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as financing of stocks. The second type concerns risks related to market-specific investments. These are investments specifically required for the type of activity for which the agent has been appointed by the principal, i.e. which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, if upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss’. 282 The Draft Notice on Vertical Restraints mentions a third type of risk, namely risks related to other activities, such as after sales or repair services or activities undertaken in other product markets. 283

Accordingly, a genuine agency agreement is identified when the agent bears no commercial or financial risks and market specific investments. Nevertheless, as it was highlighted in DaimlerChrysler AG v Commission, 284 there are certain elements of which the agent takes care which makes him bear a risk and thus makes him to be considered as a single and independent undertaking and not one economic unit with the principal. In this respect, the Guidelines indicate that Article 101(1) TFEU may apply if the agent is required to do certain actions 285, namely, if he makes a contribution to the costs of transporting the goods

281 Ibid para.13.
285 Guidelines para.16.
to the end customer without reimbursement from the principal. For instance, in the *Daimler Chrysler* decision, the Commission considered the taking care of transport costs to be a risk, nevertheless, the GC disagreed and ruled that the agent could transfer this risk to the client, as would an independent dealer.\(^{286}\)

Investing in sales and promotion costs, such as contributions to the advertising budgets of the principal, could render an agent to be considered as an independent entrepreneur. Maintaining stocks of contract goods at his own cost or risk or the inability to return unsold goods to the principal without charge, unless the goods are unsaleable due to the agent’s fault is another example. Furthermore, the provision at his own cost of after-sales, repair or warranty service to end customers will also contribute to consider the agent as a single undertaking. Two further actions would be that of investing in certain equipment, premises or training and accepting responsibility towards third parties in respect of general product liability. Finally, taking responsibility for an end customer’s default under the contract of sale, with the exception of the loss of the agent’s commission, is another action done by the agent which results in the application of Article 101 (1) TFEU.

However, the Commission recognizes the fact that some actions may be performed by the agent without jeopardizing his qualification as a ‘genuine’ agent. The Commission refers to the situation where the agent may bear an “insignificant” part of the above-mentioned risks and also to those ‘risks that are related to the activity of providing agency services in general, such as the risk of the agent’s income being dependent upon his success as an agent or general investments in premises or personnel’.\(^{287}\) Moreover, the Guidelines shows that the Commission accepts limitations concerning the territory in which the agent may sell goods or

\(^{286}\) *Daimler Chrysler* (n 284) para.104.

\(^{287}\) Guidelines para.15. However, the Commission does not explain what should be understood by an “insignificant” part of the risks.
services, limitations on customers to whom he may sell to and prices and conditions at which he must sell or purchase goods or services.\textsuperscript{288}

3. \textit{The notion of an ‘auxiliary organ’}

The risk criterion referred to above has never been the only one examined in relation to agency agreements. This stems from the fact that judgments refer to a second criterion, namely that of ‘operating as auxiliary organs forming an integral part of the principal’s undertaking’.\textsuperscript{289}

For instance, in the \textit{ASBL} judgment, a tour operator was denied the qualification of an integrated ‘auxiliary organ’ in the undertaking by the CJ since:

\ldots [h]e sells travel organized by a large number of different tour operators and a tour operator sells travel through a very large number of agents.\textsuperscript{290}

Of particular interest is the case \textit{Minoan Lines SA v Commission} wherein the GC expressly stated that:

\ldots In so far as concerns the question whether the services provided by the agent are exclusive, the Court has held that it tends not to suggest economic unity if, at the same time as it conducts business for the account of its principal, an agent undertakes, as an independent dealer, a very considerable amount of business for its own account on the market for the product or service in question...\textsuperscript{291}

However, there is a debate about this second criterion since the Commission in its Guidelines establishes that ‘it is not material for the assessment whether the agent acts for one or several principals’. Moreover, in \textit{Confederación Española de Empresarios de Estaciones de Servicio}, though the Court expounded

\begin{itemize}
\item \textsuperscript{288} Ibid para.18.
\item \textsuperscript{289} Suiker Unie (n 278).
\item \textsuperscript{290} Case 311/85 ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten [1987] ECR 3801 para.20.
\end{itemize}
the traditional expression on the two notions,\textsuperscript{292} namely that of ‘risk’ and ‘auxiliary organ’, it however, examined the risk factor as the decisive criterion in identifying a ‘genuine’ agency agreement. Hence, there still exists a doubt as to the existence of the notion of ‘auxiliary organ’; a notion which begs further clarification. Furthermore, critics argue that to maintain this second criterion would bring many agency agreements within the purview of Article 101 (1) TFEU, while these agreements were so far believed to fall short of EU competition rules.\textsuperscript{293}

4. **Adverse effects**

An agency contract may contain clauses concerning the relationship between the agent and the principal to which Article 101 TFEU applies, such as exclusivity and non-competition clauses. In the context of such relationships the CJ concluded that the agents are in principle independent economic operators and therefore such clauses are capable of infringing the competition rules ‘in so far as they entail locking up the market concerned’.\textsuperscript{294}

Another adverse effect an agreement between a principal and his agent might have is, where the agreement facilitates an anti-competitive agreement or concerted practice such that a number of principals use the same agents whilst collectively excluding others from using these agents.\textsuperscript{295}

Furthermore, critics argue that applying the two criteria of ‘risk’ and that of ‘auxiliary organ’ might result in incoherence in the application of EU competition rules, since on the one hand, the relationship between the principal and his agent fully avoids Article 101 (1) TFEU if there is no exclusivity or no competition

\textsuperscript{292} Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA [2006] ECR I-11987.


\textsuperscript{294} Confederación Española de Empresarios de Estaciones de Servicio (n 292) para.62.

\textsuperscript{295} Ibid para.20.
provisions, whilst, on the other hand, the second criterion requires exclusivity in order for an agent to be qualified as a ‘genuine’ agent.\textsuperscript{296}

5. \textit{Divergences between the parent/subsidiary and principal/agent scenarios}

Critics make various comparisons in relation to agreements between parent and their subsidiaries and agreements between agents and their principals. In particular, Chris Townley argues that the agent is an entirely separate undertaking from its principal before the agreement is formed. Conversely, the parent must already be exercising decisive influence over the subsidiary, such that the two are already a single economic entity before the agreement. As a result, one can speak of legal and economic tests in relation to a parent and its subsidiary, since they have to belong to the same group and act as a parent and subsidiary with no real freedom for the subsidiary to determine its course of action. These are the two tests in order to ensure that both the parent and its subsidiary formed a single economic entity before the agreement. On the other hand, in a principal/agent scenario, it could be that the agent was not an economic unit with its principal before the agreement such that the agent can be completely unrelated to its principal.\textsuperscript{297}

Furthermore, Townley argues that in a principal/agent relationship, the agent must not bear financial risks under the contract. On the contrary, the transfer of financial risk is an important reason for creating a subsidiary in the first place.\textsuperscript{298} In this regard, the CJ consistently held that the agent becomes dependant upon the principal. Therefore, a large part of what the agent does must be the agency work for the principal and that he must act as if he were controlled by the principal, carry out his instructions and promote his interests. To this effect, for the ‘single economic entity’ doctrine to apply, the agent’s work must be for the principal. This cannot be argued in relation to a parent/subsidiary relationship since the subsidiary can probably largely act on its own account. This led to Townley to argue that

\textsuperscript{296}Dieny (n 293).
\textsuperscript{297}Townley (n 253) p.21.
\textsuperscript{298}Ibid p.22.
agency agreements require a far higher degree of integration than parent/subsidiary agreements which, however, lead to further distortions in the way that companies transact their business, making an agency less attractive than using a subsidiary.299

C. Firm-employee relationship

Employees are not covered by Article 101 TFEU since they act on behalf of the undertaking that employs them. Therefore, they cannot constitute independent undertakings themselves.

Case-law300 shows that employees form an economic unit with the firm that they work for because during the contractual relationship they perform work for and under the direction of the firm and do not assume the financial risks involved. As a result, an employee is not considered as an autonomous entity and will rarely be an 'undertaking'. Hence, the CJ makes use of the 'independence' criterion which is often associated with the idea that entities do not constitute separate undertakings where they form a single economic unit. In such a situation, the general principle is that the rules of competition should be applied to that unit rather than to each entity individually.301

However, Article 101 TFEU is applicable in firm-employee relations where, in parallel to carrying out of his normal duties, an employee pursues his own economic interests. Thus, when the individual acts outside his or her employment relationship and against his or her employer’s interests, it would be inappropriate to treat them as one economic unit. To this end, it is pertinent to delineate the boundaries in order to identify the persons in a firm-employee relationship to whom an infringement is to be imputed. The first possibility would be where the employer

---

299 Ibid p.21-22.
initiated and executed the infringement alone as if there were no employees. Such a situation provides for the imputation of the undertaking’s infringement on the employer alone. Secondly, there might be a possibility where one or more employees were involved in the infringement. Here, one has to distinguish between employees acting on behalf and for the benefit of the firm in which they were hired and employees acting outside the employment relationship. Where employees act in accordance with the employer’s wishes, there would be no reason to apply the EU competition rules to the employee, thus fining the employer for the infringement would be both efficient and fair.\textsuperscript{302}

Conversely, the situation would be different where the employee were to act outside the employment relationship. Here, critics arrived at different conclusions. In the view of Paul Nihoul, the action would not take place within the subordination which characterises the relation with the employer, thus EU competition rules could not be applied to the employer who plays no role in the agreement, in which case, they would only affect the behaviour of the employees.\textsuperscript{303} On the other hand, Wouter P.J. Wils propounds that the employer is to be threatened with the fine since it will give him or her the incentive to select and supervise his or her employees in order to avoid them engaging in competition law infringements, and to develop within the undertaking a culture unconducive to such infringements.\textsuperscript{304} Hence, according to Wils it would not be unjust to make the employer liable for the infringements he or she failed to prevent. To this end, his conclusion is that whatever the precise involvement of the employer and the employee respectively, the undertaking’s infringement should always be imputed to the employer.\textsuperscript{305}

D. Contractor and Sub-contractor

An agreement between a contractor and a sub-contractor may also escape the prohibition laid down in Article 101 TFEU due to the close relationship that

\textsuperscript{302} Wouter P.J. Wils, ‘The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons’ (2000) 25 ELRev 110.

\textsuperscript{303} Nihoul (n 301) p.414

\textsuperscript{304} Wouter P.J.Wils (n 302) p.110.

\textsuperscript{305} Ibid.
exists between them. On issuing a Notice on Subcontracting Agreements, the Commission describes subcontracting agreements as ‘agreements under which one firm, called “the contractor”, whether or not in consequence of a prior order from a third party, entrusts to another, called “the subcontractor”, the manufacture of goods, the supply of services or the performance of work under the contractor’s instructions, to be provided to the contractor or performed on his behalf’.306 To this extent, the relationship between a contractor and a subcontractor could be assimilated with that of a principal and his agent since a subcontractor is to perform his work under the contractor’s instructions. In this regard, the person undertaking the manufacture of the product is, not to be treated as an undertaking independent of the firm that wants the work done.307 Thus, a contractor and a subcontractor could be treated as a ‘single economic entity’.

Interestingly, the Commission considers certain clauses in a subcontracting agreement which are unlikely to restrict competition and infringe Article 101(1) TFEU such as clauses which stipulate that any technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement.308 The Commission also speaks of clauses whereby technology or equipment provided by the contractor may not be made available to third parties and whereby goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf.309 However, these are subject to the proviso that the technology or equipment must be necessary to enable the subcontractor under reasonable conditions to manufacture the goods, supply the services or carry out the work in accordance

308 Subcontracting Notice para.2.
309 Ibid.
with the contractor’s instructions. Accordingly, in this case, the subcontractor is not regarded as an independent supplier in the market.\textsuperscript{310}

Moreover, the Notice provides that this proviso is satisfied where the subcontractor makes use of intellectual property rights or know-how belonging to the contractor. However, it is not satisfied where the sub-contractor could have obtained access to the technology and equipment needed to produce the goods, provide the services or carry out the work acting on its own.\textsuperscript{311}

To this end, an agreement between a contractor and a subcontractor does not fall under Article 101 TFEU even though the contractor may wish to restrict the use of particular technology or equipment provided by the contractor, which technology or equipment are necessary to carry out certain subcontracting agreements in accordance with the contractor’s instructions. The rationale behind this safe harbour is that the relationship between a contractor and a subcontractor is seen as being so close that they are not seen as independent of each other. However, the Courts still have to determine this particular issue in greater detail as cases on this issue are lacking.

\textbf{E. Consequences of the ‘Single Economic Entity’ Doctrine}

\textit{1. One party to the agreement}

An important consequence of the ‘single economic entity’ doctrine is that an agreement between entities which form a ‘single economic entity’, cannot amount to an agreement or concerted practice \textit{between} undertakings, since such entities are counted as only one party to the agreement.

\footnotetext[310]{Ibid. Paragraph 3 of the Notice sets out other permissible clauses such that the contractor can require the subcontractor not to reveal manufacturing processes or other know-how of a secret character and also not to make use of manufacturing processes or other know-how of a secret character received by him as long as they have not become public knowledge. The contractor can also require the subcontractor to pass on to it on a non-exclusive basis any technical improvements made during the agreement.}

\footnotetext[311]{Subcontracting Notice para.2.}
2. **Competition rules may still apply**

Furthermore, although an agreement between these entities does not fall within the scope of Article 101 TFEU, it does not mean that competition law would not be applicable at all. Therefore, if a parent company gives instructions to its subsidiary to enter into distribution agreements with third parties containing certain restrictions, the agreement which the subsidiary then actually enters into with third parties would fall under Article 101 TFEU. For example, a parent firm might order its subsidiaries to impose export bans on their distributors, in which case the agreements containing such restrictions could themselves infringe Article 101 TFEU.\(^{312}\) Hence, the agreements between the parent and its subsidiaries would not fall under Article 101 TFEU. However, the agreements entered into with third parties in compliance with these agreements would fall within the scope of this Article.

3. **Liability**

The ‘single economic entity’ doctrine establishes that companies can be held liable for the acts done by other entities within the economic unit, such as, parent companies can be held liable for infringements done by their subsidiaries. In addition, the competition authority can take action not just against the subsidiary but also against the parent company, in which case, they will be jointly and severally liable for the infringement. The Commission had set down several criteria, in its *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003*, to be taken into account in order to determine the extent of the fine that the Commission is to impose on the company, such that a parent company might find that any fine imposed upon it could be aggravated on the basis of recidivism because of previous infringements by any subsidiary within the economic entity.\(^{313}\)


4. The extraterritoriality principle

The ‘single economic entity’ doctrine can also be used to extend jurisdiction to non-EU companies such that EU law can be applied to non-EU parent companies simply because they might have their small subsidiaries in Europe. The casus classicus in this regard is the Dyestuffs case which offered the CJ its first opportunity to rule on the extraterritoriality of EU competition law. In this case, the Commission had to investigate on an alleged cartel among the producers of aniline dyes, including ICI; a British undertaking, which at that time was not a member of the Union. In arriving at its decision, the Commission fined ICI on the basis of what it considered to be the ‘effects’ doctrine such that it considered the seat of the undertakings in question to be irrelevant for the application of EU competition rules. Instead, it deemed the effects on competition to be the decisive factor.

On appeal by the ICI, the CJ decided to base its decision on the single economic entity doctrine rather than on the ‘effects’ doctrine. In this regard it held that the non-EU undertakings acted through their subsidiaries in the Union and their conduct had been carried on directly in the Union. The CJ continued to hold that ‘by making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market.’ The subsidiary did not enjoy autonomy and its actions could be attributed to the parent. Consequently, the CJ came to the conclusion that the three non-EU undertakings participated in an illegal price-fixing mechanism through their subsidiaries which were located in the EU controlled by non-EU parents.

This shows that parent companies can be held liable for the conduct of their subsidiaries irrespective of whether or not they are incorporated and operate from jurisdictions or locations outside the Union. Therefore, the ‘single economic entity’ doctrine provides for the bringing of foreign parts of the entity under the Union’s jurisdiction and to attribute behaviour from one part of the entity to the other.

314 ICI (n 260).
315 Ibid para.130.
5. **Imposition of fines – the 10 per cent turnover**

Regulation 1/2003 establishes that ‘for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year’.\(^{316}\) Consequently, when parent companies are found liable for an infringement by their subsidiaries, the 10 per cent limit would be calculated on the basis of a higher turnover. Thus, it could be that the final fine exceeds the 10 per cent of the subsidiary’s turnover but not that of the parent company. Moreover, given that the Commission may increase the fine to be imposed on undertakings which have a large turnover,\(^{317}\) the liability attributed to a parent company for an infringement by its subsidiary could increase its final penalty.

6. **Action for damages – implications for jurisdictional issues**

Another possible consequence of the ‘single economic entity’ doctrine is in the context of an action for damages. This action may be brought against a parent of a subsidiary company or against a subsidiary of a parent company such that this will give the opportunity to the aggrieved party to take his action in a number of countries.

7. **Ensuring the correct payment of fines**

The ‘single economic entity’ doctrine also results in a situation where the attribution of liability to parent companies for the wrongdoing of their subsidiaries might facilitate the Commission’s objective to ensure the correct payment of fines and facilitate actions for damages against parent companies whilst encourage complainants to bring them.

---


attributed. The general rule expounded by the GC in Enichem Anic v Commission, is that:

When ... an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.\textsuperscript{318}

In cases where there is a corporate reorganization in which an entity succeeds another one, the CJ consistently held that though an undertaking changes its legal form and name, does not create the new undertaking free of liability for the anti-competitive behaviour of the previous undertaking, if the two are economically identical.\textsuperscript{319} Hence, as it was held by the Commission in its PVC decision, the determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking in which it was merged.\textsuperscript{320}

Another scenario worth considering in this context is one where the business responsible for an infringement is sold to a third party. In effect, the purchaser here has to do a due diligence exercise such that the purchaser need to make sure that he bears no risk of a future fine. The general rule here revolves around the issue of whether the old company remained in existence or otherwise. Hence, this is different from the rule adopted in cases where there is corporate reorganizations. In the Zinc Phosphate decision, the Commission held that:

When an undertaking committed an infringement of Article 81(1) [Article 101 TFEU] ... and later disposed of the assets that were the vehicle of the infringement and withdrew them from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence.\textsuperscript{321}

\textsuperscript{320} PVC [1989] OJ L 74/1 para.42.
Nevertheless, the fact that a corporate entity which committed the violation has ceased to exist in law after the infringement has been committed implies liability on the successor. In fact, in *Commission v Anic Partecipazioni SpA* the CJ held that:

...the ‘economic continuity’ test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed.\(^{322}\)

Accordingly, when the undertakings are related by succession and the ‘two entities constitute one economic entity, the fact that the entity which committed the infringement still exists, does not as such preclude imposing a penalty on the entity to which its economic activities were transferred’.\(^{323}\) On the other hand, when one business is sold to another, despite the fact that the old company remained in existence, it would still be liable for the infringement it has committed. However, if the old company dissolves and does not exist anymore, in that case, the company which buys the business would be held liable for the old company’s infringement. Interestingly, in *Aalborg Portland A/S and Others v Commission*,\(^{324}\) despite the fact that the old company still existed, the decision was found against the two companies, since there was a structural link between the old and the new company.

The economic continuity theory is important particularly in cartel cases wherein companies try to change their legal form or merge with another company in order to escape liability. However, with the existence of this theory they would still be liable. In effect, the CJ has held that:

...if no possibility of imposing a penalty on an entity other than the one which committed an infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings,

\(^{324}\) Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123.
sales or other legal or organizational changes. This would jeopardize the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties ... 325

Therefore, economic operators appear in a wide variety of forms, ranging from single traders to more complex corporate structures. 326 Hence, delineating the boundaries of an undertaking serves as an important mechanism to identify the entity to which a certain behaviour is to be attributable in case of an EU competition law infringement and it also serves to identify those agreements which are not to be scrutinized under Article 101 TFEU; agreements which are concluded within a group characterized by a single economic strategy.

325 Ibid para.41.
326 Wouter P.J. Wils (n 302) p.100.
CHAPTER V: THE MALTESE SITUATION

A. An Overview of Maltese Competition Law

The Maltese society experienced a cultural shock when from a situation characterized by the sheltering of business against competition, its economy was changed to one based on fostering and promoting competition.\textsuperscript{327} Competition law was introduced in the Maltese legal system in 1994 with the enactment of the Competition Act (Act XXXI of 1994).\textsuperscript{328} Before the Competition Act (CA) came into force, a White Paper on ‘Fair Trading, the next step forward …’ was published in November 1993, which particularly holds that:

The aim of the Competition Act is to promote competition in trade in a manner which best guarantees positive economic results, encourages technological progress and quality and contributes towards price moderation. Competition between undertakings exercises constant pressure on prices making it increasingly possible to relax price control … This Act is intended to create a modern system consistent with the European Union rules establishing a framework for effective competition in Malta.\textit{It provides legal certainty to undertakings in Malta by defining the parameters within which they may lawfully conduct their business on the Maltese market and will guarantee business and consumers the benefits of competition.}\textsuperscript{329} (emphasis added)

In addition, in a closing speech at a seminar on “Competition Act – Recent Developments”, of the 29\textsuperscript{th} of April 2002, at that time, Hon. Josef Bonnici, Minister for Economic Services, held that ‘the White Paper of 1993 entitled \textit{Fair Trading the Next Step Forward} had originally outlined the intentions of our government to “create a comprehensive regime so as to facilitate an economic environment which

\textsuperscript{328}Competition Act Chapter 379 of the Laws of Malta.
\textsuperscript{329}FAIR TRADING, the next step forward ... Proposals for Legislative Reforms, issued with the Consumer Affairs and Competition Bills, November 1993, p.19.
promotes the general interests of consumer welfare and fair-trading.” Throughout the process of introducing the competition framework, we have aimed at creating an environment where the beneficial effects of economic liberalisation are safeguarded through the introduction of controls that prevent anti-competitive practices.  

The CA introduced two general prohibitions on breaches of competition law which are closely based on the corresponding prohibitions under Articles 101 and 102 TFEU and on European jurisprudence. Consequently, Article 5 of the CA mirrors Article 101 TFEU and it prohibits restrictive agreements entered into between commercial undertakings, decisions by associations of undertakings and concerted practices among undertakings having the object or effect of restricting, distorting or preventing competition. Furthermore, Article 9 of the CA mirrors Article 102 TFEU and it prohibits any abuse by one or more undertakings of a dominant position within Malta or any part of Malta. Initially, the Act only applied to the private sector in Malta, in which case it produced an unjust advantage for the public sector. However, it was amended in 2000 in order to make it more effective such that all undertakings are now subject to the CA. There is an exception in respect of those undertakings which operate services concerning the general economic interest, such that they are still subject to the Act except that they will not be deemed to infringe competition rules if in order to carry out these services they have no option but to infringe the competition provisions. The exception will apply so long as they have been entrusted with the operation of such services. This is reflected in Article 30 of the Act which is a mirror of what is contained in Article 106 TFEU.

In view of the fact that this work is centred on the notion of ‘undertaking’, it is of considerable importance to analyze this notion also in the light of the CA.

---

330 Closing Speech by the Hon. Josef Bonnici, Minister for Economic Services, at Seminar ”COMPETITION ACT - RECENT DEVELOPMENTS” - Attard 29TH April 2002, Press Releases, Department of Information.
331 Article 5(1) of the CA.
332 Article 9(1) of the CA.
Contrary to the TFEU, the CA contains a definition of the word ‘undertaking’ such that it defines an ‘undertaking’ as ‘any person whether an individual, a body corporate or unincorporated or any other entity, pursuing an economic activity, and includes a group of undertakings’. Although there is no analogous definition in the TFEU, it is of no doubt that the Act came up with this definition on the basis of European Commission decisions and the CJ’s jurisprudence. Notwithstanding this definition, there still exist complex issues which need to be addressed.

The law speaks of ‘any person’; an expression which indicates that even the CA adopted a broad approach as to the definition of an ‘undertaking’. As already shown from European Commission decisions and EU courts jurisprudence, EU competition rules applies to a wide variety of entities including companies, partnerships, trade associations, co-operatives, public entities, individuals acting on their own account and even liberal professions. Similarly, what the Maltese legislator had in mind, especially after the 2000 amendments, is to make the competition rules applicable to all sectors of the society, whether they are operating in the private or the public sphere.

The CA also requires the performance of an economic activity, in order for an entity to be considered as an ‘undertaking’ in terms of law. Interestingly, before the 2000 amendments, the Act spoke of ‘an economic purpose’ rather than ‘an economic activity’. This could have had various implications since in the Sacchi case, the CJ held that a body which exists for a non-economic purpose but engages in certain operations of a commercial nature will be to that extent an undertaking. The question which could have arisen at that time is whether the Maltese legislator had a similar situation in mind, such that, it could have accepted a body with a non-economic purpose, but pursuing a commercial activity, as an ‘undertaking’. Moreover, the wording used in the Act created other repercussions since it did not only speak of an economic purpose but it required such an economic purpose to be pursued on ‘a continuing basis’. As a result, entities which

---

333 Article 2 of the CA.
engaged in short-term business were sheltered from the application of the Act, regardless of the fact that they were engaging in anti-competitive practices. To this end, though the CA served as a tool to get in line with European standards, it provided for this requirement of permanency, albeit, the CJ has never mentioned that the economic activity has to be carried out on a continuing basis.

These doubts were eliminated in 2000 when amendments to the CA changed the concept of ‘an economic purpose on a continuing basis’ to that of ‘an economic activity’. As will be shown later in this work, Maltese case-law speaks of the notion of ‘economic activity’ and tries to identify those entities which, in effect, fall within the ambit of competition rules on the basis of performing activities having an economic character. Alas, neither the Act itself nor Maltese case-law provides a definition of this important notion.

The definition of an ‘undertaking’ in the CA includes also a ‘group of undertakings’, in which case, the Act itself defines them as including:

(a) the undertaking concerned;

(b) those undertakings in which the undertaking concerned, directly or indirectly:

- owns more than half the capital or business assets; or

- has the power to exercise more than half the voting rights; or

- has the power to appoint more than half the members of the board of directors or other body or bodies legally representing the undertakings; or

- has the right to manage the undertakings’ affairs;

(c) those undertakings which have in the undertaking concerned the rights or powers listed in paragraph (b);
(d) those undertakings in which an undertaking as referred to in paragraph (c) has the rights or powers listed in paragraph (b);

(e) those undertakings in which two or more undertakings as referred to in paragraphs (a) to (d) jointly have the rights or powers listed in paragraph (b).  

This definition brings into the ambit of Maltese competition law, the notion of ‘single economic entities’; a notion which the European judicial authorities applied to agreements between parent companies and their subsidiaries, principals and their agents, firms and their employees and contractors and their sub-contractors. In relation to an agreement between a parent and its subsidiary, in order for them to be considered as a ‘single economic entity’, the subsidiary has to show that it enjoys ‘no real freedom to determine its course of action on the market’. The CA, however, expressly identifies those undertakings which would be considered as forming part of the group, such that if they do not fall within the relationships set up in Article 2 of the Act, they will not be able to argue that they form a ‘single economic entity’ in order to escape the prohibition in Article 5 of the same Act.

The CA not only provides a definition of an ‘undertaking’ but it also defines ‘an association of undertakings’ since it also prohibits decisions by associations of undertakings having the object or effect of restricting, distorting or preventing competition within Malta or any part of Malta. The Act defines it as ‘a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interest of its members or of persons represented by its members’. To incorporate associations of undertakings within the ambit of this Act was seen by

---

335 Article 2 of the CA.
337 Article 2 of the CA.
many as a deterrent for encouraging associations to be formed due to immediate exposure to competition. However, others explained that:

…irridu ndahlu l-“association of undertakings” mhux bl-iskop li nillimitaw dawn milli jizviluppaw, imma dawn jizviluppaw f’ambjent kompetittiv, f’ambjent ta’ rivalita’ u f’ambjent fejn il-kompetizzjoni fis-suq tiffjorixxi.

As already explained, prior to the 2000 amendments, the CA did not apply to the public sector such that public undertakings were exempted from the application of the Act, unless the Minister, by Order in the Gazzette, declared them to be so subject. This was seen as an unjustified advantage towards the public sphere since like any other private undertaking, public undertakings may abuse of their dominant position and they may also engage in anti-competitive practices. Again, this was not in line with European standards since the EU protected the consumer also from restrictive practices adopted by the State. To this end, Article 30 of the CA was amended to such an extent that the ‘provisions of the Act shall apply to any Government departments or to any body corporate established by law or to any company or other partnership in which the Government has granted special or exclusive rights in any field’. Moreover, ‘undertakings entrusted with the operation of services of a general economic interest or having the character of a revenue-producing monopoly shall be subject to the provisions of this Act insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’. These various concepts were also raised in Maltese case-law where both the Office for Fair Competition and the Commission for Fair Trading concur in interpreting the meaning of ‘undertaking’ in the same broad manner as the European Commission and the CJ as per Schedule. On referring to EU jurisprudence, the Commission for Fair Trading was able to scrutinize the

340 Article 30(1) of the CA.
341 Article 30(2) of the CA.
categories of entities which will within the ambit of the competition rules due to their classification as ‘undertakings’.

B. Judgments of the Commission for Fair Trading

1. The Office for Fair Competition

The authority responsible for investigating anti-competitive practices and to institute actions in terms of the CA is the Office for Fair Competition (OFC). In its role as the National Competition Authority it can also carry out investigations in respect of infringements of Articles 101 and 102 TFEU. The OFC can commence investigations either on its own motion or at the request in writing of a complainant. It may also be requested to do so by the Minister responsible for commerce. The OFC generally acts as a supervisor on the market and offers advice to the Minister, undertakings and the public in relation to matters concerning fair trading practices.

It is the Director of Fair Competition who heads the OFC and when upon the conclusion of an investigation, the Director finds that there has been an infringement of Articles 5 or 9 of the Act he shall issue a decision, giving his reasons thereof. Where there has been a serious infringement of Articles 5 or 9 or else an infringement of Articles 101 and 102 TFEU, the Director shall submit a report of his conclusions to the Commission for Fair Trading, in order for the Commission to decide whether there has been a breach or not.

Indeed, Article 14 of the CA requires the Director to examine the admissibility or otherwise of any complaint submitted to his office. The law further requires him not to carry out or proceed with the investigation where he is of the opinion that the complaint is prima facie inadmissible. However, Article 14(1)(b) enables the complainant to request the Director, within 15 days of notification of the latter’s decision, to submit to the Commission for Fair Trading to review such a decision. In this respect, the Commission for Fair Trading held that this provision, as indicated by the Maltese language word ‘stharrig’, vests it with sufficient jurisdiction to examine the complaint ex novo and not simply to review the
correctness of the procedure adopted by the Director in the course of the proceedings, as the English language version of the legislation suggested.342

The Director is not only empowered to issue a decision on a finding of an infringement, but may also issue Cease and Desist or Compliance Orders. However, where it results that there has been a serious infringement or an infringement of Articles 101 and 102 TFEU, only the Commission for Fair Trading will have the power to issue such orders.

2. The Commission for Fair Trading

The CA also provides for the establishment of the Commission for Fair Trading (CFT) in order to analyze and review any decision of the Director of OFC brought before it. The CFT has also the authority to direct provisional measures to cease restrictive practices or abuses of a dominant position if it is critically necessary to avoid situations that cause grave, immediate and permanent harm to the interest of any undertaking or the general economic interest. Moreover, according to Rule 13 of the Rules of Procedure relative to the Commission for Fair Trading:

In the interpretation of this Act, the Commission shall have recourse to its previous decisions, judgments of the Court of First Instance and the Court of Justice of the European Community. It shall also have recourse to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions of the EC Treaty and secondary legislation relative to competition.343

In effect, the CFT, when adjudicating on any decision brought before it has explicitly referred to the EU courts jurisprudence especially in trying to interpret the

---


343 Rule 13 of the Rules of Procedures relative to the Commission for Fair Trading in the Schedule (Article 4) to the Competition Act, Chapter 379 of the Laws of Malta.
meaning of an ‘undertaking’. This shows that the legislator chose a system which has been proved to be an effective system in guaranteeing competition and in protecting the market against anti-competitive practices and abuse of dominant positions.

3. The relativity of the notion of ‘undertaking’ – Malta’s National Blood Transfusion Service Case

As already shown, modeled on the European Commission’s decisions and EU courts jurisprudence, the CA requires the performance of an economic activity for an entity to be classified as an ‘undertaking’ in terms of law. Hence, adopting a functional approach, leads to circumstances where an entity would be classified as an undertaking in relation to some of its activities, but not when performing others. In the context of Maltese competition law, this situation arose through a complaint filed with the Director of the OFC by Medical Laboratory Services Limited and Golden Shepherd Group Limited; two undertakings running different private hospitals in Malta. The complaint was filed against the National Blood Transfusion Services (NBTS), alleged to have abused its dominant position by charging the complainants commercial prices for supplying them with blood products while supplying the public hospital with all the same essential necessities free of charge. Subsequent to his investigations, the Director of the OFC concluded that the NBTS’s conduct did not constitute an abuse of a dominant position in terms of Article 9 of the CA. However, complainants requested the Director to submit his decision to the CFT.

Interestingly, the CFT pointed out that the complaint originates from Legal Notice 360/2003, entitled the ‘Private Clinics (Prices for Blood and Blood products) Regulations, 2003’, in which it laid down the fees to be charged on private clinics for the supply of blood products.

In determining the matter, the CFT distinguished between two principal functions that the NBTS performs, which, according to the CFT, are ethically

conflicting. First, it argued that the NBTS is the official and exclusive body in Malta charged with the regulation of blood products and with the maintenance of an adequate supply thereof. Secondly, the NBTS is in charge for the commercial trading of some of the blood products that it manufactures. Although the CFT accepted the administrative functions performed by the NBTS, however, it argued that the NBTS constitutes an ‘undertaking’ in terms of Article 2 of the CA, only in so far as the second function is concerned, namely that of trading activities. This distinction was made on the basis of the CJ’s jurisprudence, in particular the ruling in Wouters wherein the CJ ruled that EU competition rules ‘do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity … or which is connected with the exercise of the powers of a public authority’. The Commission continued to strengthen its reasoning by referring to Prof. Richard Whish’s statement, in his Fifth Edition book on Competition Law, that ‘a particular entity might be acting as an undertaking when carrying out certain of its functions but not acting as an undertaking when carrying out others’. In effect, such a dictum is reflected in the case under review, wherein the NBTS cannot be held to be an undertaking in respect of its administrative functions. However, it is classified as an undertaking in terms of law when carrying out the commercial trading of some of its blood products.

Yet, though the CFT distinguished between the activities performed by the NBTS in order to identify which activities were of an economic character for NBTS to be considered as an ‘undertaking’, it concluded that it was the subsidiary legislation in question, placing the private clinics and hospitals at a competitive disadvantage, which qualified the NBTS as a commercial undertaking. In reality, this disadvantage could not have been suffered by public health institutions, both because of them being funded by the State and also because they could continue to obtain blood products free of charge. Thus, the main argument of the CFT was

---

346 Richard Whish, Competition Law (5th edn, OUP, Oxford 2003) p. 82.
not based on the notion of economic activity but on the effect that the regulations had within the market on applying dissimilar conditions.

4. **Single economic entities - GRTU case**

Very often complaints arise out of situations where an agreement is alleged to be void and unenforceable because it breaches competition law. Both EU and Maltese competition law support the view that where an agreement is entered between entities forming one ‘single economic entity’, the competition rules will not apply.

The notion of a ‘single economic entity’ was discussed thanks to the complaint submitted by Vincent Farrugia as the Director-General of the Retailer’s Association, known as the GRTU, in the name and on behalf of two members thereof. In effect, the case revolves around the relationship of principal and agent such that the two members were commission agents and distributors of Marsovin Limited who alleged that their principal was guilty of imposing on them unfair trading conditions to the prejudice of consumers or suppliers and applying dissimilar conditions to equivalent transactions with different trading parties. Thus, they complained that this behavior was contrary to Article 9 of the CA. The Director of the OFC did not find any breach of this Act; consequently, he argued that the complaint under review is inadmissible.

On discussing the true relationship between the undertaking and its agents, the GRTU argued that the undertaking was often in direct competition with its own agents as it distributed its products within the territory reserved for its agents.

In giving its judgment, the CFT took the opportunity to formulate its judgment on the basis of the institute of ‘agency’. To this extent, the CFT defined such an institute as a contract whereby one of the parties, the principal, authorizes the other party, the agent, to act in his name and on his behalf in legal relationships

---

347 Complaint submitted by Vincent Farrugia as Director-General of GRTU in the name and on behalf of two members thereof namely Joseph Vella and Simon Diacono (31st July 1997).
that arise between the principal and third parties. Thus, in the Commission’s view, the agents act exclusively in the best interests of their principal, such that:

...notwithstanding the fact that these agents may be recognized as economic operators having a distinct and independent juridical personality for all effects and purposes of law in general, on the basis of their contractual relationship with their supplying undertaking, it results that they are merely auxiliary operators to the undertaking and are consequently equivalent only to an integrated agency... \(^{348}\) (emphasis added)

Following the CJ’s jurisprudence,\(^{349}\) the CFT concluded that the relationship between the principal and the agents is not one that produces competition between them due to the fact that they are not separate entities. As a result, the CFT deemed the complaint as unfounded and ordered the OFC to stop from carrying out further investigations relating to the complaint under review since the relationship between the supplying undertaking and its agents corresponds to a ‘single economic entity’. To this extent, the Commission ruled that ‘\textit{Nemo contra factum suum venire potest}’ such that, it was not possible for the agents to have been abused by the principal.

\section*{5. Public entities}

\subsection*{(a). Carmel Mifsud/Malta Transport Authority case\(^ {350}\)}

Competition law controls the anti-competitive agreements and the abusive behavior of undertakings, but much anti-competitive behavior is caused by the State. Complainants are often frustrated when they discover that the conduct of which they complain is attributable to the State acting in its public-law function rather than when behaving in an ‘economic’ way.\(^ {351}\) As already established in this

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item \(^{349}\) See Case C-266/93 \textit{Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH} [1995] ECR I-3477 para.19.
\item \(^{350}\) Ilment Numru: 2/2003, \textit{Carmel Mifsud vs Malta Transport Authority} (5\textsuperscript{th} July 2004).
\item \(^{351}\) Richard Whish and Silvio Meli, \textit{The Maltese Commission for Fair Trading confirmed that the Transport Authority was not an undertaking, consequently its monopoly was not subject to the Competition Act (Carmel Mifsud)} 5\textsuperscript{th} July 2004, e-Competitions, no.15758; See also Silvio Meli, \textit{Judgments of the Malta Commission for Fair Trading 1996-2005} (Gutenberg Press, 2006) p.23.
\end{itemize}
\end{footnotesize}
work, the State can have a two-fold capacity, in that, it may perform activities having an economic character; activities which fall within the competition rules, while it can also carry on activities which are considered as State’s *imperium*; activities which are shielded from the ambit of these rules. This was the central argument in the *Carmel Mifsud* case, in which, the complaint arose out of the fact that the Malta Transport Authority (MTA) refused to grant a license to the complainant to enable him to run a motor hearse business in Malta. In reality, there was already a cooperative which operated ten hearses in Malta, in which case, all the orders that were received were equally shared amongst its members. This shows that the refusal on the part of the MTA implied that the cooperative had a complete monopoly to the exclusion of all the other operators. To this extent, the complainant held that this was in breach of the principles of fair competition. Subsequent to analyzing the circumstances of the case, the Director of the OFC concluded that the MTA could not be subjected to the competition rules since it was not an undertaking, both in terms of the CA and also in terms of the EU jurisprudence. To this effect, the Director concluded that the complaint was inadmissible and refrained from taking any further cognizance of the same.

The Director arrived at this conclusion by referring to various writers and EU jurisprudence. For instance, he quoted Ritter, Braun and Rawlinson, maintaining that social activities and acts of sovereignty are excluded from regulation within a fair competition regime as Articles 81 and 82 of the Treaty in question only apply to activities of undertakings that are of a commercial nature.\(^{352}\) The Director further referred to the CJ’s jurisprudence wherein the said Court has held that Article 81 of the Treaty does not apply in those cases where a local entity acts in its capacity as a public authority and where an undertaking is entrusted with a public service.\(^{353}\)

This led the complainant to request that the Director’s decision be reviewed by the CFT. In reality, the CFT continued to strengthen the Director’s decision by


\(^{353}\) Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.
expressing itself on the notion of ‘undertaking’ in the light of EU interpretations. To this effect, it referred to the Polypropylene case wherein the European Commission held that ‘the subjects of EEC competition rules are undertakings, a concept which is not identical to the question of legal personality for the purposes of company law and fiscal law … it may, however, refer to any entity engaged in commercial activities’.\textsuperscript{354} In its judgment the Commission found that in the first place, the MTA does not have the faculty of granting a license of a commercial nature and thus, the stand it took in this issue could not be held to be equivalent to an economic activity. Consequently, the Commission concluded that the MTA is not an ‘undertaking’ for the purposes of the CA and for EU competition rules. The CFT continued to support the Director’s arguments by making reference to the Bodson\textsuperscript{355} case wherein the CJ concluded that ‘where a local authority was carrying out an administrative duty (granting concessions) and not economic activities, the Treaty competition rules were not applicable’.

Accordingly, one can infer that although it is true that the MTA is a regulatory body and thus it cannot be classified as an ‘undertaking’ in terms of law, still one may question as to whether one is to apply the reasoning of the CFT in a broad manner such that one is to always classify the MTA as an ‘undertaking’ because of it being a regulatory body or else whether there has to be an evaluation on a case by case basis. This argument holds water since in a particular case, which is going to be examined next, the CFT classified the MTA as an ‘undertaking’ in terms of law.

\textit{(b). Spiteri-Garden of Eden/Malta Transport Authority}\textsuperscript{356}

In this case, the Malta Transport Authority (MTA) had formally authorized Mr Angelo Spiteri, to import and operate into Malta, three open-top double deck buses. Subsequent to their arrival in Malta, Spiteri applied for their registration and requested the MTA to license their use on local public roads. Notwithstanding the

\textsuperscript{355} Bodson (n 353).
\textsuperscript{356} Ilment Numru: 6/2006, Spiteri et noe – Garden of Eden vs Malta Transport Authority (15\textsuperscript{th} October 2008).
fact that the MTA communicated its ‘intention’ and ‘favorable consideration’ of this application, the license was never issued. To this extent, Spiteri brought this case to the attention of the European Commission wherein the Commission held that the prohibition of licensing open-top double deck buses and other four-meter high vehicles, constitutes an obstacle to the operation of the internal market, especially when taking into account that use of these vehicles is legally authorized in the other Member States.

The MTA set up two particular routes on which similar open-top double deck buses could operate and issued a call for applications for the provision of this service. Complainants alleged that this was intended to benefit a competitor at their expense, thus applying dissimilar conditions to prospective operators in the same market. As a result, the MTA placed the complainants in a competitive disadvantage, violating Article 9 of the CA. However, the Director of the OFC decided that the MTA is not an undertaking in terms of law and therefore had no jurisdiction to investigate the complaint.

Conversely, the CFT ruled that the MTA constitutes an ‘undertaking’ and argued that besides its regulatory functions, the MTA had opted to intervene in the market for the benefit of particular operators at the expense of the complainants. In arriving at this conclusion, the CFT referred to its ruling in its previous cases,\textsuperscript{357} such that it argued that the Commission recalled its obligation to investigate any conduct of public authorities which may reasonably appear to have the object or effect of preventing, restricting or distorting competition within Malta. The CFT also referred to the CJ’s jurisprudence wherein it argued that statutory and regulatory bodies may not abuse of their special and exclusive rights, and dominant positions, and that any abusive or anticompetitive conduct of such bodies would fall within the ambit of EU competition rules.\textsuperscript{358} Moreover, the CFT argued that public authorities and bodies entrusted with similar extensive powers, for the purpose of setting the

\textsuperscript{357} Ilment Numru: 2/1998, Ivan Meli noe vs Ufficcju tal-Kompetizzjoni Gusta (23\textsuperscript{rd} April 1999); Mizura Numru 5/2005, Talba Mressqa mis-socjeta’ Medical Laboratory Services Limited operatrici ta’ St. James Hospitals u mis-socjeta’ Golden Shepherd Group Limited ta’ St.Philip’s Hospital (9\textsuperscript{th} October 2006).

\textsuperscript{358} Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio [2008] ECR I-4863.
parameters of the market and regulating competition therein, should desist from such anti-competitive attitudes and abide by the public law rules of competition. In the light of above, the CFT condemned the MTA’s unfairly discriminatory treatment of the complainants, quashed the Director’s decision and concluded that the MTA violated Article 9 of the CA.

In this case, the CFT’s concern was focused on the actions that the MTA took to favour third parties, thus manipulating the market, which is not true competition at all.

(c). *Bargain Holidays – European Air Bargains/Malta Tourism Authority*  

This case concerns three air transport and ancillary touristic services agencies, which submitted a complaint against the Malta Tourism Authority alleging that the internal structure and operative method of the Authority constitutes an abuse of dominance in terms of Article 9 of the CA. They further held that they were ignored by the Authority when organizing promotional campaigns, considering the fact that Air Malta Company Limited, their direct major competitor, was not only invited to participate in these campaigns but it was also represented on the Authority’s board.

On coming to a decision, the Director of the OFC declared that the present structure of the Authority discriminates against the complainants, however, the Director stressed that the Authority does not constitute an ‘undertaking’ in terms of Article 2 of the CA. In contrast, the Director held that since this public authority is entrusted with the national touristic promotional program in the general interest in terms of Malta Tourism Authority Act, such functions deprive its activities from being considered as economic activities. The Director further argued that the choice of members of the Board is an administrative procedure and not an

---


138
economic activity in terms of the CA. Consequently, he concluded that the complaint is inadmissible.

By way of contrast, the CFT affirmed that some of the members of the Authority, in reality, had commercial interests in specific sectors of the same touristic market regulated by the Authority. Therefore, in such a way the market could be easily influenced by such members. As a result, the CFT concluded that the Authority, being a public body, could never achieve the specific purpose of regulating the specific market in the general interest if it is made up of selected competitors in that same market. The CFT further argued that no law should be allowed to create a disguised cartel to ‘knowingly substitute[s] a practical cooperation for the risks of competition’. After making reference to several rulings of the CJ on the concept of ‘undertaking’, the CFT argued that since the operations of the authority’s constitutive board constitutes an ‘economic activity’ in terms of law, it must respect all applicable orders of fair competition, despite the fact of the same Authority being a public body. To this effect, the CFT ruled that the decision of the Director was null and void and ordered him to proceed with the investigations in terms of law.

In the light of the above, therefore, it is shown that insofar as any Government department or public body is pursuing an economic activity, it would fall within the scope of the CA.362

(d). S&D Yachts Ltd363

The Director of the OFC did not find any violation of competition law in an exclusive temporary concession of Manoel Island Yacht Yard (MIYY) concluded between the Government of Malta and the Malta Maritime Authority (MMA) and MIDI plc; the latter being a consortium operating in the estate and maritime

362 Similarly, in Ilment Numru: 5/2006, Cassar Fuels Limited vs Korporazzjoni Enemalta, (30th April 2007), the CFT asserted that Enemalta Corporation, a public corporation, was subject to the provisions of the CA.
business markets. This decision arose out of a complaint by S&D Yachts Limited, an undertaking acting as agent for yachts mooring in yacht yards in Malta, whereby it argued that in the past it had requested MMA to grant exclusive rights over this specific yacht yard, however, these requests had always been turned down. It further argued that the MMA conferred in favour of MIDI plc, temporary exclusive rights over MIYY and subsequently, MIDI plc granted a third undertaking, Melita Marine Limited, management rights over this yard. The complainant alleged that this behavior put him in a disadvantage which could possibly cause a decrease in profits and forfeiture of clients since no alternative yachts yard was offered to the complainant.

Subsequent to investigating the complaint, the Director argued that in granting temporary exclusive rights, Government acted in its capacity as a commercial undertaking and not as a market regulator, such that this agreement falls within the ambit of Article 5 of the CA. In response to this, the Attorney General, as representative of the Government of Malta, and the MMA, referred to the CJ’s jurisprudence, and argued that in granting such temporary exclusive rights, Government had acted in its regulatory capacity and cannot be held to be performing an economic activity, thus such an agreement was sheltered from the competition rules.

These pleas were upheld by the CFT, wherein it accepted that this emphyteutical concession fell within the public and regulatory duties of Government. However, the CFT examined the consequences of this concession on the relevant market, subsequently finding that the exclusive temporary concession did not manifest an object or effect of preventing, restricting or distorting competition within Malta, therefore it was not in violation of Article 5 of the CA.

Hence, here one finds a proof that where activities are carried out in the exercise of a regulatory body, the CFT follows European jurisprudence and contends that, the public body in question does not fall within the scope of the competitive markets. This decision arose out of a complaint by S&D Yachts Limited, an undertaking acting as agent for yachts mooring in yacht yards in Malta, whereby it argued that in the past it had requested MMA to grant exclusive rights over this specific yacht yard, however, these requests had always been turned down. It further argued that the MMA conferred in favour of MIDI plc, temporary exclusive rights over MIYY and subsequently, MIDI plc granted a third undertaking, Melita Marine Limited, management rights over this yard. The complainant alleged that this behavior put him in a disadvantage which could possibly cause a decrease in profits and forfeiture of clients since no alternative yachts yard was offered to the complainant.

Subsequent to investigating the complaint, the Director argued that in granting temporary exclusive rights, Government acted in its capacity as a commercial undertaking and not as a market regulator, such that this agreement falls within the ambit of Article 5 of the CA. In response to this, the Attorney General, as representative of the Government of Malta, and the MMA, referred to the CJ’s jurisprudence, and argued that in granting such temporary exclusive rights, Government had acted in its regulatory capacity and cannot be held to be performing an economic activity, thus such an agreement was sheltered from the competition rules.

These pleas were upheld by the CFT, wherein it accepted that this emphyteutical concession fell within the public and regulatory duties of Government. However, the CFT examined the consequences of this concession on the relevant market, subsequently finding that the exclusive temporary concession did not manifest an object or effect of preventing, restricting or distorting competition within Malta, therefore it was not in violation of Article 5 of the CA.

Hence, here one finds a proof that where activities are carried out in the exercise of a regulatory body, the CFT follows European jurisprudence and contends that, the public body in question does not fall within the scope of the competitive markets.
competition rules. However, the CFT always moves a step forward and examines the effects on the relevant market, since, it argues that the overriding purpose of competition law in general and the CA, is to create and conserve competition for the benefits of all market participants.

The reference to European Commission decisions and to EU court jurisprudence continue to strengthen the position of Maltese competition law, since EU competition law has proved to be an efficient system in guaranteeing competition within the EU. Despite, the limited number of judgments on the notion of ‘undertaking’, the CFT still acknowledges the importance of this notion within the context of Maltese competition law. This is seen as an important development since such a term continues to be relevant when taking into account the different types of juridical entities and therefore contributes considerably to help the practitioner determine the true limits of this institute.
CONCLUSION

The concept of what constitutes an ‘undertaking’ for the purposes of EU competition law has attracted much attention in recent times as the Courts, authorities and practitioners seek to derive some degree of certainty from the evolving case-law. In the absence of a more precise de jure definition of an ‘undertaking’, the crucial question of whether an entity is to be classified as an ‘undertaking’ in terms of law was left to be scrutinized by the EU courts. The EU courts have followed a functional approach which, in its origins, provided for an extremely wide interpretation of the notion of ‘undertaking’ and thus for an extremely wide application of the competition rules.

To this extent, we are concerned with ‘activity’ rather than with the ‘institutions’ carrying out the activity. As a result, the EU courts established the ‘economic activity’ doctrine whereby an entity is qualified as an ‘undertaking’ when it engages in economic activities. As it emerges throughout this thesis, the functional definition of an ‘undertaking’ covers a wide range of entities like companies, individuals, the State and State-owned entities. However, the EU courts had to narrow down its wide definition and established certain carve-outs and exceptions.

First, an element of autonomy was added to the element of economic activity such that it excluded certain individuals from the scope of competition rules on the basis that they lack a certain degree of independence in performing their activities. Accordingly, they could only be regarded as ‘undertakings’ on being autonomous in their decision-making, otherwise they will escape the application of competition rules. Secondly, the EU courts incorporated another element to limit the broad scope of the notion of ‘undertaking’. It added the element of imperium, such that it argued that public entities would not constitute ‘undertakings’ and thus would be shielded from the application of these rules when they exercise activities, which although they seem to be of an economic nature, they are activities which flow from the State’s sovereignty, better known as State’s imperium. Therefore, a
distinction is made between public entities acting as public undertakings, in which case they would be exercising purely economic activities, and public entities acting as public authorities, in which case they will be immune from the scope of competition law since they are closely related to the exercise of State’s *imperium*.

Statutory bodies were even held to be ‘undertakings’ in so far as they engage in commercial or economic activities such as the case of the *Spanish Courier Services*.\(^{365}\) Interestingly, this contrasts with the position adopted by the US Supreme Court in *United States Postal Services (USPS) v. Flamingo Industries (USA) Ltd. et. al.*\(^{366}\) This case arose after USPS decided to terminate its contract with Flamingo, a private corporation, to make mail sacks in favour of cheaper foreign manufacturers. Flamingo alleged that the Postal Service has sought to suppress competition and create a monopoly in mail sack production, thus it held that it was in violation of the US Sherman Act.\(^{367}\) The Sherman Act does not speak of an ‘undertaking’ but it uses the word ‘person’ such that it defines it as including ‘corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country’.\(^{368}\) Before it gave judgment, the US Supreme Court went into some detail on the development of the General Post Office. Important developments were the changes implemented by the Postal Reorganization Act 1971 (PRA),\(^{369}\) according to which the service was renamed USPS. In reality, the Act made no reference to the USPS’ position as regards liability under the anti-trust rules. In effect, though the composition of the USPS was altered, the Supreme Court considered that the service remained as an ‘independent establishment of the executive branch of the Government’ and exercised significant government powers.

---

368 Ibid Section 7.
In determining whether a government agency could be subject to substantive liability, the Supreme Court referred to previous jurisprudence and applied a two stage test. The first part of the test, that of whether there was a waiver of sovereign immunity, was satisfied since the PRA waived any immunity to legal action. The second part of the test, that of whether the prohibitions in the Sherman Act applied to the USPS, led the Supreme Court to have a closer look at the concept of ‘person’ and concluded that the USPS could not be subjected to any antitrust liability. In so doing, the Supreme Court relied on the case United States v Cooper wherein the argument revolved around the issue of whether the USA itself was a ‘person’ in terms of the US Sherman Act. The Supreme Court decided that the USA could not be regarded as a ‘person’ under this Act on the basis that the result would be that the US Government could be exposed to possible liability as an antitrust defendant in future cases. Thus, in establishing what constitutes a ‘person’ under the Sherman Act, the US Supreme Court has relied on the principle that government agencies remain protected from any legal suit under the antitrust rules, irrespective of whether they have acted in a manner that would be illegal for a private enterprise.

The broad definition of an ‘undertaking’ has also been narrowed down by the inclusion of Article 106(2) TFEU which provides that certain undertakings fall within the spectrum of competition rules, but at the same time might be exempted because the services that they carry on are of a ‘general economic interest’ so long as they have been entrusted with the operation of such services. Since there is no definition of the term ‘services of general economic interest’ in the Treaty, the question arises as to which ‘undertakings’ are covered by this exception. Again, the EU courts avoided to provide a clear-cut definition of ‘services of general economic interest’ and the categories of undertakings which fall within the ambit of this exception. Instead, it establishes certain requirements which have to be met for

---

371 United States v Cooper, 312 US 600 (1941).
undertakings to benefit from such exclusion. Despite the fact that there is a Notice on Services of General Interest,\textsuperscript{373} and CJ’s jurisprudence\textsuperscript{374} on which to have an assessment on whether the undertakings benefit from Article 106(2) TFEU, the EU should move towards adopting some form of guidelines that will explain better how the EU authorities interpret and apply the exclusion for services of general economic interest.

Faced with some politically sensitive areas, the EU courts added further exceptions. To this extent, it excluded from the scope of competition law, social security, health and pension schemes on the basis of the principle of solidarity. Thus, they are held not to be ‘undertakings’ in terms of law. Accordingly, ‘the Court has departed from the functional approach. It has excluded the provision of social insurance services, to which affiliation is compulsory, altogether from the ambit of Community competition law on the basis of the “solidarity principle”. In effect, the Court has thereby added a fourth category of activity to the previously existing (1) non-economic activities involving the exercise of imperium (2) economic activities fully subject to competition law and (3) economic activities of general interest subject to Article 106(2) TFEU’.\textsuperscript{375} In this regard, the focus of the EU courts has been on the objective of a particular scheme to enable it to determine whether public bodies act as ‘undertakings’ in the provision of social services. Thus, emphasis has been made on the mode of operation of the schemes and the extent to which that operation is guided by solidarity principles.

However, particularly in the AOK Bundesverband\textsuperscript{376} judgment, the concept of ‘some competition’ was introduced in determining the existence of an economic activity in the health care sector, such that the CJ applies a concrete test. It determines how much room the national law leaves for competition in the

\textsuperscript{373} Commission Communication on services of general interest in Europe [2001] OJ C17/4.
\textsuperscript{374} Case C-320/91 Procureur du Roi v Paul Corbeau [1993] ECR I-2533.
\textsuperscript{376} Joined cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK Bundesverband v Ichthyol-Gesellschaft Cordes [2003] ECR I-2493.
implementation of the social security concerned and whether or not the principle of solidarity plays an important role in the system. Alas, difficulties arise, as the concept of 'some competition' is not clear, thereby it leaves room for interpretation. Though it helps the CJ to remain flexible in future cases, it serves to introduce ambiguity to the concept of economic activity. Thus, the CJ should give further guidance on how to interpret the notion of 'some competition'.

Given the increasing influence of the private sector in servicing the needs of public sector authorities, a debate has inevitably focused on the extent to which public bodies that engage in purchasing activities should be subject to the competition rules. As outlined in this thesis, the EU courts concluded that in determining whether a purchasing activity is economic, the crucial factor would be whether it is linked with a subsequent economic activity in the downstream market. On the other hand, following the reasoning of the national competition authorities, the activity of purchasing goods and services, even if there is no subsequent economic activity, could nonetheless be considered as an economic activity and subject to the competition rules. These differences between the EU courts judgments and the policies of various national competition authorities regarding the qualification of healthcare purchasing activities of certain managing bodies, makes apparent the need to have a clear and consistent approach in the application of EU competition law to the healthcare sector. Perhaps the Commission might publish some form of guidelines in the form of a policy note as the one published by the OFT in order to provide for further guidance as to how it will deal with public bodies and entities, based on the solidarity principle, engaging in purchasing activities.

Since Article 101 TFEU applies not only to agreements and concerted practices between ‘undertakings’ but also to decisions by ‘associations of

undertakings', the status of these associations has also been examined by the EU courts. It has been suggested that a functional approach should be adopted to the concept of an 'association of undertakings' in the same way as it applies to the concept of undertaking. However, a question arises as to which associations are to be considered as 'undertakings' themselves or 'associations of undertakings' falling within the ambit of EU competition rules. To this extent, the EU courts ruled on various entities ranging from trade unions and trade associations to professional and sporting bodies.

The definition of an 'undertaking' has further been restricted on the basis that an agreement between persons or companies belong to the same undertaking, hence the entities in question form a 'single economic entity'. Such a restriction has been applied to the relationship between a parent and subsidiary, a principal and agent, firm and employee and a contractor and a sub-contractor. However, the concept of 'undertaking' should rest on solid foundations, reflecting the social, political and economic choices in the Treaty. Thus, legal distinctions regarding the application of EU competition law to agents, employees and subsidiaries should not be perpetuated where they produce incentives to distort the way that commercial relationships develop, unless they reflect economic reality and are consistent with the Treaty's objectives.

Thus, it could be suggested that employees should be treated as separate undertakings when acting contrary to the interests of their employers, something which could not happen as long as the Courts, generally, exempt employees from the ambit of EU competition rules. Similarly, agents could be treated as separate undertakings and the focus would be on whether agreements with their principals contain restrictions on competition.

Developments have taken place in the Maltese legal system, in order to bring it in line with EU competition rules. This is seen from the enactment of the Competition Act (Act XXXI of 1994), amendments to the provisions of this Act, the

---

establishment of an Office for Fair Competition and of the Commission for Fair Trading and the continuing reference to European Commission decisions and the EU courts jurisprudence in the judgments of the Commission for Fair Trading. In fact, these judgments deal with various concepts which are at the basis of the notion of 'undertaking', such as the relativity concept of the notion, the issue of single economic entities and the debatable argument of public entities.

Accordingly, both the EU courts and the Commission for Fair Trading provided the basic doctrines and concepts, which enable the legal and business community to evaluate with relative certainty whether an entity is to be classified as an 'undertaking'. However, since EU competition law will be increasingly used in the national courts, the notion of 'undertaking' should be expected to be examined further in order to avoid dissimilar application of the competition rules in various Member States. Thus, it seems advisable for the Commission to set clearer criteria on the notion of 'undertaking' in its future decisions. Moreover, further guidance, perhaps in the form of a Commission Notice, is required. Less ambiguity and greater consistency between different decisions and judgments appear to be desirable.
PERIODICAL LITERATURE AND ARTICLES

Belhaj, S., and van de Gronden J.W., ‘Some Room For Competition Does Not Make a Sickness Fund an Undertaking. Is EC Competition Law Applicable to the Health Care Sector? (Joined Cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK), [2004] ECLR


Bonnici, J., at Seminar “COMPETITION ACT - RECENT DEVELOPMENTS” (Attard 29\textsuperscript{TH} April 2002) Press Releases, Department of Information.


Dr. J.W van de Gronden, ‘Purchasing Care: Economic Activity or Service of General (Economic) Interest?’, [2004] ECLR


Haffner, A., ‘United States Postal Service v Flamingo Industries (USA) Ltd: Does the USA Have the Answer to the “Undertaking” Problem in Europe?’, [2005] ECLR


Kovar, J., ‘Notion of economic activity: The ECJ confirms the cases law Eurocontrol and Fenin on the notion of economic activities and the qualification of the purchase act (Selex Sistemi Integrati – Eurocontrol), Concurrences, 2009

Krajewski, M., and Farley, M., ‘Non-economic activities in upstream and downstream markets and the scope of competition law after FENIN (2007) 32 ELRev


Louri, V., “‘Undertaking” as a Jurisdictional Element for the Application of EC Competition Rules’ (2002) 29 LIEI

Lynskey, O., ‘The Irish High Court considers that the Medical Council is not an association of undertakings therefore domestic and EC Competition law rules do not apply (Ramadan Hemat)’, e-Competitions, 11 April 2006 no.1373


Sauter, W., ‘Services of general economic interest and universal service in EU law’, (2008) 33 ELRev


Valcke, P., ‘The Brussels Court of Appeal confirms the functional interpretation of the notion of “undertaking” stressing that it is a relative concept (International Gemmological Institute) e-Competitions, 31 January 2006 no.20868

Whish, R., and Meli, S., ‘The Maltese Commission for Fair Trading confirmed that the Transport Authority was not an undertaking, consequently its monopoly
was not subject to the Competition Act’ (Carmel Mifsud) e-Competitions, 5 July 2004 no.15758

Wils, W.P.J., ‘The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons’ (2000) 25 ELRev

BIBLIOGRAPHY


Buendia, J.L., Exclusive Rights and State Monopolies under EC Law – Article 86 (Formerly Article 90) of the EC Treaty (OUP, Oxford 1999)


Meli, S., Judgments of the Malta Commission for Fair Trading (Gutenberg Press 2006)


Whish, R., Competition Law (6th edn OUP, Oxford 2009)