Undertaking the definition of an "Undertaking"

By Graham Reynolds

Article 2 of the Treaty of the European Union notes that “The Community shall have as its task...to promote throughout the Community a harmonious, balanced and sustainable development of economic activities”1 The Commission, together with the national competition authorities, directly enforces EU competition rules to ensure the development of such activities “European Union markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy as a whole”2

However before the application of competition law takes effect, one must qualify whether the entity under consideration falls within the scope of an undertaking. This preliminary criterion makes its application pivotal in respect to both the Commission and Competition law. Explicit reference is made to the in Article 101.1, 102, 106 and 107. Yet for all its importance, its actual definition was omitted from the lexicon of the TFEU, providing for the Court’s to draft its scope. This liberal approach has therefore enabled the courts to apply the term in its widest sense providing for the most efficient scope of discretion in the pursuit of upholding this core function. In most instances the application criteria is straightforward and its teleological approach provides for an obvious criterion.

However an area of tension for the courts has been its desire to strike an appropriate distinction between State entities pursuing a social objective and State bodies that act in a purely economic function. Striking this balance has become more difficult in recent times due to the muddled distinction between public and private bodies as State institutions seek to outsource their typically public functions to private bodies. In attempting to avoid oscillation in their definition exclusions have been provided for two types of general activities; Where the Member state exercises its sovereign powers, and where the activity in question is governed by the principle of solidarity. This article will however show that the courts approach has at times been somewhat myopic, in the sense that it has been keen to make sweeping exemptions that on their face have

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1 Article 2 of the Treaty Establishing the European Community as Amended by Subsequent Treaties Rome, 25 March, 1957
2 http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf
the purpose of protecting both the state’s functions and social objectives, however when its secondary effects are examined it can purport state entities with a disproportionate market share and power.

**State Activity**

The issue of defining an “undertaking” was first examined by the courts in *Hofner v Macrotron*[^3], a case with a complicated set of facts involving a German public agency who had a monopoly in employment recruitment. The question the court was faced with was whether these activities could result in it being considered as an “undertaking” given that it was established by statutory provisions. The ECJ focused on the responsibilities of the relevant entity, holding that employment procurement activities were economic in nature since they had not always been, and are not necessarily carried out by public entities. The court noted:

> It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity...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.[^4]

The courts use of the word “engaged” highlighted that the meaning of an undertaking should be viewed as contextual rather than absolute. In the sense that, whether an entity is going to be coined as an undertaking is to be judged by the activity in which it is engaged, not by any permanent characteristics in its make-up. Consequently, an entity may be an undertaking when it engages in one activity and yet fall beyond the scope when it carries out a different function[^5]. This broad approach taken by the Court in *Hofner v Macrotron*[^6] proved to be insufficient on its own, as the primitive standard failed to taken into account the complex situations which would arise in relation to the application of the competition rules to activities carried out by a state or state entity. As Advocate General Poiares Maduro observed “the court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the

[^3]: Höfner and Elser v Macrotron GmbH (1991) Case C-41/90
[^5]: Competition Enforcement Decision (ED/01/008
[^6]: Höfner and Elser v Macrotron GmbH (1991) Case C-41/90
common market and respect for the powers of the Member States⁷.

In response to this qualification, Eurocontrol⁸ provided the effects-based approach in instances whereby the court focuses on the public interest of a particular activity and placed particular emphasis on the “essential function of the state⁹” and the powers which are typically granted to a public authority. Whilst these entities can still potentially be private firms they “are the instruments of a policy in the general public interest and enjoy prerogatives of the public authority, that is to say bodies that exercise an activity typical of a public authority¹⁰.”

It is submitted that the justification for this exemption is based on the ECJ’s ultimate interest, the welfare of the individual, adapting an approach which seeks to maximize the greatest scope of benefit to the individual, not the market. Attorney-General Tesauro noted in SAT v Eurocontrol¹¹ that “it is arguable that these kinds of activities are natural monopolies where competition is deemed undesirable for the effective performance of the activity in question.”¹² This subsequently highlights that in some instances, such as the administration of air safety, the interest of the individual should prevail and the Commission ought to omit these public activities from its scope.

The courts gave further consideration to this approach in SAT v Eurocontrol¹³ where the Courts examined the European Organization for the Safety of Air Navigation or Eurocontrol, an international body whose function it was to establish and collect the charges levied on users of air navigation services, in accordance to a pre-set formulae. The applicant airline, which had refused to pay the levied charges and on a number of grounds, alleged an abuse of a dominant position within the meaning of the EC Treaty, Eurocontrol brought proceedings to recover the unpaid charges in the Brussels Commercial Court. The Defendant’s claim was based, inter alia, on the assertion of an abuse of dominance by Eurocontrol and so the question arose as to

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⁷ FENIN v Commission [2003] ECR II-357
⁸ Corinne Bodson v Pompes Funebres des Regions Liberees SA [1988] ECR 2479
⁹ Corinne Bodson v Pompes Funebres des Regions Liberees SA [1988] ECR 2479 para 18
whether Eurocontrol was an undertaking for the purpose of Art.101. A number of State parties, as well as the Commission, contended that the act of air traffic control was a supervisory safety role, and thus was not an economic activity and the charges levied merely constituted the consideration for the air navigation services provided by the contracting states.

In coming to its decision, the Court noted a number of relevant factors relating to Eurocontrol; first, that it was required to provide its services to all air users, even those who had not paid the required charges and second, that its activities were financed by contributions from the contracting states and it had no influence over the amount of the route charges which it collected. The view taken by the court was that Eurocontrol was carrying out activities aimed for the interest of the public with the goal of contributing to the maintenance and improvement of air navigation safety. It was deemed that the collection of route charges, the subject of the dispute in the case, could not be separated from the organization’s other activities. Taken as a whole Eurocontrol’s activities were thus connected with the exercise of powers relating to the control and supervision of airspace, which are typically those of a public authority, they were not of an economic nature justifying the application of the EU competition rules. The Court, who held that the activity of collecting charges could not be separated from its other activities, ultimately found that:

> 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.\(^\text{14}\)

This case illustrated on the one hand the fact that a public authority irrespective of how it is established can in principle be an undertaking if it is engaged in an economic activity. On the other hand, it also illustrates the fact that such a public undertaking will nevertheless be excluded from the competition rules where it is engaged in the provision of a service which could conceivably be carried out by private undertakings and even where it makes a charge for those services; provided it is performing those services exclusively in exercise of its powers as a public authority with the objective of securing a benefit in the public interest.

\(^{14}\text{SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43, para. 75}\)
Similarly in *Cali*\(^{15}\) the ECJ referred to Eurocontrol when dealing with a case concerning anti-pollution surveillance and the regulatory role entrusted by the national port authority at Genoa to a private limited company, SEPG. In the case the port user challenged the charges levied on it by the firm stating that it had abused its dominance and was therefore contrary to Article 102. The ECJ found that SEPG was not an undertaking since it carried out services relating to the protection of the environment which were not of an economic nature but which were essential functions of the state “such surveillance is connected by its nature, its aim and rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority.”\(^{16}\) Odudu\(^{17}\) noted that it is not feasible to profit from the provision of public goods and services and that “both Eurocontrol and Diego Cali show recognition that effective provision of a public good is impossible absent the coercive power of a state”. Odudu went on to establish that these niche objectives maintain two key factors that make the ability to profiteer impossible; First, their goods will be non-rivalrous in consumption, meaning that once produced, an infinite number of consumers can enjoy them without increased production cost or diminished enjoyment by others. Secondly, the benefits are non-excludable, in the sense that it is not possible to prevent people from enjoying the benefits once the good is produced. Odudu’s “two-prong approach” has had its advocates as demonstrated by the comments of Advocate General Jacobs in *SELEX*\(^{18}\) who observed that “In assessing whether an activity is economic in character, the basic test appears to me to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits. If there were no possibilities of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.” *SELEX*\(^{19}\) further confirmed that entities would not be considered as acting as an undertaking even when conducting economic activities if those activities were connected with (and inseparable from) the exercise of public powers.

This “functional” approach taken by the courts can at times lead to difficulties. In *MOTOE*\(^{20}\) a private non-profit-making association, whose object was to organise motorcycling competitions,

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\(^{15}\) Diego Cali e Figli SrL v. SEPG [1997] ECR I-1547  
\(^{16}\) Diego Cali e Figli SrL v. SEPG [1997] ECR I-1547 par.24  
\(^{18}\) *SELEX Sitemi Integrati SpA v Commission* [2009] ECR I-2207  
\(^{19}\) *SELEX Sitemi Integrati SpA v Commission* [2009] ECR I-2207 para 45-48  
\(^{20}\) Motosykketiski Omospondia Ellados NPID (MOTOE) v Ellinkio Dimosio [2008] ECR I- 4863
sought consent for the holding of certain motorcycling events in Greece. Under s. 49 of the
Greek Road Traffic Code the required Ministerial consent could only be given following the
consent of the national representative of the International Motorcycling Federation, which was
the Automobile and Touring Club of Greece (“ELPA”). ELPA itself both organised and
marketed motorcycling events in Greece. After due compliance with all requirements, MOTOE
was informed by the Minister that he could not consent, as ELPA had failed to furnish its consent.
MOTOE therefore complained that s. 49 of the Code infringed Articles 82 and 86(1) of the EC
Treaty on the ground that it enabled ELPA to impose a monopoly in the given field and to abuse
its position. A question thus arose as to whether ELPA could be classified as an undertaking for
the purpose of Articles 82 and 86 given that as well as having the power to authorise such events,
it also organised such events itself and marketed them by entering into sponsorship, advertising
and insurance and therefore could position itself as the dominant firm on the market.

Before referring to the Court’s judgment, it is worth looking at the Opinion of the Advocate
General Kokott who held that the absence of profit-making motive did not dislodge the
presumption that ELPA was engaged in economic activity. Her conclusion on this point stated

It is true that the exercise of public powers does not fall within the scope of the
competition rules in the EC Treaty, and an organisation which exercises public powers is
not an undertaking within the meaning of competition law. However, the distinction
between public and economic activities must be drawn separately in relation to each
activity carried on by an organisation. The organisation in question may therefore operate
in part as a public body and in part as an economic agent.21

The ECJ when following the AG Opinion, held that because its activities consisted not only in
taking part in administrative decisions, but also in organising and marketing motorcycling events,
ELPA was an undertaking. The Court went on to say:

Such a right may therefore lead the undertaking which possesses it to deny other
operators access to the relevant market. That situation of unequal conditions of
competition is also highlighted by the fact … that, when ELPA organises or participates
in the organisation of motorcycling events, it is not required to obtain any consent in
order that the competent administrations grant it the required authorisation.22

Thus it can be seen that the fact that a body has both an administrative and an economic

21 Motosykletiski Omsozpondia Ellados NPID (MOTOE) v Ellinkio Dimosio [2008] ECR I- 4863 para 45
22 Motosykletiski Omsozpondia Ellados NPID (MOTOE) v Ellinkio Dimosio [2008] ECR I- 4863
operation will not mean that it cannot be classified as an undertaking for the purposes of Articles 81 and 82 of the EC Treaty (now Articles 101 and 102). Here it is evidential that the courts took a slightly different approach by examining closely the activities of the legal parties, to ascertain whether they are purely exercising public powers or if they also have other activities. The court’s thorough examination in MOTEO\(^{23}\) of the potential impacts of its proposed exemptions is greatly approved. As will be noted in more detail further below, the court’s failure to distinguish between exemptions that are provided via Article 106.2 and exclusions provided via the crafting of the scope of an “undertaking” has been an area of confusion for later judgements given its muddled approach towards the two instruments.

**Solidarity**

Healthcare and pensions have generated many of the refinements in the case law determining the point at which competition rules apply. Given the *bona fides* role these social institutions provide the courts have sought to omit their activities from the scope of Article 101 and 102. This is second qualification is more significant than the public services standard but less evidential. It excludes entities which, by their nature can be considered to be in pursuit of an act of solidarity. This qualification is typically approached by social schemes, but given their potential economic impact and the effect it can have on competition the courts have developed a somewhat complicated set of standards when applying its exclusion. The Court have devised principles which consider whether the activities in question could be carried out by a private enterprise, whether there is a market for the provision of the service in question and whether this might be a market that undertakings may wish to enter. This method was used by the courts in *Pavlov*\(^{24}\), where the Court of Justice stated that “any activity consisting in offering goods and services on a given market is an economic activity” As AG Maduro further explained in *FENIN*\(^{25}\) “activities carried under market conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity.” The core issue is therefore whether the offering of goods or services on the market could be carried out by a private firm to make a profit. As further noted in *AOK*\(^{26}\) “if there were no possibility of a private

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undertaking carrying on a given activity there would be no purpose in applying competition rules to it”\textsuperscript{27} Yet even within this explicit qualifications the Commission can still be faced with uncertainty due to the tendency of States to contract out what were initially considered to be acts of a public nature to private entities. The difficulty of this approach was noted in \textit{Glockner}\textsuperscript{28} “almost all activities are capable of being carried on by private operators”\textsuperscript{29}

The focus of the Court’s test is based on the extent to which schemes and systems in question exhibit dimensions of “solidarity” or “the inherently uncommercial act of involuntary subsidization of one social group by another\textsuperscript{30}”. This notion has to be demonstrated on a number of levels, particularly by reference to the characterisation of a system in terms of its membership, funding and benefits. In \textit{Poucet v Pistre}\textsuperscript{31} it was held that a French body running a compulsory social security scheme was not an undertaking. Particular attention was placed on the formation and structure of the scheme. In the case it was held that the benefit received by the scheme was not proportionate to contributions made and that “sickness funds…fulfil an exclusively social function that activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of contributions” The decision of “\textit{Poucet}” purported to broaden the court’s scope of consideration. This can be seen as a departure from the original standard adopted in \textit{Hofner}\textsuperscript{32} as it allows for schemes to be considered in their entirety

In \textit{INAIL}\textsuperscript{33} the ECJ had similar findings where the managing partner of a company challenged a claim for unpaid national insurance contributions by arguing that the state’s compulsory scheme for accidents at work was contrary to competition law and therefore he should have been entitled to secure insurance elsewhere. The argument was premised on INAIL being an undertaking to which the state had granted an exclusive right to operate on the market for occupational insurance. The Court however noted that INAIL was not an undertaking given that the national

\begin{footnotes}
\item\textsuperscript{27} \textit{ibid} at para.42
\item\textsuperscript{28} \textit{Ambulanz Glockner v Landkreis Sudwestpfanz} [2001] ECR I-8089
\item\textsuperscript{29} \textit{ibid} para.38
\item\textsuperscript{30} \textit{Sodemare v Regione Lombardia}
\item\textsuperscript{31} \textit{Poucet et Pistre v Assurances Generales de France} [1993] ECR I-637
\item\textsuperscript{32} Höfner and Elser v Macrotron GmbH (1991) Case C-41/90
\end{footnotes}
scheme operated under the principle of solidarity. In qualifying this approach the Court noted that the social aim of an insurance scheme was not in itself sufficient to preclude the activity in question from being classified as an economic activity but rather it was required to maintain the principles of solidarity holding that an entity must demonstrate “that the insurance scheme is financed by contributions which are not systematically proportionate to the risk insured. … [This] absence of any direct link between the contributions paid and the benefits granted entails solidarity”\(^\text{34}\). The court's analysis was based on two considerations: First, it looked to see whether there was a sufficiently high degree of solidarity, and then considered whether the restriction of competition is necessary to guarantee the solidarity inherent in the scheme.

In Albany\(^\text{35}\) the case concerned a compulsory supplementary pension fund in the textile industry. A dispute however broke out between the fund and Albany, a textile company who sought to exempt itself from the affiliation. Having been referred to the ECJ, the Courts stressed the economic functions carried out by the pension fund and it found that the fund was to be an undertaking notwithstanding the fact that affiliation to the scheme was compulsory and the pension fund was obliged to accept all workers without a medical examination. The Court held this to be the case as the pension fund was determined by the amount of contributions made and benefits received. The courts stressed that the most important feature in establishing the doctrine of solidarity was the need for the beneficial element to be independent of the investment made by the individual. The ECJ did however accept that the social objectives which the pension fund were required to pursue might make the service it provided less competitive than those offered by other insurance companies, this did not however detract from the fact that the activities which it was engaged in were economic ones. In summary the court held that the social objectives were relevant, yet the economic nature was pivotal.

In contrast to Poucet, Albany International was a non-profit making organization which managed a pension scheme which was intended to supplement a basic compulsory scheme and in that respect it was held to be an undertaking. The court acknowledged that the pursuit of a social objective, the presence of solidarity features in the scheme and various restrictions on

\(^{34}\) ibid

investments made by the sectorial fund might make its service less competitive than comparable services rendered by insurance companies, although these considerations did not prevent the fund being an undertaking, they could be taken into account when applying Article 106.2.

The case of AOK\textsuperscript{36} involved claims by pharmaceutical companies that associations of funds had breached the competition rules by setting maximum amounts to be paid for certain medical products. Similar to Poucet the court noted that these funds were involved in the management of the social security system and “in this regard fulfil an exclusively social function... and is entirely non-profit making\textsuperscript{37}” Once again, particular mention was given to the fact that the funds were obliged to offer benefits to members which were not dependent upon the amount of contributions. Further the Court held that the fixing of maximum purchasing amounts by the fund associations was linked to the funds’ social functions and did not therefore constitute an activity of an economic nature.

In Francaise des Societies d’Assurance\textsuperscript{38} a body operating a pension scheme was found to be an undertaking. Although it was non-profit making scheme similar to the one in Poucet\textsuperscript{39} it was found to be an undertaking as it operated in the same way as other insurance companies, the rules were like those of private schemes and there was no mutuality or cross-subsidy between beneficiaries.

Social solidarity may be the reason for public intervention in the marketplace but that is quite distinct from the replacement of the marketplace as in the case of compulsory social security and insurance schemes. This approach was summarized in the 2003 Commission Green Paper\textsuperscript{40} as “any activity consisting in offering goods and services on a given market is an economic activity...thus, economic and non-economic services can co-exist within the same sector and sometimes even be provided by the same organization.”\textsuperscript{41}Yet doubt was placed on this decision when the court in FENIN found that purchasing decisions by Spanish health organizations were

\begin{itemize}
\item AOK Bundesverband v. Ichthyol- Gesellschaft Cordes, Hermani & Co [2004] ECR I-2493
\item Poucet et Pisto v. Assurances Generales de France [1993] ECR I-637, para.10
\item Federation Francaise des Societes d’Assurancew and Others v. Ministere de l’Agriculture et de la Peche [1995] ECR I-4013
\item Poucet et Pisto v. Assurances Generales de France [1993] ECR I-637, para.10
\item ibid
\end{itemize}
not covered by the competition rules as the supplies were not purchased for an economic activity but for use in the context of a principle of solidarity by providing free services on the basis of universal cover. It has been argued convincingly that much of the confusion has been due to a failure to separate two distinct issues: first whether an activity is economic and so falls within the scope of community competence, and second whether there are nevertheless good reasons, such as the role of social solidarity, for modifying the application of the competition rules. It is submitted that it is somewhat unclear why the Court didn’t choose to adapt a more clarified approach. For example, instead of omitting certain health schemes when they were judged to have an appropriate social objective and solidarity they would instead classify all of them as “undertakings” but exempt those whose activities qualified this standard under Article 106.2 which notes:

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 the treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact of the particular tasks assigned to them

It is submitted that at times it can be seen that the courts fail to provide adequate recognition to the distinction between seeking to provide an exemption for an entity given its social purpose and omitting a scheme because its activities fall below the scope of the term. Whilst both approaches deliver the same conclusions to the immediate case, this simple approach can be seen as myopic as its effects simply muddle and misguide the functional approach of the Court’s in future cases. Moreover, the solidarity test can at times seem to lack precision. The court seems to measure the degree of solidarity in the scheme and declares the operators to be an undertaking only when a certain level of solidarity is achieved, yet there has been no clear indication of what this threshold might be.

The courts have noted that the state cannot shelter behind the pretext of solidarity in order to avoid economic operators being subject to competition law. However, whether such activities

42 Article 106.2, TFEU
can be neatly demarcated is not an easy task, as shown in the case involving alleged abuses of Article 102 by public bodies responsible for the management of the Spanish National Health Board (SNS). In *FENIN*\(^{43}\), an association of undertakings which included companies that supplied medical goods and equipment complained that the “SNS” would only pay back after considerable delay (on average 300 days). The Commission rejected the complaint on the grounds that the organization in question were not undertakings when they participated in the management of the national health service. Consequently they were not acting as undertakings when they purchased medical goods and supplies.

Both the Court of the First Instance and the Commission held *FENIN* to qualify as an act of solidarity and therefore its activities to be exempt. AG Poiares Maduro however noted that the Commission had failed in many respects to properly distinguish the different activities of the scheme. According to the AG the Court of First Instance had simply taken the solidarity case law relevant to the first activity and assumed it applied to the rest without identifying the different factors which might apply. Nonetheless, the Court of Justice affirmed the approach of the Court of First instance, that the nature of the purchasing activity had to be determined according to whether the subsequent use of the purchased goods amounted to an economic activity, furthermore it had to be considered when “purchasing” goods and services by a public entity that discharges social functions might constitute an economic activity.

It was stressed that it was the supply function of the entity that was important when determining whether economic activity carried out and not the purchasing function. In the context of the former, “SNS” operated according to the principle of solidarity. It was funded from social security contributions and other State funding and it provided services free of charge to its members on the basis of universal cover. If the activity for which entity purchased goods was not an economic one, it made no difference that the entity might wield very considerable power. The ECJ noted that “it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity.”\(^{44}\) The judgment in *FENIN* thus makes it clear that purchasing for consumption is not economic activity and that purchasing will only

\(^{43}\) *FENIN v Commission* [2006] *ECR* I-6295  
\(^{44}\) *FENIN v Commission* [2006] *ECR* I-6295
constitute an economic activity if it involves the offering of goods and service on the market, suggesting that public bodies (even if wielding substantial purchasing power) will escape the reach of competition law unless the goods or services are bought for an economic activity.

In FENIN the bodies were accused of abusing their monopsony power by delaying payment to suppliers of medical goods and equipment. In AOK sickness funds were accused of colluding to fix the amount of money they would have to pay for medical equipment. In both cases the body in question was not acting as an undertaking in the delivery of its core task. The court held that in purchasing medical equipment to perform their public service missions and in fixing the prices, the defendants were not behaving as undertakings, thus excluding them from the scope of application of competition law.

As seen in FENIN, the Court excluded the application of competition law because the medical equipment was not purchased to operate an economic activity, but to offer a public service based upon national solidarity. In reaching the same conclusion the Court of Justice, in AOK Bundesverband adopted a clearer criterion, concluding that the fixing of payment amounts was “integrally connected” with the funds’ public service activity.

Read jointly, these decisions act as a significant widening of the solidarity doctrine in that the Court extends the latter beyond the provision of the services, to the commercial transaction that are connected with the provision of such services. In so doing, the Court is unconcerned with the degree to which the competition is distorted and is willing to tolerate even price-fixing agreements. This effect it is submitted seems undesirable as the purchasing power of state-wide providers of health care is considerable and that the potential anticompetitive effects of the exercise of this power cannot be underestimated.

**Undertaking in Ireland**

One of the key distinctions between the national competition regime in this country and the prohibitions contained in Articles 101 and 102 TFEU is that the Treaty contains no definition of "undertaking" comparable to that in the Irish Competition Act of 2002. The rule prohibiting abuse of a dominant position is stated in s. 5(1) of the Act as follows: “Any abuse by one or
more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.”

The term “undertaking” is defined in s. 3 of that Act as meaning “a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service”. It follows therefore that the claim made by the plaintiff of the infringement of s. 5 cannot succeed unless the Court is first satisfied that the defendant is to be treated in these circumstances as an “undertaking” which has pursued an objective “for gain”, a further qualification which is omitted from the ECJ’s principle standard. This has certainly created a great ordeal of confusion and as the legislation of Ireland currently stands, acts in defiance to the standards of the European Union.

In Deane and Others v. Voluntary Health Insurance Board45 [1992] 2 I.R. 319 the Supreme Court considered the definition of “undertakings” in the context of services provided by the defendant as a statutory body incorporated under the Voluntary Health Insurance Act 195746. The issue turned upon the use of the expression “for gain” in the definition and the Supreme Court came to the opposite conclusion of Costello P. in the High Court who had considered that the expression connoted “for profit” and that the VHI did not have the making of profit as an objective but was providing a public service. Finlay C.J. said:

I am, therefore, driven to the conclusion that the true construction of this section is that the words ‘for gain’ connote merely an activity carried on or a service supplied, as it is in this case, which is done in return for a charge or payment, and that, accordingly, the defendant does come within the definition of an undertaking in the Act of 1991.47

It is arguable that this constitutes a potential difference with the EU law meaning as it is well settled in EU law that any entity engaged in an "economic activity" is liable to be considered an "undertaking" irrespective of its legal status or whether it has a profit-orientated commercial purpose. Furthermore in Competition Authority Enforcement Decision (ED/01/08) it was found that in negotiating with pharmacy bodies about the prices of drugs and purchasing pharmacy

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46 Voluntary Health Insurance Act 1957
services from private undertakings, the HSE was not an undertaking as it did not receive any payment from patients for drugs dispensed under the scheme and so was not acting “for gain”.

The recent High Court’s decision in Lifelife Ambulance Service v HSE\(^{48}\) can be viewed as the consequences of the muddled distinction between omission and exemption in regards to the application of EU competition law. The applicant within the case was a private service ambulance company who had traditionally worked with the HSE to transport individuals to and from emergency incidents in instances where all publicly owned emergency services were pre-occupied. In a shift in policy the HSE sought to remove all dependency from the private markets by allowing for the HSE’s services to be the dominant entity, to do this they gradually reduced all business provided to the applicants explicitly stating their intention of being the sole provider. The applicant took proceedings that such an intention was in breach of S.5 of the 2002 Competition Act, suggesting that the HSE, acting as an undertaking was subsequently abusing their dominant position.

The defendant’s argued however that in line with the decisions of FENIN, that entities performing the “supply side” function couldn’t be characterise as “undertakings” and subsequently their operation fell below the scope of s.3 of the Competition Act 2002. The court ultimately found in favour of the defendant, noting that their economic activities were not “for gain” when examining exclusively the supply element of their activities. It is submitted that the defendant’s provided a disfigured interpretation of “undertaking” which can rightfully be attributed to the ECJ’s muddling of the distinction. The court furthermore failed to give adequate attention to the preferred approach of the court’s in MOTOE, where due consideration was given to the subsequent effects of affording an entity such an exemplary right where “Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market\(^{49}\). Given that the Court had explicitly acknowledged Article 3.1 of Regulation No.1/2003 which states that “...Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by [Article 102] of the

\(^{48}\) Lifelife Ambulance Service v HSE [2012] IEHC 432

\(^{49}\) Motosykeliski Omospondia Ellados NPID (MOTOE) v Ellinkio Dimosio [2008] ECR I- 4863
Treaty, they shall also apply [Article 102] of the Treaty."\textsuperscript{50} It is somewhat disappointing that further consideration wasn’t given to this effects based approach.

Taking the judicial approach aside, it is submitted that the more appropriate approach would have been to find the defendant’s to be considered as “undertakings” in the sense of section 3 and 5, but to have allowed for the defendant to avail of the exemptions found in the 2002 act, similar to those under Article 106.2. Such an approach would have avoided affirming further the notion that the “supply” side can’t be considered an undertaking.

**Conclusion**

As *FENIN, AOK Bundesverband* and *Lifelife Ambulance Services* all highlight, disqualifying the “supply side” seems to be but a step too far in seeking to provide exemptions for public authorities and acts of solidarity. Pragmatically speaking, such a broaden exemption seeks to undermine the original intentions of both Articles 101 and 102 in their protection of fair competition given that the purchasing power of state-wide providers of health care can be considerable and that the potential anticompetitive effects of the exercise of this power cannot be underestimated. This issue will soon have to be readdressed before the Court, where it is hoped that proper consideration will be taken between the distinction and omission of TFEU instruments and that the Court’s will adapt an approach that reaffirms the stance of the effects based doctrine established in *MOTEO*.

\textsuperscript{50} Article 3.1 of Regulation No.1/2003