The Concept of Undertaking

The term ‘undertaking’ identifies the addressees of the European competition provisions. As such, it is central to the analysis of Article 101 TFEU, Article 102 TFEU and the European Merger Regulation, as only ‘undertakings’ may be subjected to these regulatory instruments.

The Functional Approach

The Treaty on the Functioning of the European Union (TFEU) is silent on the meaning of the term ‘undertaking’, leaving it to the European Courts to develop and establish its content and realm. To ensure the full effectiveness of the competition provisions the Courts adopted a functional approach, applying the term to entities engaged in economic activities regardless of their legal status and the way in which they are financed. This functional approach focuses on the commercial nature of activities and not on the type of entity engaged in them. Consequently, it may capture individuals, trade associations, partnerships, clubs, companies and public authorities. See for example:

IV/33.384 etc     FIFA—distribution of package tours during the 1990 World Cup

The Relativity of the Concept

The notion of undertaking is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an undertaking when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non-profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits.

The following cases highlight the way in which the European Courts and the Commission assess the nature of activities:

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-41/90</td>
<td>Höfner and Elser v Macrotron GmbH</td>
</tr>
<tr>
<td>C-364/92</td>
<td>SAT Fluggesellschaft v Eurocontrol</td>
</tr>
<tr>
<td>C-159/91 etc</td>
<td>Poucet v Assurances Générales de France</td>
</tr>
<tr>
<td>C-343/95</td>
<td>Calì &amp; Figli v Servizi ecologici porto di Genova SpA</td>
</tr>
<tr>
<td>T-319/99</td>
<td>FENIN v Commission</td>
</tr>
<tr>
<td>C-205/03P</td>
<td>FENIN v Commission</td>
</tr>
<tr>
<td>C-309/99</td>
<td>Wouters</td>
</tr>
<tr>
<td>C-264/01 etc</td>
<td>AOK-Bundesverband</td>
</tr>
<tr>
<td>C-67/96</td>
<td>Albany v Stichting Bedrijfspensioenfonds Textielindustrie</td>
</tr>
<tr>
<td>C-113/07</td>
<td>SELEX Sistemi Integrati SpA v Commission</td>
</tr>
<tr>
<td>C-138/11</td>
<td>Compass-Datenbank GmbH v Republik Österreich</td>
</tr>
</tbody>
</table>
The concept of undertaking

See also summary references to:

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Party Details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-244/94</td>
<td>Fédération Française des Sociétés d'Assurance</td>
<td>7, 13</td>
</tr>
<tr>
<td>C-475/99</td>
<td>Ambulanz Glöckner v Landkreis Sudwestpfalz</td>
<td>8, 11</td>
</tr>
<tr>
<td>C-157/99</td>
<td>Smits and Peerbooms</td>
<td>10</td>
</tr>
<tr>
<td>1006/2/1/01</td>
<td>BetterCare v The Director General of Fair Trading</td>
<td>11</td>
</tr>
<tr>
<td>C-218/00</td>
<td>Cisal di Battistello Venanzio &amp; Co Sas</td>
<td>14</td>
</tr>
<tr>
<td>C-22/98</td>
<td>Jean Claude Becu</td>
<td>15</td>
</tr>
</tbody>
</table>

**Single Economic Entity**

Moving away from the functional assessment of the activity, another question related to the term ‘undertaking’ is raised in the application of Article 101 TFEU. The Article applies to, among other things, agreements between undertakings. It therefore does not cover internal activities within an undertaking.

The concept of undertaking may encompass several legal entities or natural persons. Subsequently, the corporate principle of separate legal personality gives way in the area of competition law to the economic concept of undertaking.

The scope given to the term undertakings may affect the application of competition laws to groups of companies. On one hand it may exclude agreements between separate legal entities within a single economic unit from the application of competition law and view them as an internal allocation of functions. On the other hand, it may link separate legal entities by viewing them as a single undertaking, thus holding the group of entities responsible for an anticompetitive activity carried out by one of them. See for example:

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Party Details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>107/82</td>
<td>AEG-Telefunken v Commission</td>
<td>20</td>
</tr>
<tr>
<td>C-73/95P</td>
<td>Viho Europe BV v Commission</td>
<td>21</td>
</tr>
<tr>
<td>IV/32.732</td>
<td>IJsselcentrale and others</td>
<td>22</td>
</tr>
<tr>
<td>C-189/02P etc</td>
<td>Dansk Rørindustri and others v Commission</td>
<td>23</td>
</tr>
<tr>
<td>2002/470</td>
<td>Provimi Ltd v Aventis Animal Nutrition SA and others</td>
<td>24</td>
</tr>
<tr>
<td>1072/1/1/06</td>
<td>Sepia Logistics Ltd v OFT</td>
<td>25</td>
</tr>
<tr>
<td>C-97/08</td>
<td>Akzo Nobel v Commission</td>
<td>26</td>
</tr>
<tr>
<td>C-628/10P</td>
<td>Alliance One International and Others v Commission</td>
<td>27</td>
</tr>
<tr>
<td>C-172/12P</td>
<td>EI du Pont de Nemours v Commission</td>
<td>28</td>
</tr>
<tr>
<td>T-234/07</td>
<td>Koninklijke Grolsch v Commission</td>
<td>30</td>
</tr>
<tr>
<td>T-185/06</td>
<td>L’Air Liquide and others v Commission</td>
<td>30</td>
</tr>
<tr>
<td>HC09C04733</td>
<td>Toshiba Carrier UK ltd v KME Yorkshire ltd</td>
<td>31</td>
</tr>
</tbody>
</table>

See also summary references to:

<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Party Details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-286/98P</td>
<td>Stora Kopparbergs Bergslags v Commission</td>
<td>19, 22</td>
</tr>
<tr>
<td>170/83</td>
<td>Hydrotherm v Compact</td>
<td>20</td>
</tr>
<tr>
<td>T-68/89 etc</td>
<td>SIV and others v Commission</td>
<td>20, 23</td>
</tr>
<tr>
<td>C-201/09P etc</td>
<td>ArcelorMittal Luxembourg SA v Commission</td>
<td>24, 31</td>
</tr>
<tr>
<td>22/71</td>
<td>Beguelin Import Co v SAGL Import Export</td>
<td>21</td>
</tr>
<tr>
<td>T-301/04</td>
<td>Clearstream v Commission</td>
<td>21</td>
</tr>
<tr>
<td>T-314/01</td>
<td>Avebe v Commission</td>
<td>21</td>
</tr>
<tr>
<td>2002 WL 31413939</td>
<td>Suretrack Rail Services Limited v Infraco JNP Limited</td>
<td>21</td>
</tr>
<tr>
<td>T-168/05</td>
<td>Arkema SA v Commission</td>
<td>23</td>
</tr>
</tbody>
</table>
Pure financial investor defence

When a parent company exercises decisive influence over a subsidiary, it can be held liable for the activities of the subsidiary. Where a parent company has a 100 per cent shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary. The presumption of decisive influence may be rebutted by demonstrating that in practice the parent company exercised restraint and did not influence the market conduct of its subsidiary. Such may be the case, for example, when the parent company is a pure financial investor.

See also summary references to:

T-392/09 1. Garantovaná as v Commission 32
T-395/09 Gigaset AG v Commission 32
**FIFA—distribution of package tours during the 1990 World Cup**

Cases IV/33.384 and IV/33.378


**Facts**

The European Commission considered a complaint regarding the ticket distribution system endorsed by the International Federation of Football Associations (FIFA) during the FIFA World Cup, held in Italy in 1990. The organisation of the event and the distribution of tickets were managed through a ‘local organising committee’ which was set up jointly by FIFA and the National Italian Football Association (FIGC). The ticket distribution system operated through various sports associations yet it included a restriction on sales to travel agencies. This restriction enabled the exclusive grant of the world wide distribution rights of tickets as part of package tours to an Italian joint venture ‘90 Tour Italia SpA. This exclusivity arrangement prevented other travel agencies from offering combined package tours with tickets for the 1990 World Cup. In its decision the Commission considered the compatibility of the exclusive distribution agreement with Article 101 TFEU.

A preliminary question concerned the nature of the entities involved and whether they constituted an undertaking within the meaning of Article 101 TFEU.

**Held**

Any entity, regardless of its legal form, which engages in economic activity, constitutes an undertaking within the meaning of Articles 101 and 102 TFEU. An economic activity includes any activity, whether or not profit-making, that involves economic trade. (para 43)

The World Cup is indisputably a major sporting event yet it also involves activities of an economic nature. These activities include the sale of package tours comprising hotel accommodation, transport and sight-seeing, the conclusion of contracts for advertising, the conclusion of television broadcasting contracts and more. (para 44)

FIFA is a federation of sports associations and accordingly carries out sports activities, yet it also carries out activities of an economic nature. These include, among other things, the conclusion of advertising contracts and television broadcasting rights which account for around 65 per cent of total World Cup revenue. Consequently, FIFA is an entity carrying on activities of an economic nature and constitutes an undertaking within the meaning of Article 101 TFEU. (paras 47–9)

Similarly, the National Italian Football Association (FIGC) carries on activities of an economic nature and is consequently an undertaking within the meaning of Article 101 TFEU. (paras 50–3)

The ‘local organizing committee’ was set up jointly by FIFA and the FIGC for the purpose of carrying on activities relating to the technical and logistical organisation of the World Cup and the establishment and implementation of the ticket distribution arrangements. The local organizing committee's revenue derived from, among other things, television rights, advertising rights and the sale of tickets. The exclusive rights granted to the Italian joint venture ‘90 Tour Italia’ resulted in remuneration for the local organizing committee. Subsequently, the local organizing committee carried on activities of an economic nature and constituted an undertaking within the meaning of Article 101 TFEU.

**Comment**

Note that the fact that an organisation lacks profit motive or economic purpose does not in itself bring it outside the concept of undertakings.

On the functional approach, see also the following cases below (pages 5–19), which focus on the distinction between economic activity and public or charitable activities which fall outside the competition prohibitions.
**Facts**

A preliminary reference to the Court of Justice by the German court seeking advice on, among other things, whether a monopoly of employment procurement granted to a public employment agency constituted an abuse of a dominant position within the meaning of Article 102 TFEU.

In its ruling the Court of Justice examined the exclusive rights in light of both Article 102 TFEU and Article 106 TFEU. The latter concerned the conditions that a Member State must observe when it grants special or exclusive rights. The former examines whether an undertaking abused its dominant position and thus required the Court of Justice to establish whether the public employment agency may be classified as an undertaking.

**Held**

In the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. (para 21)

‘The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.’ (para 22)

It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Union competition rules. (paras 21–3)

**Comment**

In defining the scope of the Union rules on competition, the Court of Justice gave priority to considerations of an economic nature rather than to stricter classification of a legal entity. The functional benchmark relies on the nature of the activity rather than on the form of the entity. This functional approach widens the group of entities which may be classified as undertakings and thereby subjected to the competition provisions. These may include, among other things, individuals, trade associations, clubs, societies, partnerships and companies.

Examples of entities being found not to constitute an undertaking may be found in Case C-364/92 SAT v Eurocontrol (page 6 below), Case C-159/91 etc Poucet v Assurances Générales de France (page 7 below), Case C-343/95 Cali & Figli Srl (page 8 below), Case T-319/99 and C-205/03P FENIN v Commission (pages 9–10 below), and Cases C-264/01 etc AOK-Bundesverband (page 13 below).

Note that the application of Article 102 TFEU to public bodies or undertakings entrusted with the operation of services of general economic interest may be limited by the provisions of Article 106(2) TFEU. Subsequently, a public employment agency such as the one in this case, which is classified as an undertaking, is subjected to the prohibition contained in Article 102 TFEU, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency may be in breach of Article 106(1) TFEU where it creates a situation in which that agency cannot avoid infringing Article 102 TFEU. On the application and interpretation of Article 106 TFEU, see Chapter 7 ‘Competition Law and the State’.
**THE CONCEPT OF UNDERTAKING**

**SAT Fluggesellschaft mbH v Eurocontrol**
Case C-364/92

**Undertaking**
The Relativity of the Concept
Public Tasks

**Facts**
Eurocontrol is a regionally oriented international organisation which was founded by a multinational agreement between several Member States to strengthen cooperation between them in the field of air navigation and provide a common system for establishing and collecting route charges for flights within their airspace.

The dispute in question came before the Belgian court and concerned the refusal of the air navigation company SAT Fluggesellschaft mbH (SAT) to pay Eurocontrol the route charges for flights made between September 1981 and December 1985. SAT alleged, among other things, that the procedure followed by Eurocontrol in fixing variable rates for equivalent services constituted an abuse of a dominant position.

In a reference made by the Belgian 'Cour de cassation', the Court of Justice was asked whether Eurocontrol was an undertaking within the meaning of Articles 102 and 106 TFEU.

**Held**
In Union competition law, 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. Subsequently, in order to determine whether Eurocontrol’s activities are those of an undertaking within the meaning of Articles 102 and 106 TFEU, it is necessary to establish the nature of those activities. (paras 18, 19)

The Convention establishing Eurocontrol outlines its tasks which are chiefly concerned with research, planning, coordination of national policies and the establishment and collection of route charges levied on users of airspace. Eurocontrol also provides air space control for the Benelux countries and the northern part of the Federal Republic of Germany from its Maastricht centre. For the purposes of such control, Eurocontrol is vested with rights and powers of coercion which derogate from ordinary law and which affect users of airspace. With respect to this operational exercise Eurocontrol is required to provide navigation control in that airspace for the benefit of any aircraft travelling through it, even where the owner of the aircraft has not paid the route charges owed to Eurocontrol. Finally, Eurocontrol’s activities are financed by the contributions of the Member States which established it. (paras 20–6)

Eurocontrol carries out, on behalf of the Contracting States, tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety. Eurocontrol’s collection of route charges cannot be separated from its other activities. The charges are set by, and collected on behalf of, the Member States and are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services. (paras 27–9)

‘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.’ (para 30)

**Comment**
Eurocontrol was found not to constitute an undertaking. The collection of the route charges was held by the Court of Justice to be inseparable from Eurocontrol’s other activities, thus making its operation, as a whole, one that is connected with the performance of a public/state task.
Facts

Mr Poucet and Mr Pistre sought the annulment of orders served on them to pay social security contributions to French social security organisations which manage the sickness and maternity insurance scheme for self-employed persons in non-agricultural occupations. The proceedings, which took place in the French Tribunal des Affaires de Securité Sociale de l’Hérault, were stayed while the French tribunal referred to the Court of Justice for a preliminary ruling two questions, one of them on whether an organization charged with managing a special social security scheme is an undertaking for the purposes of Articles 101 and 102 TFEU.

Held

The social security systems at issue subject self-employed persons in non-agricultural occupations to compulsory social protection. They are intended to provide cover for all the persons to whom they apply against the risks of sickness, old age, death and invalidity, regardless of their financial status and their state of health at the time of affiliation. (paras 7 – 9)

The systems pursue a social objective and embody the principle of solidarity. The compulsory contribution to such system is indispensable for application of the principle of solidarity and entails paying statutory benefits which bear no relation to the amount of the contributions received. (paras 8 – 13)

The schemes at issue are entrusted by statute to social security funds whose activities are subject to control by the State. The funds thus cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. (paras 14, 15)

The concept of an undertaking, within the meaning of Articles 101 and 102 TFEU, encompasses all entities engaged in an economic activity. It does not include, therefore, sickness funds and organisations involved in the management of the public social security system. These organisations fulfil a social function exclusively which is based on the principle of national solidarity and is entirely non-profit-making. Accordingly, the organisations to which this non-economic activity is entrusted are not undertakings. (paras 17 – 20)

Comment

Solidarity was used in this case as the benchmark which distinguishes between commercial and non-commercial activities. Its impact on the nature of the scheme was apparent at different levels: first, ‘solidarity in time’ in that the contributions paid by active workers were directly used to finance benefits paid to pensioners; secondly, ‘financial solidarity’, balancing the compulsory schemes in surplus and those in deficit; and thirdly ‘solidarity in relation to the least well-off’, who are entitled to certain minimum benefits even in the absence of adequate contributions paid by them. (See analysis by AG Tesauro in Case C-244/94 Fédération Française des Sociétés d’Assurance v Ministère de l’Agriculture et de la Pêche [1995] ECR I-4013).

Contrast the facts in Poucet v Assurances Générales de France with those in Case C-244/94 Fédération Française des Sociétés d’Assurance. There, the scheme in question was based on the principle of capitalisation and paid benefits to persons insured in proportion to their contributions and the financial results of the investments made by the insurance provider. The scheme established a direct link between the amount of contributions and the amount of benefits and followed the principle of solidarity only to a minimal extent, in so far as it provided for a limited balancing mechanism between insured persons.

Note references to both of these judgments in Cases C-264/01 etc, AOK-Bundesverband, page 13 below.
THE CONCEPT OF UNDERTAKING

**Cali & Figli v Servizi ecologici porto di Genova SpA**
Case C-343/95

<table>
<thead>
<tr>
<th>Undertaking</th>
<th>The Relativity of the Concept</th>
</tr>
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<tbody>
<tr>
<td>Task of a Public Nature</td>
<td></td>
</tr>
</tbody>
</table>

**Facts**

A dispute between Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG) regarding the payment to be made by Cali & Figli for preventive anti-pollution services performed by SEPG in the oil port of Genoa. The proceedings which took place in the Italian Tribunale di Genova were stayed while the Italian tribunal referred to the Court of Justice for a preliminary ruling several questions concerning the application of Article 102 TFEU, one of them being whether SEPG could qualify as an undertaking.

**Held**

‘As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7).’ (para 16)

‘In that connection, it is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights …’ (para 17)

‘In order to make the distinction between the two situations referred to in paragraph 16 above, it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the State has conferred special or exclusive rights (Case 118/85 Commission v Italy, cited above, paragraph 7).’ (para 18)

SEPG activities are carried on under an exclusive concession granted to it by a public body. The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa 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. Such surveillance is connected by its nature, its aim and the 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. It is not of an economic nature justifying the application of the Treaty rules on competition. (paras 15, 22, 23)

**Comment**

Note that the public task in this case was performed by SEPG, which was not a state entity. Despite this, SEPG was held not to act as an undertaking as it exercised official authority. SEPG’s position was not pertinent to the analysis since the public nature of the task performed was not questionable.

In many instances, doubts may be raised as to the public nature of the task performed. See for example Case C-475/99 Ambulanz Glöckner v Landkreis Südstewpflaz [2001] ECR I-8089 where health organisations, to which the public authorities delegated the task of providing the public ambulance service, were held to be undertakings. The court focused on the nature of the activity and noted that ‘any activity consisting in offering goods and services on a given market is an economic activity’ (para 19). It held that ‘the medical aid organisations provide services, for remuneration from users, on the market for emergency transport services and patient transport services. Such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities. … The provision of such services therefore constitutes an economic activity for the purposes of the application of the competition rules laid down by the Treaty’ (para 20). The activities in question were carried on under market conditions, albeit facing limited competition. As such they resemble schemes operating under the principle of capitalisation (see for example Cases C-244/94, C-159/91 etc, page 7 above) and are distinguishable from those operating under the principle of solidarity.
FENIN v Commission
Case T-319/99
General Court, [2003] ECR II-357, [2003] 5 CMLR 1

Facts
FENIN is an association of undertakings which markets medical goods and equipment used in Spanish hospitals. It submitted to the Commission a complaint alleging an abuse of a dominant position, within the meaning of Article 102 TFEU, by various bodies or organizations responsible for the operation of the Spanish national health system (SNS). The Commission rejected FENIN’s complaint on the ground that the alleged bodies were not acting as undertakings when they purchased medical goods and equipment from the members of the association (Decision SG(99) D/7.040). FENIN launched an action for annulment.

Held
It is a well established principle that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. (para 35)

Whereas the offering of goods and services on a given market were the characteristic feature of an economic activity, purchasing, as such, was not. Therefore, in deciding whether an activity is economic, it was incorrect to dissociate the activity of purchasing goods from their subsequent use. The nature of the purchasing activity had to be determined according to whether or not the subsequent use of the purchased goods amounted to an economic activity. (para 36)

Consequently, an organisation which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of [Union] competition law and is therefore not subject to the prohibitions laid down in Articles [101(1) TFEU] and [102 TFEU]. (para 37)

Consequently, SNS did not act as an undertaking. This conclusion relies on SNS operating according to the principle of solidarity in that it was funded from social security contributions and other State funding and in that it provided services free of charge to its members on the basis of universal cover. Consequently SNS did not act as an undertaking when purchasing from FENIN. (paras 38–40)

Comment
FENIN challenged the Commission’s reliance on Cases C-159/91 etc Poucet v Assurances Générales de France (page 7 above), arguing that whereas in Poucet the question before the Court was whether such bodies acted as undertakings in their dealings with their members, in this case the question centred on whether SNS acted as undertaking when purchasing from third parties goods which they needed in order to provide services to their members. FENIN thus favoured a functional approach which focused on the nature of the activity rather than the nature of the body. Accordingly, FENIN deemed irrelevant the principle of solidarity relied upon in Poucet. The General Court impliedly rejected this argument when in its decision it based its conclusion that SNS did not act as an undertaking on the fact that it operated according to the principle of solidarity.

The consequences of dual, public and private, characteristics were not explored in this case. FENIN argued that SNS, on occasion, provided private care in addition to State-sponsored healthcare and consequently in those circumstances should be regarded as an undertaking. The Court did not decide on this point as it was not raised in the original complaint to the Commission.

FENIN appealed against the judgment of the General Court (see page 10 below).
THE CONCEPT OF UNDERTAKING

**FENIN v Commission**  
Case C-205/03P  
Court of Justice, [2006] ECR I-6295, [2006] 5 CMLR 7

The Relativity of the Concept  
Purchasing Goods

**Facts**

FENIN appealed against the judgment of the General Court (Case T-319/99 (page 9 above)) in which the General Court dismissed its action for annulment against the Commission’s decision. In its appeal to the Court of Justice, FENIN alleged that the General Court misinterpreted the definition of ‘undertaking’ by either [1] wrongfully omitting to consider whether a purchasing activity is in itself an economic activity which may be dissociated from the service subsequently provided or, [2] failing to consider whether the provision of medical treatment, is itself economic in nature and therefore makes the purchasing activity an economic activity subject to the competition rules.

**Held**

FENIN’s allegations, on which the second part of the plea is based, were not raised at first instance and are submitted for the first time at the appeal stage. ‘It follows that the second part of the single plea relied on by FENIN must be dismissed as inadmissible.’ (paras 22, 20 – 22)

With respect to the first part of the plea, the General Court rightly held in paragraph 36 of its judgment ‘that it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 36).’ (para 25)

The General Court rightly deduced that ‘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, and 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.’ (para 26)

FENIN’s plea, according to which the purchasing activity of the SNS management bodies constitutes an economic activity in itself, must therefore be dismissed as unfounded. Appeal dismissed.

**Comment**

In his opinion AG Maduro provided an excellent overview of the concept of undertaking. The opinion is interesting, not the least since the AG proposed that the Court of Justice uphold the second part of the appeal and refer the case back to the General Court. AG Maduro was of the opinion that the General Court should have distinguished between SNS activities and roles. In this respect, the compulsory membership of a sickness or insurance fund should have been distinguished from the activity in this case, being that of the provision of healthcare. ‘Accordingly, the degree of solidarity which exists in that sector must be assessed in the light of factors other than those which apply to the activity of a sickness or insurance fund’ ( paras 30, 31, 46, 47, AG opinion). ‘In the present case, it does not appear that the activity of providing health care to its members carried on by the SNS is of a different kind from that which was carried on by the public hospitals in Smits and Peerbooms [Case C-157/99 [2001] ECR I-5473]. While it does not comprise only hospital care, it none the less includes such care. Similarly, if patients do not pay medical practitioners the amount owing in respect of treatment provided to them, those practitioners are nevertheless remunerated. However, in order to determine whether that activity should be subject to competition law, it is necessary to establish whether the State, with a view to adopting a policy of redistribution by entrusting that activity exclusively to State bodies which would be guided solely by considerations of solidarity, intended to exclude it from all market considerations’ (para 52, AG opinion). ‘The judgment under appeal shows that the SNS is obliged to guarantee universal cover to all its members free of charge. However, the [General Court] did not state whether the requirements of the market are entirely satisfied by public bodies or whether private organisations having the characteristics of an undertaking take part in it as well. The essential information for concluding that the activity of providing health care of the SNS is of a non-economic nature is therefore not available’ (para 53, AG Opinion). ‘In any event, were it to be concluded that the SNS carries on an economic activity, that would not call into question the social objectives pursued by the SNS, because such a conclusion does not preclude the implementation
of the principle of solidarity, whether in relation to the method of financing by social security and other State contributions or in relation to the provision of services provided to members free of charge on the basis of universal cover. The application of competition law and a recognition that certain sectors must be subject to special rules are not mutually incompatible. On the contrary, the purpose of Article [106(2) TFEU] is precisely to provide a basis for conferring exclusive rights on undertakings entrusted with the operation of services of general interest [Case C-475/99 Ambulanz Glöckner v Landkreis Sudwestpfalz [2001] ECR I-8089]. The likely effects of making certain activities carried on by undertakings entrusted with the operation of services of general interest subject to competition law do not lead to a reduction in social protection any more than do those which arise from the application of the principle of freedom of movement to the health sector. In both cases, [Union] law seeks to incorporate principles of openness and transparency into health systems originally conceived on a national scale …’ (para 55, AG Opinion). He concluded that the case should be referred back to the General Court ‘for it to make the necessary findings in fact in order to determine whether public and private health sectors coexist in Spain or whether the solidarity which exists in the provision of free health care is predominant’ (paras 54, 57, AG Opinion).

It is interesting to contrast the Court of Justice and General Court approach in FENIN with the judgment of the English Competition Commission Appeal Tribunal (CCAT) in BetterCare v The Director General of Fair Trading [Case No 1006/2/1/01 [2002] Competition Appeal Reports 299]. There, the CCAT considered an alleged abuse by a Trust which was entrusted, under the law, to provide nursing home and residential care services for elderly persons. The trust was accused by BetterCare, a UK provider of residential and nursing home care, of abusing its dominant position by forcing it to agree to unduly low prices. The CCAT considered whether the Trust may be considered as an undertaking and concluded that it was acting as an undertaking, both in the purchasing of services from BetterCare and the direct provision of elderly care by its own statutory homes. The CCAT decision differs from the European courts’ approach in FENIN in terms of the test used to establish economic activity and the finding of solidarity. According to the CCAT, the decisive factor was the Trust being in a position to generate effects which the competition rules seek to prevent. The CCAT also distinguished the facts in BetterCare from those in previous European cases and found little to support the application of the principle of solidarity in this case.

In December 2011, the UK Office of Fair Trading (OFT) issued a policy note on ‘Public Bodies and Competition’ (OFT 1389), which replaced the initial note published in August 2004 (OFT 443). The OFT’s policy note on public bodies has been adopted by the Competition and Markets Authority (CMA). According to the publication, ‘Where the nature of the activity is such that profitable private sector involvement is impossible, no “market” for the activity exists. Market forces do not (and could not) therefore play any part in the activity and, as such, that activity would not be capable of having anti-competitive effects. The fact that a public body’s conduct was capable of having anti-competitive effects in the market has been taken by the UK Competition Appeal Tribunal as evidence that that conduct was economic (see BetterCare II). To the extent that that judgment focused on purchasing conduct, it must now be considered in the light of the principles subsequently endorsed by the Court of Justice in FENIN and SELEX’ (para 2.23, OFT 1389).

The narrow definition of the term undertaking in the case of National Health Services, as advocated in FENIN, may be viewed and understood from a political perspective. It reflects a policy choice embedded in constitutional reasoning and affected by the division of powers between the Union and its Member States. The application of EU competition law in this case would have intruded into the national social sphere. The narrow approach to the term ‘undertaking’ safeguards the state’s sovereignty as national health provider and shields it from the application of European competition, despite possible anticompetitive effects.
Facts

The case arose out of a dispute between Mr Wouters and the Dutch Bar which under its regulations prohibited its members from practising in full partnership with accountants. Mr Wouters argued that the prohibition is incompatible with Union rules on competition and freedom of establishment. The Dutch court referred the case to the Court of Justice, asking, among other things, whether a regulation concerning partnerships between members of the Bar and other professionals is to be regarded as a decision taken by an association of undertakings within the meaning of Article 101(1) TFEU.

Held

‘In order to establish whether a regulation such as the 1993 Regulation is to be regarded as a decision of an association of undertakings within the meaning of [Article 101(1) TFEU], the first matter to be considered is whether members of the Bar are undertakings for the purposes of [Union] competition law.’ (para 45)

The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. It is also settled case-law that any activity consisting of offering goods and services on a given market is an economic activity. Members of the Bar offer, for a fee, services in the form of legal assistance and bear the financial risks attached to the performance of those activities. That being so, members of the Bar carry on an economic activity and are undertakings for the purposes of Article 101 TFEU. 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. (paras 46–9)

A second question is whether when it adopts a regulation concerning partnerships between members of the Bar and members of other professions, the Bar is to be regarded as an association of undertakings, or on the contrary, as a public authority. ‘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 (see to that effect, Joined Cases C-159/91, C-160/91 Poucet and Pistre [1993] ECR I-637, paragraphs 18 and 19, concerning the management of the public social security system), or which is connected with the exercise of the powers of a public authority (see to that effect, Case C-364/92 Sat Fluggesellschaft [1994] ECR I-43, paragraph 30, concerning the control and supervision of air space, and Case C-343/95 Diego Cali & Figli [1997] ECR I-1547, paragraphs 22 and 23, concerning anti-pollution surveillance of the maritime environment).’ (para 57)

The Netherlands Bar is not fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (Poucet and Pistre), nor does it exercise powers which are typically those of a public authority (Sat Fluggesellschaft). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity. Its governing bodies are composed exclusively of members of the Bar elected solely by members of the profession. In addition, when it adopts measures such as the Regulation in question, the Bar is not required to do so by reference to specified public-interest criteria. Subsequently, the Netherlands Bar must be regarded as an association of undertakings within the meaning of Article 101(1) TFEU. (paras 58–64).

Comment

The Bar was held to be an association of undertakings when it adopts a regulation such as the 1993 Regulation which regulates the member’s economic activities. Note, however, that the Bar was held not to constitute an undertaking or group of undertakings for the purposes of Article 102 TFEU, since it does not carry on any economic activity and because its members are not sufficiently linked to each other to be able adopt the same conduct and limit competition between them. (paras 112–14)
Facts
Reference from the German courts for a preliminary ruling, concerning the classification of German ‘associations of sickness funds’ as undertakings. According to the statutory health insurance scheme in Germany, employees are obliged, subject to some exceptions, to be insured by statutory sickness funds. These funds, which are governed by German law and financed through contributions levied on insured persons and their employers, based on their income, operate under the principle of solidarity. They compete, to a limited extent, with each other and with private funds when providing services to those people for whom insurance is voluntary. In the proceedings at the German courts the question arose whether these funds, when operating according to the law and setting the maximum level of contribution for medicines and medical products are operating as undertakings.

Held
‘The concept of an undertaking in competition law covers any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed (Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21, and Case C-218/00 Cisal [2002] ECR I-691, paragraph 22).’ (para 46)

‘In the field of social security, the Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not engage in economic activity. The Court has found that to be so in the case of sickness funds which merely apply the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. Their activity, based on the principle of national solidarity, is entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions (Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, paragraphs 15 and 18).’ (para 47)

‘The fact that the amount of benefits and of contributions was, in the last resort, fixed by the State led the Court to hold, similarly, that a body entrusted by law with a scheme providing insurance against accidents at work and occupational diseases, such as the Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro (the Italian National Institute for Insurance against Accidents at Work), was not an undertaking for the purpose of the Treaty competition rules (see Cisal, cited above, paragraphs 43 to 46).’ (para 48)

‘On the other hand, other bodies managing statutory social security systems and displaying some of the characteristics referred to in paragraph 47 of the present judgment, namely being non-profit-making and engaging in activity of a social character which is subject to State rules that include solidarity requirements in particular, have been considered to be undertakings engaging in economic activity (see Case C-244/94 Fédération Française des Sociétés d’Assurance and others [1995] ECR I-4013, paragraph 22, and Case C-67/96 Albany [1999] ECR I-5751, paragraphs 84 to 87).’ (para 49)

‘Thus, in Fédération Française des Sociétés d’Assurance and others, at paragraph 17, the Court held that the body in question managing a supplementary old-age insurance scheme, engaged in an economic activity in competition with life assurance companies and that the persons concerned could opt for the solution which guaranteed the better investment. In paragraphs 81 and 84 of Albany, concerning a supplementary pension fund based on a system of compulsory affiliation and applying a solidarity mechanism for determination of the amount of contributions and the level of benefits, the Court noted however that the fund itself determined the amount of the contributions and benefits and operated in accordance with the principle of capitalisation. It deduced therefrom that such a fund engaged in an economic activity in competition with insurance companies.’ (para 50)

Sickness funds in the German statutory health insurance scheme are involved in the management of the social security system and fulfil an exclusively non-profit making social function, which is founded on the principle of national solidarity. The funds are compelled by law to offer their members benefits which do not depend on
the amount of the contributions. The funds are not in competition with one another or with private institutions as regards grant of the obligatory statutory benefits in respect of treatment or medicinal products which constitutes their main function. (paras 51–4)

‘It follows from those characteristics that the sickness funds are similar to the bodies at issue in Poucet and Pistre and Cisal and that their activity must be regarded as being non-economic in nature.’ Subsequently, the funds do not constitute undertakings within the meaning of Articles [101 TFEU] and [102 TFEU]. (paras 55, 57)

‘The latitude available to the sickness funds when setting the contribution rate and their freedom to engage in some competition with one another is meant to encourage the sickness funds to operate in accordance with principles of sound management and does not call this analysis into question.’ (para 56)

When the fund associations determine the fixed maximum amounts they merely perform an obligation which is imposed upon them by the law. This action is linked to the exclusively social objective of the sickness funds and does not constitute an activity of an economic nature. (paras 58–64)

Comment

In paragraph 58 the Court noted that there is a possibility that, ‘besides their functions of an exclusively social nature within the framework of management of the German social security system, the sickness funds … engage in operations which have a purpose that is not social and is economic in nature. In that case the decisions which they would be led to adopt could perhaps be regarded as decisions of undertakings or of associations of undertakings.’ The court then concluded that the fixing of maximum amounts in this particular case is linked to the social objectives of the funds (paras 58–64). The statement of principle is interesting as the court considered it possible for the funds to be classified as undertakings if they would engage in operations which are not social in nature.

Note that the Court of Justice did not follow the opinion of Advocate General Jacobs. In his opinion, AG Jacobs stated that ‘compulsory state social security schemes such as those at issue in Cisal [Case C-218/00 Cisal di Battistello Venanzio & Co Sas v Istituto Nazionale Per L’Assicurazione Contro Gli Infortuni Sul Lavoro, [2002] ECR I-691, [2002] 4 CMLR 24,] and Poucet and Pistre [Joined cases C-159/91 and C-160/91, page 7 above] are not classified as economic activities because they are incompatible, even in principle, with the possibility of a private undertaking carrying them on’ (paras 30–2, AG opinion). ‘By contrast, pension schemes which are funded through the administration of a capital fund, into which contributions are paid, and in which benefits are directly related to contributions, have been held in FFSA and Albany to be subject to the [Union] competition rules, despite the existence of certain elements of solidarity. In such schemes, the redistributive element is not such as to entail a suppression of the types of activity habitually provided by private insurance and pension companies, such as actuarial assessment and the management of investments.’ (para 34, AG opinion). He subsequently distinguished between this case and Cisal and Poucet and Pistre as in the present case there was potential for the funds to compete with one another and with private undertakings in the provision of health insurance services, a fact which demonstrates that the system's redistributive element is not such as to preclude economic activity. The Advocate General added that the fact that the level of benefits provided under a scheme is determined by law cannot in itself rule out the application of the competition rules. Given the existence of such competition, he concluded that European competition rules should be applicable. In addition he concluded that the setting of fixed amounts, which is the alleged anti-competitive conduct, falls within the sphere of the economic activity which the sickness funds perform.
Facts
A preliminary reference to the Court of Justice which originated in proceedings in the Netherlands Hoge Raad that reviewed Albany’s refusal to make contribution to ‘State endorsed’ pension funds, while arguing that these acted in violation of competition law. In its judgment the Court of Justice considered, among other things, whether a non-profit-making pension fund which has been entrusted with the management of a supplementary pension scheme, which has been set up by a collective agreement between organisations representing management and labour, constitutes an undertaking. The Court of Justice made references to Höfner and Elser (page 5 above), Poucet Pistre (page 7 above), and Fédération française des sociétés d’assurance (page 7 above). It noted that the sectoral pension fund in this case engaged in an economic activity in competition with insurance companies. It held that the fact that the fund was non-profit-making and that its operation was based on the principle of solidarity were not sufficient to deprive the sectoral pension fund of its status as an undertaking.

Comment
The judgment is consistent with earlier case-law. Noteworthy are comments made by AG Jacobs on the status of employees and trade unions.

The AG confirmed in his opinion that it is generally accepted that employees fall outside the prohibition of Article 101(1) TFEU. As for trade unions, he commented that: ‘Since employees cannot be qualified as undertakings for the purposes of [Article 101 TFEU], trade unions, or other associations representing employees, are not “associations of undertakings”. However, are trade unions themselves “undertakings”? The mere fact that a trade union is a non-profit-making body does not automatically deprive the activities which it carries on of their economic character. A trade union is an association of employees. It is established that associations may also be regarded as “undertakings” in so far as they themselves engage in an economic activity. It must be borne in mind 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. With regard to ordinary trade associations, the result of that delimitation is often not important, since [Article 101 TFEU] applies in the same way to agreements between undertakings and to decisions by associations of undertakings. It maybe relevant when the Commission has to decide to whom to address its decision and whom to fine. However, in the case of trade unions that delimitation becomes decisive, since, if the trade union is merely acting as agent, it is solely an executive organ of an agreement between its members, who themselves—as seen above—are not addressees of the prohibition of [Article 101(1) TFEU]. 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. There are certainly circumstances where activities of trade unions fulfil both conditions. Some trade unions may for example run in their own right supermarkets, savings banks, travel agencies or other businesses. When they are acting in that capacity the competition rules apply. However in the present cases the trade unions are engaged in collective bargaining with employers on pensions for employees of the sector. In that respect the trade unions are acting merely as agent for employees belonging to a certain sector and not in their own right. That alone suffices to show that in the present cases they are not acting as undertakings for the purposes of competition law.’ (paras 218–27, AG opinion)

In Case C-22/98 Jean Claude Becu [2001] ECR I-5665, [2001] 4 CMLR 968, the Court of Justice noted that in performance of dock work for their employers, recognised dockers operate as workers and are incorporated into their employer’s economic unit and do not therefore in themselves constitute ‘undertakings’ within the meaning of Union competition law. (para 26)
Facts


In its judgment the General Court dismissed an application for annulment of a Commission's decision in which it rejected a complaint concerning an alleged infringement of Article 102 TFEU by the European Organisation for the Safety of Air Navigation (Eurocontrol) on the basis that Eurocontrol did not constitute an undertaking within the meaning of Article 102 TFEU.

The General Court held that the European Commission was wrong to rely on its decision in a previous Court of Justice judgment in which Eurocontrol was held not to constitute an undertaking. (Case C-364/92 SAT Fluggesellschaft, page 6 above) It stated 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.' (para 54, General Court judgment) It therefore held that that judgment did not preclude Eurocontrol from being regarded as an undertaking in relation to other activities than those referred to in Case C-364/92.

The General Court examined Eurocontrol's activity of technical standardisation and found it not to constitute an economic activity as it did not consist of offering goods or services on a given market. (paras 56–62, General Court) Citing the FENIN judgment (pages 9 and 10 above) the General Court stated, that the fact that Eurocontrol's standardisation activity is not an economic activity implies that the acquisition of prototypes in the context of that standardisation is also not an economic activity and, in any event, is ancillary to the promotion of technical development. (paras 65–77, General Court) The General Court noted that Eurocontrol's activity of assisting the national administrations was separable from its tasks of airspace management and involved the offering of services in a market in which private undertakings operate. It concluded that the activity whereby Eurocontrol provides assistance to the national administrations is an economic activity and that, consequently, Eurocontrol, in the exercise of that activity, is an undertaking within the meaning of Article 102 TFEU. (paras 86–90, General Court) It nonetheless did not find this activity to infringe Article 102 TFEU.

Held

Did the assistance provided by Eurocontrol constitute an economic activity?

'It should be borne in mind in this regard, as the [General Court] observed at paragraph 87 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity (Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 75; and Case C-49/07 MOTOE [2008] ECR I-4863, paragraph 22).' (para 69)

'It should also be borne in mind that, according to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition (see, to that effect, Case 107/84 Commission v Germany [1985] ECR 2655, paragraphs 14 and 15; SAT Fluggesellschaft, paragraph 30; and MOTOE, paragraph 24).' (para 70)

'In SAT Fluggesellschaft, the Court, while not specifically ruling on Eurocontrol's activity of assisting the national administrations, considered at paragraph 30 of that judgment 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 and are not of an economic nature. The Court therefore held that [Articles 102 and 106 TFEU] must be interpreted as meaning that an international organisation such as Eurocontrol is not an undertaking for the purposes of those provisions.' (para 71)
"Contrary to what Selex maintains, that conclusion also applies with regard to the assistance which Eurocontrol provides to the national administrations, when so requested by them, in connection with tendering procedures carried out by those administrations for the acquisition, in particular, of equipment and systems in the field of air traffic management." (para 72)

"It can be inferred from the Convention on the Safety of Air Navigation that the activity of providing assistance is one of the instruments of cooperation entrusted to Eurocontrol by that convention and plays a direct role in the attainment of the objective of technical harmonisation and integration in the field of air traffic with a view to contributing to the maintenance of and improvement in the safety of air navigation. That activity takes the form, inter alia, of providing assistance to the national administrations in the implementation of tendering procedures for the acquisition of air traffic management systems or equipment and is intended to ensure that the common technical specifications and standards drawn up and adopted by Eurocontrol for the purpose of achieving a harmonised European air traffic management system are included in the tendering specifications for those procedures. It is therefore closely linked to the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation and is thus connected with the exercise of public powers." (para 76)

"The [General Court] therefore made an assessment that was erroneous in law in finding that the activity of assisting the national administrations was separable from Eurocontrol's tasks of air space management and development of air safety by considering that that activity had an indirect relationship with air navigation safety, on the ground that the assistance provided by Eurocontrol covered only technical specifications in the implementation of tendering procedures and therefore affected air navigation safety only as a result of those procedures." (para 77)

"It follows from all the foregoing considerations that the [General Court] erred in law by regarding Eurocontrol's activity of assisting the national administrations as an economic activity and, as a consequence, on the basis of grounds that were erroneous in law, considering that Eurocontrol was, in the exercise of that activity, an undertaking within the meaning of Article [102 TFEU]. Consequently, it erred in upholding, to that extent, the first plea in law expounded before it by the appellant alleging a manifest error of assessment as to the applicability of Article [102 TFEU] to Eurocontrol. Consequently, it erred in upholding, to that extent, the first plea in law expounded before it by the appellant alleging a manifest error of assessment as to the applicability of Article [102 TFEU] to Eurocontrol. (para 80)

This error in law in the grounds of the judgment under appeal does not affect its operative part and subsequently does not mean that it must be set aside. (para 83)

The activity of technical standardisation

"In order to draw the distinction complained of, the [General Court] first of all stated, at paragraph 59 of the judgment under appeal, that the adoption by the Council of Eurocontrol of standards drawn up by the executive organ of that organisation is a legislative activity, since the Council of Eurocontrol is made up of directors of the civil aviation administration of each contracting Member State, appointed by their respective States for the purpose of adopting technical specifications which will be binding in all those States. According to the grounds of the judgment under appeal, that activity is directly connected with the exercise by those States of their powers of public authority, Eurocontrol's role thus being akin to that of a minister who, at national level, prepares legislative or regulatory measures which are then adopted by the government. This activity therefore falls within the public tasks of Eurocontrol." (para 89)

"The [General Court] then stated, at paragraph 60 of the judgment under appeal, that the preparation and production of technical standards by Eurocontrol could, conversely, be separated from its tasks of managing air space and developing air safety. As justification for that assessment, it considered that the arguments advanced by the Commission to prove that Eurocontrol's standardisation activities were connected with that organisation's public service mission related, in fact, only to the adoption of those standards and not to the production of them, since the need to adopt standards at international level does not necessarily mean that the body which sets those standards must also be the one which subsequently adopts them." (para 90)

"However, Article 2(1)(f) of the Convention on the Safety of Air Navigation provides that Eurocontrol is responsible for developing, adopting and keeping under review common standards, specifications and
practices for air traffic management systems and services. It is therefore clear that the contracting States entrusted Eurocontrol with both the preparation and production of standards and with their adoption, without separating those functions.’ (para 91)

‘Moreover, the preparation and production of technical standards plays a direct role in the attainment of Eurocontrol’s objective, defined in Article 1 of the Convention on the Safety of Air Navigation and referred to at paragraph 73 above, which is to achieve harmonisation and integration with the aim of establishing a uniform European air traffic management system. Those activities form an integral part of the task of technical standardisation entrusted to Eurocontrol by the contracting parties in the context of cooperation among States with a view to maintaining and developing the safety of air navigation, which constitute public powers.’ (para 92)

‘It follows that the judgment under appeal is vitiated by an error in law in that it states that the preparation and production of technical standards by Eurocontrol can be separated from its task of managing air space and developing air safety. However, that error does not affect the [General Court’s] conclusion, which is based on other grounds, that the Commission did not make a manifest error of assessment in taking the view that Eurocontrol’s technical standardisation activities were not economic activities and that the competition rules of the Treaty did not apply therefore to them. It must therefore be held once again that the fact that there is an error of law in the grounds of the judgment under appeal does not mean that that judgment must be set aside.’ (para 93)

The EU case-law on social benefits

The General Court did not err when it held ‘that it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity (see Case C-205/03P FENIN v Commission [2006] ECR I-6295, paragraph 26). The [General Court] correctly concluded from this that the fact that technical standardisation is not an economic activity means that the acquisition of prototypes in connection with that standardisation is not an economic activity either… That reasoning can obviously be applied to activities other than those that are social in nature or are based on solidarity, since those factors do not constitute conditions for the purpose of determining that an activity is not of an economic nature …’ (paras 102, 103)

Appeal dismissed.

Comment

The company in these proceedings is the same company as that in Case C-364/92 (page 6 above) which was held in those proceedings not to be an undertaking. Note, however, that the functional approach requires each activity to be evaluated in context and subsequently led the General Court to reject the Commission’s reliance on the previous judgment by the Court of Justice. (para 54, General Court judgment)

The Court of Justice rejected the General Court’s finding that the activity of assisting the national administrations was separable from Eurocontrol’s tasks of air space management. (paras 69–83)

Note the application of the reasoning laid down in FENIN according to which the nature of the purchasing activity is determined according to the nature of the subsequent use of the purchased goods. (paras 102, 103 Court of Justice judgment; paras 65–77, General Court judgment)
Facts
A reference for a preliminary ruling concerning activities of a public authority operating the ‘companies register’, which collects information that undertakings have a statutory obligation to submit to it, and which provides access to that information and searches in its database in return for payment. The referring Court asked whether this constitutes an economic activity, as a result of which the public authority is considered an undertaking and therefore may be subjected to the provisions of Article 102 TFEU.

Held
An undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. Offering goods and services amounts to an economic activity. Accordingly, the state, or a state entity may act as an undertaking, in relation to part of its activities, and be subjected to the competition provisions. (paras 35–7)

‘In so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers (see, to that effect, Case C-113/07P SELEX Sistemi Integrati v Commission [2009] ECR I-2207, paragraph 72 et seq).’ (para 38)

‘In addition, the fact that a product or a service supplied by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity carried out to be classified as an economic activity and the entity which carries it out as an undertaking (see, to that effect, SAT Fluggesellschaft, paragraph 28 et seq and Diego Calì & Figli, paragraphs 22 to 25).’ (para 39)

The data collection activity in this case, which is based on a statutory obligation on undertakings to submit information, falls within the exercise of public powers and is not an economic activity. Maintaining the database, making that data available to the public and allowing searches cannot be separated from the activity of collection of the data and therefore do not constitute economic activities. (paras 40–41)

Access to the data in this case is subjected to payment. ‘[T]o the extent that the fees or payments due for the making available to the public of such information are not laid down directly or indirectly by the entity concerned but are provided for by law, the charging of such remuneration can be regarded as inseparable from that making available of data. Thus, the charging … of fees or payments due for the making available to the public of that information cannot change the legal classification of that activity, meaning that it does not constitute an economic activity.’ (para 42)

Comment
The judgment reflects the Court’s jurisprudence, as developed in FENIN (pages 9 and 10 above) and SELEX (page 16 above), and maintains a narrow interpretation of the concept of ‘economic activity’.

The Court held that it is impossible to separate the activity of collecting data submitted by undertakings in accordance with a statutory obligation (that activity was held not to amount to an economic activity) from the activity of making that data available to the public against payment. The Court did not elaborate on the reason which ties the profitmaking utilisation of the data to the regulatory harvesting of the data.
Facts

AEG–Telefunken (AEG), a German company which manufactures and markets consumer electronic products, notified the Commission of a selective distribution system (SDS) for its branded products. The Commission did not object to the SDS, yet later found that the actual application of the SDS by AEG and its subsidiaries did not correspond to the scheme notified to it. Subsequently, the Commission found that AEG had infringed Article 101 TFEU and improperly applied its SDS by discriminating against certain distributors and by influencing dealers’ resale prices. AEG appealed to the Court of Justice, arguing, among other things, that it cannot be held liable for activities and individual infringements alleged by the Commission to have been committed by its subsidiaries (TFR, ATF, ATBG).

Held

The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. This is particularly so where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. (para 49)

‘As AEG has not disputed that it was in a position to exert a decisive influence on the distribution and pricing policy of its subsidiaries, consideration must still be given to the question whether it actually made use of this power. However, such a check appears superfluous in the case of TFR which, as a wholly-owned subsidiary of AEG, necessarily follows a policy laid down by the same bodies as, under its statutes, determine AEG’s policy.’ (para 50)

‘AEG’s influence on ATF emerges indirectly from an internal memorandum of ATF dated 30 June 1978, where it is stated that a distributor with whom ATF was negotiating with a view to his acceptance was aware of “Telefunken’s policy, which succeeds in keeping retail prices stable and thus in maintaining an appropriate profit margin for retailers”. The word “Telefunken” shows that in fact ATF was referring to commercial policy perceived as being the result of an initiative on the part of AEG which alone was in a position to draw up a unitary policy to be followed by its various subsidiaries responsible for distributing Telefunken products.’ (para 51)

‘As to ATBG, it may be seen from the documents relating to the case of the Belgian wholesaler Diederichs that ATBG constantly informed TFR about its negotiations with Diederichs. … Furthermore, it emerges from those documents that TFR made direct contact with Diederichs to consider the possibility of regularizing his activities, although they did not involve the German market …, that it raised within its organization problems raised by Diederichs’s application for admission… and that it finally stated that: “at present there is no reason to pursue the discussions initiated with Mr Diederichs”… These matters show clearly that there was no question of ATBG’s having any independent power of decision-making as against AEG and TFR.’ (para 52)

‘It must therefore be concluded that the conduct of TFR, ATF and ATBG in restraint of competition are to be ascribed to AEG.’ (para 53)

Comment

In Case C-286/98P Stora Kopparbergs Bergslags v Commission [2000] ECR I-9925, the Court of Justice held that when a subsidiary is wholly owned it is legitimate to assume ‘that the parent company in fact exercised decisive influence over its subsidiary’s conduct.’ This was particularly so since in that case ‘the appellant had presented itself as being, as regards companies in the Stora Group, the Commission’s sole interlocutor concerning the infringement in question.’ (para 29)
Viho Europe BV v Commission
Case C-73/95P

Facts

Parker Pen Ltd operated a distribution system in Europe which was partially based on wholly owned subsidiaries. The sales and marketing activities of these subsidiaries were directed and controlled by Parker Pen. One of the main characteristics of the system was the prohibitions imposed on Parker Pen's subsidiaries from supplying Parker products to customers established in Member States other than that of the subsidiary.

Viho Europe BV challenged Parker's practice in a complaint to the European Commission alleging, among other things, that Parker infringed Article 101 TFEU by restricting the distribution of Parker products to allocated territories, consequently dividing the internal market into national markets. The Commission rejected the complaint on the ground that Parker's subsidiary companies were wholly dependent on Parker Pen UK and enjoyed no real autonomy in determining their course of action. Subsequently the implementation of Parker's policies was regarded as a normal allocation of tasks within a group of undertakings which is not subjected to Article 101 TFEU.

Viho Europe BV appealed to the General Court for annulment of the Commission's decision. The General Court dismissed the appeal and held that in the absence of an agreement between economically independent entities, relations within an economic unit cannot amount to an agreement or concerted practice between undertakings which restricts competition within the meaning of Article 101 TFEU (Case T-102/92 Viho v Commission [1995] ECR II-17).

Viho appealed to the Court of Justice.

Held

'Parker and its fully owned subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.' (para 16)

As the subsidiaries do not enjoy real autonomy in determining their course of action in the market, activities within the Parker unit, even if affecting the competitive position of third parties, cannot make Article 101 TFEU applicable. Such activities are unilateral and could in principle only fall under Article 102 TFEU if the conditions for its application were fulfilled. Appeal dismissed. (paras 17, 18)

Comment

Note the Court of Justice ruling in Case 170/83 Hydrotherm v Compact [1984] ECR 2999, where it held that '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.' (para 11).

Also note the General Court judgment in Joined Cases T-68/89, T-77/89 and T-78/89 SIV and others v Commission [1992] ECR II-1403, where it was held that Article 101 TFEU refers only to relations between economic entities which are capable of competing with one another and does not cover agreements or concerted practices between undertakings belonging to the same economic unit (paragraph 357). See also the Court of Justice ruling in Case 22/71 Beguelin Import Co v SAGL Import Export [1971] ECR 949, which focused on the lack of economic independence.

In ArcelorMittal Luxembourg SA v Commission (Joined Cases C-201/09P and C-216/09P [2011] 4 CMLR 21) AG Bot noted that this 'interpretation of the concept of undertaking has the consequence of excluding the application of Article 101(1) TFEU to agreements between a subsidiary and its parent company, since there is no agreement “between undertakings”.' (para 178).
Ijsselcentrale and others
Case IV/32.732

Facts
The Commission considered a complaint which alleged that four electricity-generating companies in the Netherlands, and a joint venture (SEP) established by them to facilitate cooperation between the electricity generators, infringed Article 101 TFEU. As part of the assessment of the complaint the Commission considered the competitiveness of a cooperation agreement concluded between the four electricity companies and SEP. It especially focused on Article 21 of the cooperation agreement which prohibited the importation and exportation of electricity by undertakings other than SEP.

SEP argued that Article 101 TFEU is not applicable to the cooperation agreement as it was not concluded between independent undertakings. It submitted that the participating companies formed an economic unit, because they were components in 'one indivisible public electricity supply system'. Accordingly, Article 21 of the cooperation agreement secured an internal allocation of tasks within the group and is not subjected to competition laws.

Held
Article 101 TFEU 'is not concerned with agreements between undertakings belonging to the same group of companies, 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 are concerned merely with the internal allocation of tasks as between the undertakings.' (para 23)

In this case, however, 'the four participants do not belong to a single group of companies. They are separate legal persons, and are not controlled by a single person, natural or legal. Each generating company determines its own conduct independently. … The fact that the generators all form part of one indivisible system of public supply changes nothing here. The distributors likewise form part of the same system, but there is no reason to suppose that they form an economic unit with the generators on that ground alone. Finally, it cannot be said that SEP itself forms an economic unit with one or more of the generating companies. SEP is a joint venture controlled by its parent companies together.' (para 24)

Comment
The Commission's finding that the companies do not form part of the same undertaking paved the way for the application of Article 101 TFEU to the agreements between them.

Note that SEP's argument raises an interesting question as to the level of control which would be deemed to deprive companies from 'real autonomy in determining their course of action in the market' (Viho Europe BV v Commission, page 21 above). Whereas in Viho the holding structure of the Parker Pen group gave rise to clear control and dependence, it is difficult to identify clearly which lower levels of control might suffice to bring different companies under the umbrella of a single undertaking. On this issue note references to Sepia Logistics v OFT and Suretrack Rail Services Limited v Infraco JNP Limited, page 25 below.

In merger cases control is defined by Article 3(2) of the Merger Regulation (Regulation (EC) No 139/2004) as the possibility of exercising decisive influence. The Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings ([2008] OJ C95/1) elaborates on that concept. Note that the Merger Regulation benchmark for control, 'possible decisive influence', is lower than the Viho benchmark which requires 'actual control.' (See Viho, para 16, contrast with the Jurisdictional Notice, paras 23, 11–35.)
Dansk Rørindustri A/S and others v Commission  

**Undertaking**  
Single Economic Entity

**Facts**

Joined appeals on several General Court judgments in which the General Court dismissed the appellants’ actions for annulment of Commission decisions in which various undertakings, and in particular certain of the appellants, were found to participate in a series of agreements and concerted practices within the meaning of Article 101(1) TFEU (Case IV/35.691/E-4 Pre-insulated pipes) ([1999] OJ L24/1). One of the issues raised on appeal concerned the General Court finding that a group of companies constituted a single undertaking for the purpose of European competition law.

**Held**

‘[T]he anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (see, in particular, Case C-294/98P Metsa-Serla and others v Commission [2000] ECR I-10065, paragraph 27).’ (para 117)

‘It is true that the mere fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those companies are a single economic unit with the result that, under [Union] competition law, the actions of one company can be attributed to the other and that one can be held liable to pay the fine for the other (see Case C-196/99P Aristrain v Commission [2003] ECR I-11005, paragraph 99).’ (para 118)

In the present case the General Court did not infer the existence of the economic unit constituting the Henss/Isoplus group solely from the fact that the undertakings concerned were controlled from the viewpoint of their share capital by a single person, but considered a series of additional elements. These established that the companies were controlled by one individual who held key functions within the management boards of those companies and represented them in various meetings. (paras 119, 120)

‘In those circumstances, the [General Court] cannot be criticised for having held, following an overall and, in principle, sovereign assessment of a range of facts, that the various undertakings constituting the Henss/Isoplus group must, for that purpose, be regarded as belonging to a single economic entity.’ (para 130)

**Comment**

Note the Court of Justice decision in Case C-286/98P Stora Kopparbergs Bergslags v Commission [2000] ECR I-9925, [2001] 4 CMLR 12. There, while dealing with a claim contesting the General Court finding that two entities formed one single undertaking, the Court noted that ‘the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, in particular, ICI v Commission, cited above, paragraphs 132 and 133); Case 52/69 Geigy v Commission [1972] ECR 787, paragraph 44, and Case 6/72 Europenballage and Continental Can v Commission [1973] ECR 215, paragraph 15).’ (para 26)

In Case T-301/04 Clearstream v Commission the General Court noted that when a parent company holds 100 per cent of the capital of a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary and that they therefore constitute a single undertaking for the purposes of competition law. It is for the parent company to rebut that presumption by adding evidence to establish that its subsidiary was independent. (para 199) See also Case T-314/01 Avebe v Commission [2006] ECR II-3085, para 136.
Facts
Following an investigation into the vitamin and pigment markets in Europe, the Commission found that various manufacturers of vitamins, among them Hoffmann-La Roche and Aventis SA, had operated price-fixing and market-sharing cartels contrary to Article 101 TFEU (Commission decision in Case COMP/E-1/37.512—Vitamins). The claimants, who had purchased vitamins from the Roche and Aventis groups during the existence of the cartels, brought proceedings in the English court for damages against a number of the cartel members and subsidiaries of the cartel members.

In the applications before the court, the defendants’ aim was to strike out and/or set aside part of the proceedings. One of the issues raised by the applicants was that there is no infringement of Article 101 TFEU if the implementation of the agreement by the subsidiary company consisted simply of obeying the orders of the parent company to sell at cartel prices that have been agreed by the parent company without the knowledge of the subsidiary.

Held
It is arguable that where two corporate entities are part of the same undertaking and one of those corporate entities has entered into a cartel agreement with a third independent undertaking, then if the first corporate entity, which was not part of the agreement and lacks knowledge of it, implements that infringing agreement, it is also infringing Article 101 TFEU. ‘In my view it is arguable that it is not necessary to plead or prove any particular “concurrence of wills” between the two legal entities within Undertaking A. The EU competition law concept of an “undertaking” is that it is one economic unit. The legal entities that are a part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of Article 101 TFEU, to be treated as the mind and will of the other entity. There is no question of having to “impute” the knowledge or will of one entity to another, because they are one and the same.’

‘In my view the fact that, in the Decision, the Commission identifies only one particular legal entity as the “infringing undertaking” does not detract from my conclusion. EU competition law has to bow to the practical fact that in national laws it is legal entities that exist; and it is legal entities that own the funds from which fines are paid. So particular entities need to be identified in order to enforce the Decision. But those practical considerations cannot determine a prior question which is whether, if one entity of an undertaking is an infringer by agreeing to fix prices, another entity that has implemented the same infringing agreement, is also an infringer.’ (paras 31, 32)

Comment
Note that in this motion the Court aimed to establish whether claims brought by the claimants were arguable. The weight attributed to the holding of the Court should reflect this lower yardstick.

In Cooper Tire and Rubber Company v Shell Chemicals UK Case No A3/2009/2487 [2010] EWCA Civ 864, the English Court of Appeal noted that ‘Although one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an [Article 101] context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the Provimi point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely?’ (para 45)
Facts

Sepia Logistics Ltd (formerly known as Double Quick Supplyline Ltd (DQS)) appealed to the Competition Appeal Tribunal against a decision taken by the Office of Fair Trading (OFT) in which the OFT concluded that, together with a number of suppliers of aluminium double-glazing spacer bars, it participated in an anti-competitive agreement and/or concerted practice and infringed the Chapter I prohibition of the UK Competition Act 1998. The OFT decision addressed not only DQS but also its parent company, Precision Concepts Ltd (PC), on the basis that PC formed part of the same undertaking as DQS, and was equally liable for its participation in the infringement. On appeal, DQS and PC challenged, among other things, the OFT’s conclusion that DQS and PC form part of the same undertaking.

Held

‘It is well established that an undertaking does not correspond to the commonly understood notion of a legal entity under, for example, English commercial or tax law; and that a single undertaking may comprise one or more legal or natural persons.’ (para 70)

‘The European Court of Justice in Hydrotherm, [Case 170/83 Hydrotherm Gerätebau GmbH v Compact de Dott Ing Mario Andreoli & CSAS [1984] ECR 2999, [1985] 3 CMLR 224] said at paragraph [11]: “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.”’ (para 72)

Crucial to this question is the matter of control as highlighted in Case C-73/95P Viho v Commission. The issue of control was also considered in Case C-286/98 Stora Kopparbergs Bergslag AB, where the Court of Justice held that the fact that a subsidiary has separate legal personality does not exclude the possibility of its conduct being imputed to the parent company, especially where it does not independently decide its own conduct on the market. Similarly, in Cases C-189/02P etc Dansk Rørindustri and others v European Commission, the Court of Justice held that conduct of one undertaking can be attributed to a controlling undertaking. (paras 73–6)

In this case DQS was a wholly-owned subsidiary of PBM of which 80 per cent were held by SGH, which was a wholly-owned subsidiary of PC. PC therefore owned indirectly 80 per cent of the shares in DQS. Mr Sander, a director of both DQC and PC had direct involvement in the infringement. Consequently, PC, through Mr Sander, was both aware of DQS’ involvement in the infringement and capable of exercising control over DQS. (paras 77–80)

Comment

Note the English High Court of Justice (Chancery Division) decision in Suretrack Rail Services Limited v Infraco JNP Limited [2002] EWHC 1316 (Ch), where as part of an application for interim relief the Honourable Mr Justice Laddie commented that ‘The fact that subsidiaries take their own decisions does not, of itself, indicate whether those subsidiaries are either independent of each other or independent of the parent. … If the fact that directors of a subsidiary take their own decisions and make their own assessment of the risks and profitability of the decisions from the viewpoint of that subsidiary were enough to prevent the subsidiary from being considered as part of a single economic unit for competition law purposes, then all subsidiaries would be treated as being separate undertakings’ (para 18). Chapter I of the UK Competition Act 1998 was held not to be applicable as the three companies concerned were subsidiaries of the same parent company and subsequently an ‘agreement between undertakings’ did not exist.

Also note Case IV/32.732 IJsselcentrale and others, and the commentary on page 22 above.
**Facts**


The Commission’s decision followed an investigation into cartel activity in which several subsidiaries of Akzo Nobel NV were involved. In its decision the Commission concluded that the subsidiaries lacked commercial autonomy and were controlled by their parent company, Akzo Nobel NV. Together, these companies formed a single economic unit and constituted a single undertaking. The Commission subsequently addressed the contested decision to Akzo Nobel, notwithstanding the fact that it had not itself participated in the cartel.

**Held**

The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. That concept must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal. (paras 54–55)

‘It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, … having regard in particular to the economic, organisational and legal links between those two legal entities. … That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking. … Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of [Article 101 TFEU] 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.’ (paras 58, 59)

Where a parent company has a 100 per cent shareholding in a subsidiary which has infringed competition rules, there is a rebuttable presumption that the parent company exercised a decisive influence over the conduct of its subsidiary. The Commission is able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, show that its subsidiary acts independently on the market. (paras 61–65) Appeal dismissed.

**Comment**

The concept of a single economic unit implies that a parent company may be held liable for the anticompetitive activity of its wholly owned subsidiary even if the parent company was not party to the anticompetitive activity. The Commission can subsequently address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

In its judgment the Court of Justice clarified that where a parent company has a 100 per cent shareholding in its subsidiary there is a rebuttable presumption that the parent company exercises a decisive influence over the conduct of its subsidiary. That presumption may also be applied in cases of partial ownership which entail control. See, for example, Case T-168/05 Arkema SA v Commission, in which the General Court held that holding of ‘almost entirety of the capital of a subsidiary’ will give rise to a rebuttable presumption that the parent company exercises a decisive influence. (para 70) On appeal, the Court of Justice upheld the General Court’s judgment (Case C-520/09P).
Facts

An application for annulment of Commission Decision (Case COMP/C.38.238.B-2—Raw tobacco) in which the Commission found that a number of undertakings had infringed Article 101 TFEU by fixing the price of raw tobacco. One of the undertakings involved in the cartel was World Wide Tobacco España, SA (‘WWTE’). In its decision the Commission attributed the unlawful conduct of WWTE to three companies which directly or indirectly held controlling shares in WWTE. These were (1) Trans-Continental Leaf Tobacco Corp Ltd (‘TCLT’), a wholly owned subsidiary of (2) Standard Commercial Tobacco Co, Inc (‘SCTC’), a wholly owned subsidiary of (3) American Multinational Standard Commercial Corp (‘SCC’). The Commission found WWTE and its parent companies jointly responsible for the infringement.

The parties applied to the General Court for annulment of the Commission’s decision. Case T-24/05 [2011] 4 CMLR 9. The General Court held that the conduct of a subsidiary may be attributed to the parent company in particular where that subsidiary does not decide independently upon its own conduct on the market, but carries out the instructions the parent company gives it. The Court noted that the fact that a subsidiary has a dedicated local management and its own resources does not prove, in itself, that the subsidiary is independent of its parent companies. It clarified that the Commission is able to address a decision imposing fines on the parent company not because of an alleged liability of the parent company due to its participation in the infringement, but because the parent company and the subsidiary constitute a single undertaking for the purposes of Article 101 TFEU. The Court added that the Commission has to establish (1) that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, and (2) that that influence was actually exercised. Decisive influence may be exercised through sole or joint control. Where a parent company has, directly or indirectly, 100% shareholding in a subsidiary there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary. The fact that a subsidiary has a dedicated local management and its own resources does not prove, in itself, that that company decides upon its conduct on the market independently of its parent companies. The General Court partially annulled the Commission’s decision with respect to TCLT’s liability. The judgment had no effect on the fine for which the other two parent companies, SCC and SCTC, remained jointly and severally liable. The undertakings and Commission appealed to the Court of Justice. Appeals dismissed.

Held

When a parent company has a 100% shareholding in a subsidiary, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary. In those circumstances, it is sufficient for the Commission to prove that the entire capital of the subsidiary is held by its parent company in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. In its decision, the Commission is not bound to rely exclusively on that presumption. There is nothing to prevent the Commission from establishing that a parent company actually exercises decisive influence over its subsidiary by means of other evidence or by a combination of such evidence and that presumption. (paras 47–49)

Comment

In its decision, the Commission found the parent companies liable only where there was evidence to support actual exercise of decisive influence by the parent companies holding the entire share capital of the subsidiaries. The Court of Justice held that the Commission was justified to use the ‘dual basis’ approach, considering the uncertainty as to the case law at the time of the decision. The General Court and Court of Justice noted that in choosing that method, the Commission imposed upon itself a standard of proof of the actual exercise of decisive influence which was more onerous than that under the presumption of decisive influence.
Facts

An appeal against the General Court’s judgment in Case T-76/08 in which the General Court dismissed the application to annul a Commission decision which found EI du Pont de Nemours and the Dow Chemical Company to be liable for cartel activity carried out by their joint venture, DuPont Dow Elastomers LLC, which was held, at that time, in equal shares by both companies.

In its judgment the General Court considered the economic, legal and organisational links between the parent companies and the joint venture. It noted the parent companies’ ability to supervise the strategic direction of the joint venture, their power to appoint and dismiss officers of the joint venture, and to approve capital expenditure and borrowing above certain levels. The fact that the parent companies held equal shares in the joint venture meant that each could block the joint venture’s strategic decisions. The General Court held that:

‘It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities… in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking.’ (para 59, General Court Judgment, Case T-76/08)

EI du Pont de Nemours appealed to the Court of Justice, asking to set aside the General Court’s judgment.

Held

The conduct of a subsidiary can be imputed to its parent company where that subsidiary, although it has separate legal personality, does not operate independently but carries out, in all material respects, the instructions given to it by the parent company. In such case, the parent company and its subsidiary form a single economic unit and therefore a single undertaking for the purposes of Article 101 TFEU. Subsequently, ‘the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (see Akzo Nobel and Others v Commission, paragraph 59, and Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others, paragraph 44).’ (paras 41, 42)

‘[I]n order to be able to impute the conduct of a subsidiary to the parent company, the Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised (see, to that effect, Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, paragraph 50).’ (para 44)

‘It should be noted in that regard that the rule that it is necessary to check whether the parent company actually exercised decisive influence over its subsidiary applies only where the subsidiary is not wholly owned by its parent company. According to the settled case-law of the Court of Justice, where the entire capital of the subsidiary is owned, there is no longer any requirement to carry out such a check since, in those circumstances, there is a presumption of decisive influence on the part of the parent company, which has the burden of rebutting that presumption (see Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International and Others, paragraphs 46 and 47 and the case-law cited).’ (para 45)

‘Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of [Article 101 TFEU].’ (para 47)
'It must therefore be held that, as regards the verification process of the assessment carried out by the Commission, the General Court did not misconstrue the term “a single undertaking.”' (para 48) The autonomy which a joint venture enjoys within the meaning of Article 3(4) of the EC Merger Regulation does not mean that that joint venture also enjoys autonomy in relation to adopting strategic decisions and that it is not under the decisive influence of its parent companies for the purposes of Article 101 TFEU. (paras 51–53) Appeal dismissed.

Comment

When a parent company holds the entire capital of the subsidiary, there is a rebuttable presumption of decisive influence on the part of the parent company. The two entities form a single economic unit and therefore a single undertaking for the purposes of Article 101 TFEU. Unless the parent company rebuts the presumption of decisive influence, the conduct of its subsidiary can be imputed to it and the Commission may address a decision imposing fines to the parent company, without establishing its involvement in the infringement.

When a parent company does not hold the entire capital of the subsidiary, the Commission must show that influence was actually exercised in order to impute the conduct of a subsidiary to a parent company. To do so, the Commission needs to take account of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company.

The fact that a joint venture forms a separate legal personality from that of the parent companies, and is an ‘autonomous economic entity’ in the context of the European Merger Regulation, does not preclude the possibility that it does not enjoy autonomy in strategic decision-making, and that it is therefore under the decisive influence of its parent companies for the purposes of Article 101 TFEU.

The fact that a parent company is liable for the activities of a joint venture under Article 101 TFEU does not necessarily lead to the conclusion that the companies form a single undertaking. Agreements between the parent company and the joint venture may constitute an agreement ‘between undertakings’ and be subjected to Article 101 TFEU if the two companies do not form a ‘single economic entity’.

In Case C-408/12P YKK v Commission, the Court held that: ‘A company cannot be held to be responsible for infringements committed independently by its subsidiaries before the date of their acquisition, since the latter must themselves answer for their unlawful conduct prior to that acquisition, and the company which has acquired them cannot be held to be responsible (see the judgment in Cascades v Commission, C-279/98 P, …, paragraphs 77 to 79).’ (para 65) For a full review of this case, see the discussion on fines in Chapter 10.

In Case C-279/98P, Cascades SA v Commission, the Court held that: ‘It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking.’ (para 78)
Koninklijke Grolsch NV (Grolsch), and its fully owned subsidiary were found by the Commission to have taken part in an anticompetitive cartel between brewing companies in the Netherlands. Grolsch brought an action of annulment against the decision and denied direct involvement in the infringement to which its subsidiary was part.

The General Court held that the Commission had not established Grolsch’s direct involvement in the agreement. The Court repeated the case law on parent liability and noted that the conduct of a subsidiary may be imputed to the parent company especially when, despite having a distinct legal personality, the subsidiary does not decide independently upon its own conduct in the market. In such a situation, the parent company and its subsidiary form a single economic unit and are treated as a single undertaking within the meaning of Article 101 TFEU. This allows the Commission to issue a decision imposing fines on the parent company, without any requirement to establish its personal involvement in the offence. Where a parent company owns 100% interest in a subsidiary, there is a rebuttable presumption that the parent company actually exercises decisive influence. (paras 80–2)

However, in this case the Commission failed to state clearly the reasons why it attributes the infringement carried out by the subsidiary to the parent company, Grolsch. The Commission’s decision makes no reference to the economic, organisational and legal relationship between the parent company and its subsidiary. By omitting to state clearly that Grolsch’s liability was imputed based on its full ownership and control of the subsidiary, the Commission deprived Grolsch of its right of defence and of an opportunity to rebut the presumption of influence. (paras 76–94). The Commission’s decision was annulled.

Application for partial annulment of Commission decision (Case COMP/F/38.620—Hydrogen peroxide and perborate), in which the Commission found Air Liquide to be liable for the unlawful conduct of its subsidiary, Chemoxal. In its decision the Commission noted that where a parent company owns 100% interest in a subsidiary there is a rebuttable presumption that the parent company effectively exercises a decisive influence on the conduct of its subsidiary. In those circumstances, it is sufficient that the Commission shows that the entire capital of a subsidiary is owned by its parent to assume that the latter has a decisive influence on trade policy of the subsidiary. Air Liquide attempted to rebut the presumption by demonstrating, among other things, the lack of overlap between the companies in terms of management and staff, the broad powers of Chemoxal’s officers to run the company, Chemoxal’s autonomy in the development of strategic projects, and the fact that it had its own services to implement its commercial activities. The Commission considered that evidence presented by Air Liquide was insufficient to rebut the presumption. Air Liquide brought an action of annulment against the decision.

The General Court did not comment directly on the arguments put forward by Air Liquide to demonstrate the independence of Chemoxal. It held, however, that the nature of the rebuttable presumption at issue required the Commission to examine whether Air Liquide had demonstrated that its subsidiary was acting independently. However, the Commission did not adequately examine the arguments put forward by Air Liquide, in light of all relevant factors relating to economic, organisational and legal issues between the companies concerned. In doing so the Commission failed to state reasons for the attribution of the infringement at issue to Air Liquide. Decision annulled. (paras 66–84)
Toshiba Carrier UK Ltd v KME Yorkshire Ltd

FACTS

The European Commission found a number of companies to have infringed Article 101 TFEU by taking part in an international cartel in the supply of industrial copper tubing. Following the Commission decision, Toshiba Carrier and other companies launched a damage action in the English court against the infringing companies. The action targeted the companies identified in the Commission’s decision, as well as their UK subsidiaries, even though those companies were not the subject of Commission findings. In a summary judgment the Court was required to consider whether the claims were arguable. It dismissed the defendant’s application for orders striking out the claims.

HELD

In *Provimi v Roche Products Ltd* Aikens J considered it arguable that where two corporate entities are part of an undertaking and one of those entities has entered into an infringing agreement, then if the other corporate entity implements that infringing agreement, it is also infringing Article 101 TFEU. He added that the fact that the Commission identifies in its decision only one particular legal entity as the infringing undertaking does not detract from that conclusion. (para 27)

In *Cooper Tire and Rubber Company v Shell Chemicals UK* the Court of Appeal made reference to the *Provimi* judgment and noted that it does not sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible, rather than to impose a fine on all the entities of the relevant undertakings. It is therefore by no means obvious that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. The Court concluded by stating that if it had been necessary to address the *Provimi* point, it would have been inclined to make a reference to the Court of Justice before coming to a conclusion on jurisdiction. (paras 28-30)

‘I have, of course, noted and carefully considered what the Court of Appeal there said about making a reference to the Court of the European Union. In my view it would not be appropriate to make a reference at this stage.’ (para 43)

‘If the Commission has investigated certain trade practices pursued by specified undertakings and reached the conclusion that they infringed Article 101 that will bind the addressee. If a national court concludes on evidence adduced before it that X Ltd was a part of the same undertaking and involved in the same trade practices as that addressee it would be contrary to Article 16 to conclude that X Ltd or that undertaking had not infringed Article 101 in pursuing those same trade practices. And if the national court is precluded by Article 16 from reaching a conflicting decision why should it undertake the task of re-investigating the same matters …’ (para 44)

COMMENT

The judgment adds to a number of cases in which as part of a private action before national courts, purchasers bring proceedings against the subsidiaries of addressees of a Commission decision (the undertaking). These subsidiaries are used as ‘Anchor defendants’ to bring the claim within the jurisdiction of the national court, in line with the provisions of Regulation 44/2001 and as of January 2015 with Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In the context of the discussion of the notion of undertaking, these cases raise a difficult question as to whether the competition law notion of undertaking is sufficient in order to impute liability to a company which was not addressed directly in the Commission’s decision, yet forms part of the single economic entity.

For a discussion of *Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc*, see page 24 above.
Facts

On 2 April 2014, the European Commission adopted a decision condemning a number of undertakings for their participation in a cartel activity in the market for underground and submarine high-voltage power cables. One of the undertakings, Prysmian, which participated in the cartel, was owned by the private equity fund Goldman Sachs Group, Inc, during part of the cartel operation period. Having established that Prysmian infringed the competition laws, the Commission subsequently found both Prysmian and its former owner, Goldman Sachs, to be jointly and severally liable for the fine.

In a press release Commissioner Almunia noted that the investment bank Goldman Sachs had acquired decisive influence over Prysmian—the same as that of industrial owners. The bank had several managers and directors on Prysmian’s board and took part in strategic decision-making. He noted that investment companies have a responsibility to ensure a compliance culture.


Comment

The pure financial investor defence reflects the understanding that such an investor would not acquire decisive influence over the target company. In her opinion in Case C-97/08P Akzo Nobel, Advocate General Kokott noted that the presumption of decisive influence may be rebutted by demonstrating that in practice the parent company exercised restraint and did not influence the market conduct of its subsidiary. Such may be the case, for example, when the parent company is a pure financial investor.

The scope of the pure financial investor defence was later explored by the General Court in Case T-392/09 Garantovaná as. v Commission. There, the Court held that a “pure financial investor” must therefore be understood as referring to the case of an investor who holds shares in a company in order to make a profit, but who refrains from any involvement in its management and in its control.’ (para 52)

In Case T-395/09 Gigaset AG v Commission the General Court considered the activities of an investment company specialising in restructuring. That company was held liable for the activities of the target company, SKW, which participated in a cartel activity. Gigaset argued that it is not liable for the activities of SKW as it acted as a ‘pure financial investor’. The Court rejected this argument. It noted that as part of the restructuring Gigaset had the ability to make strategic decisions with regard to SKW, received on an ongoing basis information on the economic performance of SKW and established a taskforce dedicated to the implementation of the restructuring. The General Court found these actions to form evidence of actual exercise of influence. It held that: ‘[T]he person responsible within the applicant, for the acquisition of SKW, was appointed to lead SKW Holding. This person would report regularly on behalf of that company, the applicant, in particular the progress of the restructuring of SKW. Assuming these reports disclose any difficulty in the implementation of the restructuring strategy, the applicant stood ready to intervene with the task force to the restructuring. All these elements show that the applicant had implemented, through SKW Holding, a specific strategy SKW restructuring and that it was closely following its implementation, in order to intervene at the slightest indication of trouble in the achievement of objectives, including financial, of this strategy. This is the effective exercise of decisive influence on the behaviour of SKW Holding, namely the management of the single element of its assets (SKW, SKW Holding which owned the entire share capital).’ (para 54, unofficial translation)