

Concept of Undertakings

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Word count: 14 591

LL.M thesis in Competition Law
Summer term 2012

Abstract

The major criticism upon current jurisprudence on the concept of undertakings has been that the judgments and decisions in this area are majorly fact specific. The Courts have not yet set out clearly defined requirement for the definition of undertakings. As the concept allows for the application of competition law, a development towards more simple requirements is desirable – making competition law even more efficient. The purpose of this paper is to set out such requirements.

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PART I

1 INTRODUCTION

1.1. Concept of undertakings

'Undertakings' refer to the addressees of EU and UK competition law.¹ Typical for the general drafting of EU law there is no definition² of undertakings in the Treaty on the Functioning of European Union (hereafter 'TFEU'), nor in the UK Competition Act 1998 (hereafter 'the Act').³ The task of clarifying its meaning has predominantly been one for the ECJ.⁴

The meaning of undertakings is a debatable subject. A recent judgment on undertakings was given in *AG2R Prévoyance v Beaudout Père et Fils SARL*⁵, judgment 3rd of March 2011, and more judgments are likely to come. For example an on-going interesting debate is whether public hospitals should be regarded as undertakings, considering the consequences of applying competition law to the public health sector. The Office of Fair Trading (hereafter 'the OFT') consider there to be uncertainty whether competition law applies to health institutions and takes the view that

'[t]here will only be further clarification on the scope of the application of the competition rules to state organizations through additional case law'.⁶

Historically the ECJ has sought to maximise the application of competition law by taking a broad definition of 'undertakings'. The traditional definition in *Höfner*⁷ provides that

'[t]he 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...'⁸

For private economic operators their qualification as undertakings is generally not problematic. The EU courts have widely identified different collections of resources with an economic aim as

¹ See the Treaty on the Functioning of the European Union Article 101 and 102 and the Competition Act 1998 Chapter I prohibition and Chapter II prohibition.

² OJ (2003) L255/1 *Methionine* paragraph 237.

³ This is different from the EEA Treaty where undertakings are defined as 'any entity carrying out activities of a commercial or economic nature', see Art. 1 of Protocol 22.

⁴ The European Court of Justice.

⁵ Case C- 437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL*, judgment 3rd of March 2011

⁶ See OFT, *Competition in Mixed Markets: Ensuring Competitive Neutrality: A Working Paper (OFT 1242, 2010a)*, paragraph 5.15. Also OFT, *The Competition Act 1998 and Public Bodies (OFT 443 Policy Note 1/2004, 2004)*.

⁷ Case C-41/90 *Klaus Höfner and Fritz Elser v Macratron GmbH* [1991] ECR I-1979.

⁸ *Ibid* paragraph 21.

undertakings.⁹ More disputes have been related to classifying public entities as undertakings. The question whether an entity is an undertaking therefore typically arises in so-called 'mixed markets', where States, additionally to private operators, take part in the economic or commercial market.¹⁰ Because of the significant impact public entities have on markets, it is important that their potential distortions of competition can be addressed. However, as the concept of undertakings decides the scope for competition law, setting a fixed definition is difficult. This difficulty occurs especially where public entities participate, as the boundaries for what constitutes an undertaking meets the tension between opening the doors to EU law or respecting State sovereignty. The meaning of undertakings is thus subject to political controversy.

Jurisprudence of the ECJ defines undertakings by reference to economic or non-economic activity. This paper argues that an underlying rationale for such a split is based on the constitutional separation of competence between the EU system and Member States.

1.2 Objective and methodology

The aim here is to clarify the definition of undertakings. For this purpose two questions are raised: (1) is it possible to set out a simple legal test for defining undertakings; and if so (2) what are the requirements.

This research is predominantly concerned with jurisprudence and legal theory developed in European Union competition law. In seeking a more holistic analysis of undertakings from an UK competition law perspective, a comparison to cases from the UK might also be taken into the discussions. However, the definition of undertakings in the UK and in the EU will to a far extent fall together following the requirement that UK competition law is dealt with consistently with the treatment of correspondent questions in EU competition law 'so far as is possible'.¹¹

From the literature on the meaning of undertakings, the research by *Dr Okeoghene Odudu*¹² appears particularly thoroughly. It is therefore his opinions, first of all, that shall be referred to and tested along the analysis of EU jurisprudence in this paper.

⁹ According to the General Court: *'Article 101(1) of the Treaty is aimed at economic units which consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision, Case T-9/99 HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities [2002] ECR II-01487.*

¹⁰ Whish and Bailey (2012) page 84.

¹¹ See Section 60 of the Act.

¹² Odudu (2006).

Since the first European legislation was adopted, EU competition law has been subject to several changes. A renumbering of the Treaty articles took place as late as the 1st December 2009, but the competition provisions were not materially amended.¹³ For practical reasons only references to current numbering will be used in this paper, even when referring to cases with the older numeration.

1.3 Disposition

This dissertation is structured as follows. The first part (I) gives an introduction to the concept of undertakings. The second part (II) presents the current jurisprudence within the EU on the meaning of undertakings. In the third (III) part it is sought to construct a rationale for the present case law. The fourth (IV) and final part concludes upon the questions raised in this paper and sets out conditions to qualify as an undertaking.

1.4 Delimitation

It is no aim in this paper to give an exhaustive presentation of the conditions for competition law to apply. The concept of an undertaking forms a requirement for the application of competition law, but the possibility remains that the competition rules do not apply as other provisions play their role. The Treaty itself provides an exception in Article 106 TFEU, excluding entities entrusted with a public service obligation from the application of the competition rules to their activity in so far as it would obstruct the performance of their obligations. Article 106 will not be part of this dissertation.

Furthermore, the legal substance of undertakings has two aspects.¹⁴ First of all, it sets the material boundaries for which types of activity are subject to the competition law rules. Secondly, it has procedural aspects on whom to address, e.g. rules on when to hold a parent company liable for its subsidiary's conduct – the so-called 'single economic doctrine'.

Only the material aspect of undertakings is discussed in this paper.

¹³ The Treaty of Lisbon.

¹⁴ Advocate General Jacobs emphasized this point in his opinion in *C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, paragraph 226.

2 INTRODUCTION TO THE CONCEPT OF UNDERTAKINGS

2.1 The undertaking as an autonomous concept within EU law

It was in the outset pointed out that an undertaking within EU Competition law must be interpreted independently of national conceptions.¹⁵ Another arrangement would make States themselves able to affect the applicability of EU competition rules. The definition of undertakings is therefore not necessarily corresponding to corporate structure in national law - a point made explicitly clear in *Methionine*;

*'...the subject of the competition rules in the TFEU (and the EEA Agreement) is the undertaking, a concept not necessarily identical to the notion of corporate legal personality in national commercial, company or fiscal law.'*¹⁶

The autonomous character of the definition of undertakings is not without limits. It must be emphasized that the EU can only expand the meaning of this term insofar as legitimate competence of EU law goes. Suggesting that 'every entity engaged in harmful competitive activity within EU is an undertaking' would clearly go beyond the competence of EU competition law. Thus, from a theoretical position, the boundaries of 'undertakings' should be defined to the fullest within the boundaries of the policy aims of EU legislation, but no further. A wider scope of the term would go beyond the agreed legitimacy of EU law.

The ECJ has held that it is

*'[s]ettled case-law 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 unit consists of several persons, natural or legal.'*¹⁷

This is the autonomous definition of undertakings and a functional approach is used to detect 'an economic unit', see section 2.2.

¹⁵ Odudu (2006) page 212.

¹⁶ OJ (2003) L255/1 *Methionine* paragraph 236.

¹⁷ Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11.

2.2 The functional approach: defining 'undertakings' by the performance of economic activities

As a general proposition, anyone could be subject to competition law. The EU courts approach to defining undertakings is described as '*functional rather than institutional*'.¹⁸ An undertaking is defined on the basis of their activities, and not by reference to their institutional form. It is clear that an individual will be acting as an undertaking insofar as he engages in economic activity.¹⁹ Limited companies²⁰, partnerships²¹, State corporations²², agricultural cooperatives²³, self-employed professionals²⁴, professional sports athletes²⁵ and international organisations²⁶ are all examples of entities held to constitute undertakings. Advocate General stated in his opinion in *AOK Bundesverband*:

*'[T]he Court's general approach to whether a given entity is an undertaking within the meaning of the competition rules ... focuses on the type of activity performed rather than on the characteristics of the actors which perform it.'*²⁷

The definition of an undertaking is therefore also relative. An entity may be regarded as an undertaking when it carries out some tasks, but not when performing others. A public authority and owner of land can be acting as an undertaking when selling or renting out its properties, but not as an undertaking when adopting legislation in its capacity as a public authority. A consequence of the functional approach is that an entity cannot be defined as an undertaking once and for all. Each classification as an undertaking depends on the activity of subject matter.

Although the functional approach is laid down in the system of EU Competition law, its implications in full have yet to be revealed or fully considered.²⁸ From a policy perspective within competition law, an underlying problem in defining undertakings could be seen from the use of a functional approach. Discussion often revolves around what *entities* should, or should not, be subject to competition law, but the jurisprudence of the EU law is not concerned with entities, but *activities*. The reason why the Courts have adopted a functional approach is because it in theory can ensure full effectiveness of the

¹⁸ Odudu (2006) page 212 and Korah (2007) page 48.

¹⁹ Case C-35/83 *BAT v Commission* [1985] ECR 00363

²⁰ Case C-258/78 *Nungesser v Commission* [1982] ECR 02015

²¹ OJ 1999 L50/27 *Price Waterhouse/Coopers & Lybrand*

²² Case C-41/90 *Klaus Höfner and Fritz Elser v Macratron GmbH* [1991] ECR I-1979

²³ Case C-61/80 *Coöperatieve Stremsel-en Kleursel-fabriek v Commission* [1981] ECR 851.

²⁴ Case C-309/99 *Wouters* [2002] ECR I-01577

²⁵ Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-06991

²⁶ Case C-364/92 *Eurocontrol* [1994] ECR I-00043

²⁷ Case C-265/01 *AOK-Bundesverband and Others* [2003] ECR I-00683, Advocate Generals Opinion at paragraph 25.

²⁸ Odudu (2006) page 213.

competition provisions, regardless of the legal status of the entity in question and the way in which it is financed.²⁹ Its benefits lie especially in its ability to ensure that operators cannot escape the application of competition law by organising their legal status for such purpose. Whatever implications might arise from a functional approach, such an approach is accepted *de lege lata*.³⁰

PART II

3. ECONOMIC ACTIVITY

3.1 The basic definition of an undertaking and detecting an economic activity

Established case law following *Höfner*³¹ holds that 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.³² Another common definition defines the concept of undertakings as a designated 'economic unit':

*'It is clear from settled case-law 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'.*³³

The key point in the definition of an undertaking thus relies on a notion of economic activity or an economic unit. An undertaking is someone engaged in economic activity. The TFEU itself, however, provides limited guidance on what constitutes an economic activity, so an analysis must be based on the jurisprudence from the ECJ.

It has been argued that a unitary definition of 'economic' within EU law *can* be formulated and concludes that 'economic activity' has the same content under both internal market and competition

²⁹ Ariel Ezrachi (2010) page 1.

³⁰ Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-08089, Case C-343/95 *Diego Cali & Figli Sri v Servizi Ecologici Porto di Genova SpA* [1997] ECR I-01547 and Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751, Case C-170/83 *Hydrotherm* [1984] ECR 02999.

³¹ Case C-41/90 *Klaus Höfner and Fritz Elser v Macratron GmbH* [1991] ECR I-1979, paragraph 21.

³² Case C-41/90, *Höfner and Elser v Macratron* [1991] ECR I-1979 paragraph 21, T-513/93 *CNSD* [2000] ECR II-01807 paragraph 36, T-314/01 *Avebe* [2006] ECR II-03085 paragraph 78, T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797 paragraph 55, T-217/03 *French Beef* [2006] ECR II-04987 paragraph 52, Case C-159/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-00637 paragraph 17, Case C-244/94 *Federation Française des Sociétés d'Assurance* [1995] ECR I-4013, paragraph 14.

³³ Case T-66/99 *Minoan Lines* [2003] ECR II-05515 paragraph 21, Case 170/83 *Hydrotherm* (1984) ECR 2999 paragraph 11, Case T-234/95 *DSG v Commission* (2000) ECR II-2603 paragraph 124.

law.³⁴ The Commission, on the other hand, is of the view that a definition of economic activity '*cannot be given a priori and requires a case-by-case analysis*'.³⁵ If accepted that the definition of economic activity cannot be given a priori, this is disappointing in terms of legal certainty.

*Jones and Sufrin*³⁶ holds after exploring a series of cases that the characteristic features of an economic activity is (1) the offering of goods or services on the market (2) where the activity could at least in principle be carried out by a private undertaking in order to make profit. Odudu³⁷ takes a similar view in which two necessary and sufficient conditions to constitute economic activity "emerges" from an analysis of the jurisprudence of the ECJ. An entity must (1) be a supplier of goods or services; and (2) there must be a potential to make profit in absent of legislative intervention. Odudu³⁸ also identifies a third element; a requirement that the (3) entity must bear financial risk, see section 3.4 below.

In the following the jurisprudence on what constitutes an economic activity is explored.

3.2 Offering goods and services

From case law of the ECJ it is seen that the issue of economic activity has not been dealt with purely fragmentary. General statements provide that:

*'Any activity consisting in offering goods and services on a given market is an economic activity.'*³⁹

From this repeatedly referred definition two cumulative requirements is seen; (1) there has to be an offer of goods and services, and (2) there has to be a given market, see section 3.3 below. In the judgment of *French Beef*⁴⁰, the question of economic activity was accordingly dealt with in short:

*'The activity of farmers, whether arable or stock farmers, is certainly of an economic nature. Their activity is indeed the **production of goods which they offer** (emphasis added) for sale in return for*

³⁴ Hatzopoulos (2011) page 4-5.

³⁵ *Communication on a single market for 21st century Europe-Services of general interest, including social services of general interest: a new European commitment* COM (2007) 725 final, page 5.

³⁶ Jones and Sufrin (2010) page 124-125.

³⁷ Odudu (2011) page 233

³⁸ Odudu (2006) pages 23-56

³⁹ T-513/93 *CNSD* [2000] ECR II-01807 paragraph 36, T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797 paragraph 50, T-217/03 *French Beef* [2006] ECR II-04987 paragraph 52, C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 75 and C-309/99 *Wouters* [2002] ECR I-01577 paragraph 47.

⁴⁰ T-217/03 *French Beef* [2006] ECR II-04987

payment. Consequently, farmers constitute undertakings within the meaning of Article 101(1) TFEU'.⁴¹

While it is clear that the offer of goods and services *can* constitute an economic activity⁴², it is on the other hand difficult finding cases where an activity has been regarded as economic in the absence of any offer of goods or services. A suggestion is thus that the offer of goods or services on a given market constitutes an absolute requirement for an 'economic activity'. In *SELEX*⁴³ the question was whether the different activities of Eurocontrol was of an economic nature. Regarding Eurocontrol's activity of technical standardization, the Court held:

*'In the present case, the applicant has thus still failed to show that the activity at issue consisted of offering goods or services on a given market, as is required by the case-law referred to in the previous paragraph.'*⁴⁴

Eurocontrol's activity was subsequently regarded as non-economic activity. From the language of *SELEX*, the offering of goods and services is a *requirement* to qualify as an economic activity. The Court went no further and discussed other ways in which the activity could be regarded as economic activity. Other judgments from the ECJ also support that the offering of goods and services are required elements in the notion of economic activity.⁴⁵

One should however note that this proposition is in contrast to UK Competition law and the Competition Appeal Tribunal's (hereafter 'the CAT') view in *BetterCare*.⁴⁶ Here the CAT went carefully through case law of the ECJ and held:

'According to the case law of the European Court, an "economic activity" is one which involves "offering goods or services on the market"'.⁴⁷ Furthermore, 'it does not seem to us that the offering of goods and services is necessarily exhaustive as to what an 'economic' activity might be'.⁴⁸

⁴¹ Ibid paragraph 53.

⁴² T-513/93 *CNSD* [2000] ECR II-01807 paragraph 36, T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797 paragraph 50, T-217/03 *French Beef* [2006] ECR II-04987 paragraph 52, C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 75 and C-309/99 *Wouters* [2002] ECR I-01577 paragraph 47.

⁴³ T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797

⁴⁴ Ibid paragraph 59.

⁴⁵ Case T-513/93 *CNSD* [2000] ECR II-01807 paragraph 36, T-217/03 *French Beef* [2006] ECR II-04987 paragraph 52, C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 75 and C-309/99 *Wouters* [2002] ECR I-01577 paragraph 47.

⁴⁶ *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 7.

⁴⁷ Ibid paragraph 189.

⁴⁸ Ibid paragraph 190.

By reference to Mr Jacobs Opinion in *Cisal*, the CAT said a key consideration is whether the undertaking in question '*[i]s in a position to generate the effects which the competition rules seeks to prevent*'.⁴⁹ Later on it was held that entering into transactions on a "*business-like*" manner could constitute an economic activity.⁵⁰ Although 'undertakings' in UK competition law, 'so far as is possible', should be understood consistently with EU law⁵¹, the definition of undertaking on this point is arguably an example where the definition of undertakings in UK competition law goes further from what is laid down in EU law. There is no support to be found in EU case law that effect on a market following transactions is sufficient for an activity to be regarded as economic.

On this background, it is argued that an economic activity within EU competition law requires there to be an offer of goods and services.

3.2.1 What are the characteristic features of someone offering goods or services?

The typical example of someone engaging in the offer of goods or services would be a producer or a distributor selling in return for payment, e.g. Apple, Barclays Banks, Ryan Air, O₂, Starbucks, McDonalds or Vauxhall Motor. These examples are all private firms selling for profit. However, as will be seen, the ECJ disregards whether you are a private or public body and it is not decisive the entity is seeking to make profit. It is held that the legal personality of the entity, the way in which the entity is financed, the complexity and technical nature of the activity, whether the entity is subject to public or private law, and whether the entity is making profit or aim to make profit, are all factors not necessarily decisive for defining undertakings. These elements are explored in more detail in the following sections.

3.2.1.1 *The legal personality of the entity does not matter*

Whether an entity is private, public or has any particular legal status is immaterial. As frequently held: '*[t]he concept of an undertaking encompasses every entity engaged in economic activity, regardless of legal status of the entity...*'.⁵² An argument was run in *Höfner*⁵³ that activities of an employment agency did not fall within the scope of the competition law rules if the activities were carried out by a public body, more precisely a public employment agency could not be classified as an undertaking.

⁴⁹ Ibid paragraph 202.

⁵⁰ Ibid paragraph 198.

⁵¹ Competition Act 1998 section 60 (1).

⁵² Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14; and Case C-55/96 *Job Centre* [1997] ECR I-7119, '*Job Centre II*', paragraph 21.

⁵³ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 19.

This argument was rejected.⁵⁴

Not only does it not matter whether an entity is private or public, but the case law of the Union goes as far as there is no need for an economic entity to have a legal personality at all. The need for a legal personality was claimed in *HFB*⁵⁵, but rejected by the ECJ. It is not necessary for an entity to have legal personality under the law of the Member State where it operates in order for it to be an undertaking:

*'Contrary to the applicant's contention, there is no need for the economic entity identified as a 'group' to have legal personality. 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...'*⁵⁶

Similar in the later judgment of *Avebe*⁵⁷ the lack of legal personality was accepted. These judgments harmonise well with the functional approach focusing merely on the activity of offering goods and services, not the legal status of the body.

3.2.1.2 Whether the entity is subject to private or public law

EU courts and the Commission's decisions have established that the status of law to which an entity is subject, does not affect the economic character of its activities. The ECJ held in *CNSD*⁵⁸ that the public-law status of a national body such as the CNSD does not preclude the application of the Treaty. In *UER*⁵⁹ the Commission held the EBU members were undertakings regardless of the fact that they were public institutions entrusted under national law with the task of providing programmes in the public interest. In *Stichting Kraanverhurr*⁶⁰ the Commission held that SCK, a foundation under Dutch law set up on the initiative of FNK for the purpose of certifying crane-hire firms against payment, were regarded as an undertaking, notwithstanding the fact that the SCK rules were recognized by the Certification Council. In *Eco Emballages*⁶¹ the Commission held that by entering into contracts with Eco Emballages with a view to both receiving financial support, the local authorities were carrying on an economic activity of an industrial and commercial nature. The fact that they did so under their statutory obligation to dispose of household waste was insufficient to enable them to be regarded as

⁵⁴ See paragraph 22 og 23.

⁵⁵ Case T-9/99 *HFB and Others v Commission* [2002] ECR II-01487 paragraph 66, see *Hydrotherm* [1984] ECR 2999, paragraph 11.

⁵⁶ *Ibid* paragraph 11.

⁵⁷ Case T-314/01 *Avebe v Commission*[2006] ECR II-03085, paragraph 78.

⁵⁸ T-513/93 *CNSD* [2000] ECR II-01807 paragraph 40.

⁵⁹ OJ (1993) L179/23 *UER* paragraph 45.

⁶⁰ OJ (1994) L117/30 *Stichting Kraanverhurr* paragraph 19.

⁶¹ OJ (2001) L233/37 *Eco Emballages* paragraph 70.

acting in the role of an official authority. Nor the fact that the activity is imposed as a public service obligation can deprive the activity of its economic character, although they are placed at a competitive disadvantage compared to others.⁶² Even agreements between trading interests made within a public law framework may fall under Article 101 TFEU.⁶³

So whether an entity is subject to public or private law is not on its own decisive for the finding of an economic activity. However, whether the activity is subject to private or public law can be *relevant* as a factor in the assessment of the nature of an activity, see section 4.1.2 below.

3.2.1.3 *Financial arrangements does not matter*

It follows from the frequently stated definition of undertakings that the concept encompasses every entity engaged in an economic activity, regardless of the legal status of the entity ‘...and the way in which it is financed’.⁶⁴

Subsequently, e.g. entities wholly funded from State resources have been characterized as entities subject to the competition rules.⁶⁵ From the clear language of the ECJ, the way in which an entity is financed should be not decisive for defining undertakings. This is beneficial, as the entities cannot escape competition law by clever organisation. Furthermore, its impacts on competition could be equally significant, regardless of the way in which the entity is financed.

3.2.1.4 *The complexity and technical nature of the activity performed*

In some cases arguments have been raised that the offering of a service in question has special characteristics to their performance, which thereby should exclude the activity from the application of competition law.⁶⁶

In *Wouters*⁶⁷, the Members of the Bar offered services for remuneration, including legal assistance and representation clients in legal proceedings. The Court stated that the complexity and technical nature of these services and the fact that the practice of the judicial profession was regulated could not save them from being regarded as undertakings. In *Pavlov*⁶⁸ the complexity and technical nature of the

⁶² Case C-475/99 *Ambulanz Glöckner v Landkreis Sidwestpfalz* [2001] ECR I-08089, paragraph 21.

⁶³ Case 123/83 *BNIC v Clair* [1985] ECR 00391

⁶⁴ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, Case C-244/94 *Fédération française des sociétés d'assurances and Others* [1995] ECR I-4013, paragraph 14, and Case C-55/96 *Job Centre* [1997] ECR I-7119 paragraph 21.

⁶⁵ Case C-237/04 *Enirisorse SpA v Sotacarbo SpA* [2006] ECR I-2843 paragraph 32-33.

⁶⁶ Case C-309/99 *Wouters* (2002) ECR I-1577, C-180/98 *Pavlov* [2000] ECR I-06451.

⁶⁷ Case C-309/99 *Wouters* (2002) ECR I-1577.

⁶⁸ C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 72-82 and 102-119.

services provided could not exclude self-employed medical specialists being regarded as undertakings. Furthermore in the Commission's decision in *COAPI*⁶⁹ industrial property agents were regarded as undertakings, notwithstanding the fact that they were a regulated profession for the purposes of Spanish law and Council Directive 89/48/EEC and that the service they provided was of an intellectual, technical or specialized nature performed on a personal and direct basis.

I have not seen judgments or decisions excluding activities from the notion of 'offering goods and services' because of their specific or technical nature. These arguments do not seem to have had convincing force before the ECJ.

3.2.1.5 *Whether you are making profit or aim to make profit does not matter*

In *Van Landewyck (Heintz) Sarl v Commission*⁷⁰ the ECJ held that any entity engaged in commercial activity could be regarded as an undertaking, even in the absence of the pursuit of profit. The subjective aim for profit is not decisive. There are good reasons for ignoring subjective intentions. Firstly, intention can be difficult to prove. Secondly, the effects on competition from an activity could be significant, regardless of the subjective aim.

In order to be regarded as an economic activity, there is no requirement that an entity is actually profit-making. For example, football associations have been held to constitute undertakings notwithstanding the fact that the entities were non-profit making bodies.⁷¹ The ECJ has held that

*'[t]he absence of remuneration is only one indication among several factors and cannot by itself exclude the possibility that the activity in question is economic in nature.'*⁷²

On the other hand, the fact that a charge is made for a service or good does not automatically mean that the activity performed is of an economic nature.⁷³

Although profit motives or payment are relevant factors for the assessment of an economic activity, it is seen from the judgments above that profit-motives or remuneration are not decisive elements for defining undertakings. A problem is, however, that if payment is irrelevant, almost any activity could be carried out in the private sector.⁷⁴ A requirement of demonstrating a potential market for the

⁶⁹ OJ (1995) L122/37 *COAPI* paragraph 32

⁷⁰ Joined Cases 209 to 215 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125 at paragraph 88.

⁷¹ OJ (2003) L291/25 *UEFA*

⁷² T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797 paragraph 77.

⁷³ *Ibid.*

⁷⁴ Korah (2007) page 48.

activity in question reduces the problems arising from payment being immaterial to the definition of undertakings.

3.3 The requirement of demonstrating a market for private commercial operators

It has never been stated positively by the ECJ that a condition to qualify as an undertaking require there to be a potential to make profit. This however follows construed ratio decidendi several judgments.⁷⁵ A 'potential to make profit' is synonymous to their being a potential market. This is the case where the activity at least in principle could be performed by a private undertaking.⁷⁶ There has to be a potential market for the service provided, otherwise it would be meaningless discussing the applicability of competition rules - there is no use in applying competition law to a non-existing market.

In *SELEX*⁷⁷ the Court held explicitly held:

*'In this case, the applicant has not shown that there is a market for 'technical standardization services in the sector of ATM equipment'. The only purchaser of such services can be States in their capacity as air traffic control authorities...'*⁷⁸

On this basis the Court found that the applicant had thus failed to show that the activity at issue was an economic activity.

There are two key points rising from the fact that a potential market is identified. Firstly, when an activity could at least in principle performed by a private undertaking, the activity is presumed to be of an economic nature. The ECJ in *SELEX* acknowledged this point:

*'...[t]he Court of First Instance has held that the fact that an activity may be exercised by a private undertaking is a further indication that the activity in question may be described as a business activity.'*⁷⁹

Secondly, the presumption of economic activity because private undertakings could perform the activity, is not rebutted by the fact that public organs traditionally perform the activity:

⁷⁵ The requirement of showing a potential market is also formulated by Odudu's analysis of EU case law.

⁷⁶ Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-08089.

⁷⁷ T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797.

⁷⁸ Ibid paragraph 58.

⁷⁹ Ibid paragraph 88.

*'...[i]t should be pointed out that the Court has held, on several occasions, that the fact that activities are normally entrusted to public offices cannot affect the economic nature of such activities, since they have not always been, and are not necessarily, carried out by public entities...In the circumstances under consideration in this case, this means that the fact that the services in question are not at the current time offered by private undertakings does not prevent their being described as an economic activity, since it is possible for them to be carried out by private entities'.*⁸⁰

The ECJ again looks at the realities of the activity in question, and not the internal organization within a Member State, tradition or not. This legal assessment is in accordance with the autonomous and the functional approach to the concept of undertakings.

3.4 Financial risk

Whether or not an entity bears the financial risks attached to their activity is occasionally mentioned in the case law of EU competition law.⁸¹ The question is therefore whether risk-bearing is a requirement for being an undertaking. It has never been stated positively by the ECJ that to qualify as an undertaking this requires an entity to bear financial risk. Odudu, however, advocates that such a requirement could be formulated on the basis of the EU jurisprudence. In his view *'risk-bearing is an essential component of the concept of economic activity used to determine the addressee of the competition rules: the absence of risk-bearing prevents activity being seen as economic'*.⁸² This view is explored in the following.

3.4.1 Is bearing financial risk a requirement for undertakings?

It must be born in mind that the ECJ has occasionally for the finding of an economic activity taken into consideration factors that are fact-specific for the definition of undertakings. These factors may be relevant in an assessment of economic activity, but are not necessarily general requirements for constituting an undertaking. For example, the ECJ has held that profit is not decisive for the definition of undertaking, but the Court reasoned in *French Beef* that farmers performed an economic activity because *'[t]hey offer for sale in return for payment...'*⁸³ In *Pavlov* medical specialist were undertakings because *'[t]hey are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity...'*⁸⁴ Furthermore, in *Wouters*⁸⁵ the ECJ held that Members of the Bar were undertakings because they offered, for a fee, services in the form of legal

⁸⁰ Ibid paragraph 89.

⁸¹ C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 76 and OJ (2002) L257/1 *Mercedes Benz*, paragraph 123.

⁸² Odudu (2006) page 221.

⁸³ T-217/03 *French Beef* [2006] ECR II-04987.

⁸⁴ C-180/98 *Pavlov* [2000] ECR I-06451, paragraph 76.

⁸⁵ Case C-309/99 *Wouters* (2002) ECR I-1577.

assistance, and in addition bore the financial risks attached to those activities. Receiving payment is not a general decisive factor for defining undertakings, but used in these judgments, the same could be claimed about risk-bearing. Odudu argues that *Pavlov* and *Wouters* use risk-bearing as a general criterion for defining undertakings.⁸⁶ He supports his view by arguing that this explains why employees are not regarded as engaged in economic activity although they offer a service for remuneration.⁸⁷ As Advocate General Colomer held in *Becu*:

*'It is that ability to take on financial risks which gives an operator sufficient significance to be capable of being regarded as an entity genuinely engaged in trade, that is to say to be regarded as an undertaking. In other words, recognition as an 'undertaking' requires, at least, the existence of an identifiable centre to which economically significant decisions can be attributed. For that reason, employees do not constitute undertakings.'*⁸⁸

However, the element of risk-bearing in *Wouters* and *Pavlov* is rarely seen in other judgments on the definition of undertakings. The use of risk-bearing as a relevant factor in *Wouters* and *Pavlov* could also be explained on other grounds. As we have seen, the term undertakings seek to address an 'economic unit' for the subject matter. The fact that lawyers in *Wouters* and medicals in *Pavlov* perform an activity in return for payment while bearing the financial risk, provides factors to identify them as an designated economic unit. The fact that they assume risk can be used as an argument for their independent activity. For employees in general, they are not engaged in economic activity because they are not acting sufficiently independent: they form part of the business were they are employed. Other criteria than risk can be used to define 'an economic unit' - as long as they show that the entity is conducting its activities independently. *Korah* seems to argue in this same direction:

*'The ECJ has held that whether an agent is treated as part of it's principal's undertaking depends on whether it is **integrated** into it – a difficult concept to apply, as many independent dealers are also closely integrated into their supplier's undertaking. The Commission is now looking mainly to risk. If the agent bears significant risk it is likely to be independent and its agreement with its principal subject to Article 101.'*⁸⁹

While acknowledging the difficulties in identifying independency, *Korah* emphasizes that the Commission "mainly" looks to risk. Other factors should thus be relevant. *Goyder*⁹⁰ also mentions that it is unlikely that an individual or other entity will be regarded as an undertaking 'where the relevant

⁸⁶ Odudu (2006) page 221.

⁸⁷ Odudu (2006) page 222.

⁸⁸ Case C-22/98 *Becu and Others* [1999] ECR I-05665, Advocate General's opinion at paragraph 53.

⁸⁹ *Korah* (2007) page 51.

⁹⁰ *Goyder* (2003) page 64.

person is simply an integral part of a larger organization (which itself may well be an undertaking) and has therefore no separate or independent economic role on the market'. It implicit follows from Goyder's statement that the concept of undertakings requires an entity to have an independent economic role on the market. The element of independence could also be seen mentioned in the Commission's decision in Mercedes Benz:

*'The Mercedes-Benz agents are undertakings within the meaning of Article 101 (1). An undertaking is any legal subject which **independently** exercises a commercial or economic activity and, in so doing, bears the associated financial risks. An agent appointed to negotiate business transactions is defined in Articles 1(2)(7) and 84(1), first sentence, first alternative, of the German Commercial Code as a trader and, as such, pursues an economic activity. The Mercedes-Benz agents also exercise their activity independently. DaimlerChrysler shares the view that the agents are independent businesses.'*⁹¹

My point is that an independent economic role on the market appears to be a requirement for defining undertakings. On the basis of the arguments set forward above, it is argued here that risk does not form a general requirement in the definition of undertakings, but simply a factor in the assessment of identifying an economic unit. Case law from the ECJ does not support the view that bearing the financial risk related to an activity is a requirement in the definition of undertakings.

3.5 Purchasing as economic activity and the judgment of FENIN

So far it has been suggested that economic activity requires there to be an offer of goods and services. The contrast to the offering is the purchasing of goods and services. Whether this could constitute an economic activity is explored in the following.

It was from the early days of competition law assumed that purchases for one's own consumption were not an economic activity.⁹² However, in a more narrow sense, the activity of 'purchasing' has been held to constitute an economic activity. The General Court held in *FENIN*⁹³:

'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

⁹¹ OJ (2002) L257/1 *Mercedes Benz* paragraph 123

⁹² Valentine Korah (2007) page 47.

⁹³ Case T-319/99 *FENIN v Commission* [2003] ECR II-00357, upheld by the Court of Justice in C-205/03 P *FENIN v Commission* [2006] ECR I-06295.

*for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.*⁹⁴

Hence, purchasing of its own is not an economic activity, but the judgment implies that purchasing for the subsequent offer of goods and services could be an economic activity. This is later confirmed by the judgment in *SELEX*.⁹⁵ It was argued in *SELEX* that the reasoning in *FENIN* could not be transposed to the case at matter. The Court, however, rejected this argument:

*'To the extent that the applicant submits, first, that the situation in the case of FENIN v. Commission is very different from that in the present case, it must be pointed out that the Court of First Instance considered in that case, generally, that an organisation which purchases goods 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 (FENIN v Commission, paragraph 37). The general wording of that sentence, and in particular the fact that it expressly refers to a social activity only as an example, permits the approach adopted in that judgment to be transposed to any organisation purchasing goods for non-economic activities...'*⁹⁶

One can thus separate between purchasing for consumption and purchasing for reselling. Although consumption may cause significant effects in a market, it appears to be the view of the ECJ that a significant effect on a market is not in itself sufficient for consumption to be an economic activity. An argument was run in *SELEX* that even though the application of case-law, namely that the nature of the purchasing activity must be determined by whether or not the subsequent use of the purchased goods amounts to an economic activity, this could not disregard that the purchasing activity may significant effects on a market, and in particular where, as were the case, the acquirer is in a monopsony situation at European level. The ECJ ruled that this argument was based on a flawed interpretation of the case of *FENIN v Commission*. The ECJ explained as follows:

'The Court held in that case (FENIN) that whilst an entity purchasing a product to be used for the purposes of a non-economic activity '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 Community

⁹⁴ Ibid paragraph 37.

⁹⁵ T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797.

⁹⁶ Ibid paragraph 64.

competition law and is therefore not subject to the prohibitions laid down in Articles 101 and 102 TFEU.⁹⁷

As explicitly made clear, effects on a market on its own, is not sufficient to regard consumption as an economic activity. Following the purchase of goods or service, there has to be a subsequent offering on a market.

3.5.1 What is the rationale for excluding consumption from the notion of economic activity?

There is no reasoning given neither by the General Court nor later in the judgment by the ECJ, as to why the activity of consumption is not regarded as an economic activity. One might claim that consumption does not normally have significant effects on market and that such activity therefore does not have to be subject to competition law. This explanation is however unsatisfactory: especially since consumption by public institutions can have significant effects on a market. Should consumption *de lege ferenda* be subject to competition law purely on the basis that it can cause anti-competitive effects on a market? The UK decision in *BetterCare*⁹⁸ argues in this direction. In this case BetterCare accused a trust that provided nursing home and residential care services for elderly persons of abusing their dominant position by forcing them to agree to excessively low prices. The CAT held that the trust was in a position to cause effects that the competition rules seek to prevent, and thereby competition law could apply. However, the UK Office of Fair Trading (OFT) has abandoned such a view in Policy Note 1/2004⁹⁹ following the later judgment of FENIN:

*'Following the FENIN judgment, it is the OFT's view that, even if an entity is in a position to generate anti-competitive effects, it will not be an undertaking for the purposes of the competition rules if the subsequently related supply of the goods or services (for which the purchase is made) do not themselves constitute economic activities and the entity does not itself directly provide the services'*¹⁰⁰

So why is purchasing for consumption not subject to competition law, when purchasing for reselling is subject to full scrutiny? A reasoning could be formulated on the basis that there are several differences between normal consumption and purchasing for reselling. In all cases of purchase, there is a freedom of choice in choosing the source of supply. Competition law should not, and does not, require purchasing from the lowest bidder. However, for pure consumption it is here the buyer himself who

⁹⁷ Ibid paragraph 65.

⁹⁸ *BetterCare Group Limited v Director General of Fair Trading* [2002] CAT 7.

⁹⁹ August 2004, Policy Note 1/2004 on 'The Competition Act 1998 and Public bodies' (OFT 443).

¹⁰⁰ Ibid paragraph 22.

suffers from not choosing the best offer – there is no pass-on to a third part consumer. Thus, there is no need to protect the buyer, as he is free to make his own choice. For products or services that are bought and resold, it is different. As competition law is concerned about protecting consumers through economic efficiency, it is unfair if consumers should suffer from the bad choices done by their supplier. Especially, since the end consumers are not able to affect the purchasing process in the upstream market. From this view, it seems legitimate that competition law could apply to certain forms of purchasing if the goods are resold, since this activity could lead to potentially higher prices for the end consumers. Protecting end consumers is in accordance with the policy aims of competition law. An example can illustrate this: A local retailer in a monopolised market could speculate in his outlet prices by choosing more expensive products in the upstream market. The subsequent offer of goods in a downstream market would ensure higher prices for end consumers.

4 NON-ECONOMIC ACTIVITY

4.1 Exercise of public powers or activities on the basis of solidarity are non-economic

According to case law of the ECJ there are two groups of activities that are regarded as non-economic: the exercise of public authority and activities performed on the basis of social solidarity, e.g. such as social services. Non-economic activities do not qualify an entity as an undertaking.

The jurisprudence on non-economic activities is explored in the following sections.

4.1.1 A functional approach for identifying activities in the exercise of public powers

The competition rules do not apply to activities essentially connected to the powers of a public authority.¹⁰¹ It is not enough that an organ is performing such activities. Each activity of the State needs to be analysed separately. As the Court held in *SELEX*¹⁰²:

*'[t]he various activities of an entity must be considered individually and the treatment of some of them as powers of a public authority does not mean that it must be concluded that the other activities are not economic ...'*¹⁰³

Where the State has appointed a private organ with the task of a public interest, this organ does not constitute an undertaking. In the case of *Diego Cali*¹⁰⁴ there was a dispute between Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG). SEPG was responsible for the anti-pollution surveillance in the oil port of Genoa. Such surveillance was held by the Court to be a task in the public interest forming part of the essential functions of the State as a protector of the environment. The fact that SEPG was a private entity did not alter this conclusion. This is in line with the functional approach and legal status being irrelevant. As only undertakings, and not Member States, are subject to Article 101 and 102, it could be seen as a consequence that there should be no legal difference whether the public task is de facto performed by the Member State or by a body appointed by the State.

¹⁰¹ Case C-343/95 *Diego Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECR I-01547, paragraph 16.

¹⁰² Case T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797.

¹⁰³ *Ibid* paragraph 54.

¹⁰⁴ Case C-343/95 *Diego Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECR I-01547).

4.1.2 When is an activity of a public nature?

In the case of *Diego Cali*¹⁰⁵ the ECJ held that in order to separate activity in the exercise of official authority and economic activities, it is necessary to consider '[t]he nature...' of the activities carried on by the public undertaking or a private body appointed by the State. The Court held that the surveillance was connected by '[i]ts nature, its aim and the rules to which it is subject...' with the exercise of powers relating to the protection of the environment that are '[t]ypically those of a public authority...'.¹⁰⁶

The rules to which an activity is subject has been used as an argument in several cases. It is relevant whether the activity has any public law basis. In defining the economic nature of SCK's activities in *Stichting Kraanverhurr*¹⁰⁷, the Commission held that 'SCK does not have any public-law basis'. However, the fact that an activity is governed by public law is not enough for the activity to be regarded as non-economic. In the case of *Wouters*¹⁰⁸ it was held that the public law regulation of the constitution of the Bar Association did not affect the application of Article 101.

What is less clear is whether an activity that is not subject to public law could still be regarded as within the public sphere. In *Institute of Independent Insurance Brokers v Director General of Fair Trading*¹⁰⁹ the CAT stated that it was doubtful whether, as a matter of EU law, the notion of an exercise of 'official authority' or 'public powers' can extend to cases where the legal basis of the activity in question is contracts between private parties.¹¹⁰ It does not seem reasonable to require that all activities of public powers be governed by public law. Such a requirement could become an obstacle for Member States to handle within their sovereign powers effectively.

The *aim* of an activity is often relevant when it comes to identifying an activity as exercise of public powers. However, a pursuit of a public service objective is not necessarily decisive. In *SELEX*¹¹¹ the Court stated:

'... the fact that the assistance is given in pursuit of a public service objective may be an indication that it is a non-economic activity, but this does not prevent an activity consisting, as is the case here, in offering services on a given market from being considered to be an economic activity.'¹¹²

¹⁰⁵ Ibid paragraph 18.

¹⁰⁶ Ibid paragraph 23.

¹⁰⁷ *Stichting Kraanverhurr* OJ (1994) L117/30 paragraph 19

¹⁰⁸ Case C-309/99 *Wouters* (2002) ECR I-1577.

¹⁰⁹ *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] CAT 4.

¹¹⁰ Ibid paragraph 256.

¹¹¹ T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797.

A suggestion is that Court has neither been willing nor perhaps able, to set out fixed requirements for when an activity is within the State sovereignty sphere. As could be seen from the case law of the EU Courts, such assessments are often majorly fact specific. A flexible assessment based on factors instead of fixed conditions, may be the best approach in this area. It is characteristic for the public entities that they perform powers that are sovereign to them. If an activity is typical of the State, this will be an argument for the activity being non-economic in nature. In *SAT v Eurocontrol*¹¹³ the ECJ held:

*'Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.'*¹¹⁴

However, the fact that an activity is typical as in normally entrusted to public organs is not necessarily decisive.¹¹⁵ As held in both *Höfner*¹¹⁶ and *Ambulanz Glöckner*¹¹⁷, although the activities in question were traditionally those of the State, the activities had *'[n]ot always been, and is not necessarily, carried out by public entities...'*¹¹⁸ If there is a market for private entities conducting the activity, this is an argument that the activity is of economic nature. Although one could think of ambulance services as a service of public nature, the fact that such activities have been performed by private organizations in the past, and that they in theory could be performed by private organizations, lead the Court to the conclusion that the medical organizations were undertakings in *Ambulanz Glöckner*.

To summarize, whether an activity should be regarded as exercise of powers must be answered on the basis of a sound assessment. Competition law does not apply to an activity which by its nature, its aim, and the rules to which it is subject, does not belong to the sphere of economic activity.¹¹⁹

¹¹² Ibid paragraph 91.

¹¹³ Case C-364/92 *SAT v Eurocontrol Elser* [1994] ECR I-00043.

¹¹⁴ Ibid paragraph 23.

¹¹⁵ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

¹¹⁶ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979.

¹¹⁷ Case C-475/99 *Ambulanz Glöckner v Landkreis Sidwestpfalz* [2001] ECR I-08089.

¹¹⁸ Case C-41/90 *Höfner and Elser* [1991] ECR I-1979 paragraph 22, Case C-475/99 *Ambulanz Glöckner* paragraph 20.

¹¹⁹ Case C-343/95 *Diego Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECR I-01547, paragraph 18.

4.2 The principle of solidarity

4.2.1 Introduction to the principle of solidarity

The principle of solidarity is developed by the ECJ and relates to activities regarded as non-economic because of their lack of a commercial nature.¹²⁰ In *Poucet and Pistre*¹²¹ the ECJ held that the management of a public social security system fulfilled an exclusively social function based on '[t]he principle of national solidarity...'.¹²² In *AOK-Bundesverband*¹²³ the ECJ came to similar conclusion on the management of a social security system in Germany. After an analysis of the system in question the ECJ stated that it followed '[f]rom 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... (emphasis added)'.¹²⁴

The cases on solidarity are considered relatively fact-specific.¹²⁵ From the language of the ECJ it is seen that they do not operate with fixed conditions or sharp edges in this area. They describe 'characteristics' and similarities. This is comprehensible as schemes come in a great variety of forms and classification is thus necessarily a matter of degree.¹²⁶ The following sections will seek to identify general requirements in the principle of solidarity.

4.2.2 What are the elements in activities performed on the basis of solidarity?

In the case of *Poucet and Pistre* the ECJ held:

*'Sickness funds, and the organizations involved in the management of the public social security system, fulfill an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions.'*¹²⁷

From this statement several elements is seen. Firstly (1), the activity fulfilled an 'exclusively social function'. Secondly (2), the activity was 'non-profit making'. Thirdly (3), the benefits were 'statutory'. Fourthly (4), the Court used the principle of 'national solidarity' as a benchmark for

¹²⁰ Case C-180/98 *Pavlov* [2000] ECR I-06451C-218/00, C-218/00 *Cisal* [2002] ECR I-00691 paragraph 37.

¹²¹ Case C-159/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-00637.

¹²² *Ibid* paragraph 18.

¹²³ Case C-265/01 *AOK-Bundesverband and Others* [2003] ECR I-00683.

¹²⁴ *Ibid* paragraph 55.

¹²⁵ Whish and Bailey (2012) page 88.

¹²⁶ Whish and Bailey (2012) page 88.

¹²⁷ Case C-159/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-00637 paragraph 18.

distinguishing between commercial and non-commercial activity.¹²⁸ Finally (5), the benefits from the scheme made 'no relation' between these benefits and the amount of contributions. It should also be added that the social security scheme in *Poucet and Pistre* was (6) compulsory.

In the case of *Fédération Française des Sociétés d'Assurance and Others*¹²⁹, the ECJ held that neither (1) the social aim nor the fact that the activity was (2) non-profit making and (3) governed by law could alter a conclusion that the activity was operating according to the principle of capitalization, and thus constituted an undertaking. A body was responsible for the managing of an old-age pension scheme and the Court did not discuss (4) 'national solidarity'. The (5) benefits depended solely on the amount of contributions paid by the contributors and on the investments made by the managing body, and the scheme was (6) optional, rather than compulsory as in *Poucet and Pistre*.

The relevance of the following elements discussed in both *Poucet and Pistre* and *Fédération Française des Sociétés d'Assurance and Others* will be dealt with in turn:

- the social aim
- non-profit making
- governed by law
- 'national solidarity'
- the relation between benefits and contributions
- compulsory or optional schemes

4.2.2.1 *The social aim*

It is clear from the case law of the ECJ, that the social aim of an activity is not itself sufficient to fall within the principle of solidarity.¹³⁰ In *Fédération Française des Sociétés d'Assurance and Others*¹³¹ the scheme at issue was found to operate in accordance with the principle of capitalization because of the limited element of solidarity:

'First, the principle of solidarity is reflected in this case by the fact that contributions are not linked to the risks incurred, by the placing of resources corresponding to the contributions paid at the disposal of the scheme in the event of the pre- mature death of a member, by a mechanism for granting exemption from payment of contributions in the event of illness, and by the temporary suspension of payment of contributions for reasons connected with the economic situation of the holding. Such provisions already exist in certain group life assurance policies, or may be included therein. In any

¹²⁸ Ariel Ezrachi (2010) page 6.

¹²⁹ Case C-244/94 *Federation française des sociétés d'assurances and Others* [1995] ECR I-4013

¹³⁰ Case C-218/00 *Cisal* [2002] ECR I-00691 paragraph 37, C-180/98 *Pavlov* [2000] ECR I-06451 paragraph 118.

¹³¹ Case C-244/94 *Federation française des sociétés d'assurances and Others* [1995] ECR I-4013.

*event, the principle of solidarity is extremely limited in scope, which follows from the optional nature of the scheme. In those circumstances, it cannot deprive the activity carried on by the body managing the scheme of its economic character.*¹³²

It is seen from this judgment that a social aim is not in itself sufficient to be regarded as an activity based on solidarity. From the ECJ assessment in *Federation française des sociétés d'assurances and Others* and *Poucet and Pistre* it appears from that an activity must fulfill an 'exclusively social function' to be excluded on the basis of solidarity.

4.2.2.2 *Non-profit making*

If an entity is earning profit on its business, such an activity could doubtfully be regarded as non-economic according to principles of solidarity. However, the fact that an entity is entirely non-profit making is on the other hand not enough to fulfill the principle of solidarity. The ECJ continued its reasoning in *Federation française des sociétés d'assurances and Others* that the mere fact that the CCMSA was a non-profit-making body could not deprive its activity of an economic character.¹³³

Thus, a profit making activity excludes the possibility of being exempted under the notion of activities based on solidarity. The entity is required to be non-profit making under the notion of solidarity-activities, but this non-profit making element is, on the contrary, not in itself sufficient.

4.2.2.3 *Governed by law*

Whether or not a law governs an activity is not decisive for the economic or non-economic nature of the activity.¹³⁴ In *Federation française des sociétés d'assurances and Others* the non-profit-making organization managing an old-age insurance scheme, established by law as an optional scheme, was not regarded as operating according to the principle of solidarity. The fact that an activity is governed by law is therefore not sufficient to fall within the principle of solidarity. A question is, however, whether the principle of solidarity *requires* an activity to be governed by law. I have not found any statement of this kind by the ECJ. Following a functional approach it should not be required that an activity is governed by law to be regarded as fulfilled on the basis of solidarity.

¹³² Ibid paragraph 19.

¹³³ Ibid paragraph 21.

¹³⁴ Ibid paragraph 22.

4.2.2.4 *'National solidarity'*

The element of 'solidarity' has not been explained in general terms by the ECJ. From *Poucet and Pistre* the ECJ held that the activity was based on 'the principle of national solidarity'. What is meant by 'national' is not clear. A suggestion is that the principle of solidarity must be limited to activities within the State sovereignty sphere, see section 5.3 below.

Advocate General Fennelly has defined the concept of solidarity as redistribution:

*'Social solidarity envisages **the inherently uncommercial act of involuntary subsidization** (emphasis added) of one social group by another.'*¹³⁵

Redistribution of resources seems to form the core aspect of activities performed on the basis of solidarity. Such activities cannot be fulfilled with profit.

4.2.2.5 *The relation between benefits and contributions*

In *Poucet and Pistre* for the sickness and maternity scheme in question, the benefits were the equal for all recipients, and contributions were proportionate to income. This was different in *Federation française des sociétés d'assurances and Others* where the benefits depended solely on the amount of contributions paid by the recipients and the financial results of the investments made by the managing organization.¹³⁶ There was here a direct link between the contributions and the amount of benefits given. It is reasonable to assume that activities on the basis of solidarity requires there to be no direct link between the benefits given and the contributions made. Where the contributions are linked to the benefits, such a scheme is similar to commercial insurances schemes and the element of solidarity would be less evident.

4.2.2.6 *Compulsory or optional schemes*

In the case of *Sodemare* Advocate General Fennelly stated that '*compulsory contributions was indispensable to the principle of solidarity.*'¹³⁷ When a scheme is optional, rather than compulsory, this becomes an argument for finding the scheme as economic because the scheme is merely an alternative to other similar types of insurances of health schemes and as such a competitor. The ECJ

¹³⁵ Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-03395, Opinion of the Advocate General, paragraph 25.

¹³⁶ Case C-244/94 *Federation française des sociétés d'assurances and Others* [1995] ECR I-4013 paragraph 17.

¹³⁷ Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-03395, Opinion of the Advocate General, paragraph 25.

held in *Federation française des sociétés d'assurances and Others* that, since the Coreva scheme was, among other factors, optional, the CMMA was carrying on an economic activity in competition with life assurance companies. In *Brentjens*¹³⁸ a supplementary pension scheme was not excluded on the basis of solidarity, and the pension fund responsible for the managing of the supplementary pension scheme in question was thus regarded as an undertaking. It is therefore concluded, supported also by *Odudu*¹³⁹, that compulsory participation is required according to the principle of solidarity.

4.3 Summary of solidarity

As seen, several elements are relevant when assessing the nature of solidarity within an activity. The solidarity aim of an activity is in itself not sufficient, as the activity must fulfil an exclusive social function to be excluded from the concept of undertakings. Furthermore, an entity must be non-profit making and performing according to the principle of national solidarity. There cannot be a direct link between the contributions and the amount of benefits given, and the scheme is required to be compulsory.

This understanding of the factors above is in accordance with the summary of the ECJ in *AOK-Bundesverband*¹⁴⁰. The ECJ held that:

*'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*¹⁴¹ [...] *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*'.¹⁴²

From this judgment it is seen that the fact that an activity only displays some characteristics of an activity performed on the basis of solidarity, is not sufficient to fall within the principle of solidarity.

¹³⁸ Case C-115/97 *Brentjens* [1999] ECR I-06025

¹³⁹ *Odudu* (2006) page 226.

¹⁴⁰ Case C-265/01 *AOK-Bundesverband and Others* [2003] ECR I-00683.

¹⁴¹ *Ibid* paragraph 47.

¹⁴² *Ibid* paragraph 49.

PART III

5 CONSTRUCTING A RATIO DECIDENDI

5.1 Economic activity - what else?

From consistent case law the meaning of undertakings is focused upon entities engaged in economic activity. The ECJ has ruled that public television broadcasting organizations are 'undertakings' within the meaning of Article 101(1) '*[i]n so far as they exercise economic activities...*'¹⁴³, the SCK, which carried out '*[c]ommercial or economic activities*', was accordingly an undertaking within the meaning of Article 101(1).¹⁴⁴, AAMS was an entity '*[e]ngaged in economic activities that are both industrial [...] and commercial [...] in nature*', and more general definitions provide that '*[a]n undertaking is any legal subject which independently exercises a commercial or economic activity...*'¹⁴⁵ or '*...[i]t may refer to any entity engaged in commercial activity...*'¹⁴⁶ (emphasis added).

The language of these decisions and judgment vary to some extent, but they all concern forms of 'commercial', 'industrial', or 'economic' activity. Their exclusive attention on economic activity implies that the ECJ has no intention of defining undertakings by reference to other forms of activity.

A desire for a rationale then emerges; why is the definition of undertakings merely concerned with entities engaging in economic activity?

It is a common feature in law that a detailed reasoning is not given before reaching the areas of uncertainty. It is therefore not surprising that a more detailed statement of law was given when addressing sports, endorsing the specificity of sport, to competition law. The Commission held in UEFA¹⁴⁷ paragraph 105 that:

'The Court of Justice has ruled that, having regard to the objectives of the Community, sport is subject to Community law to the extent it constitutes an economic activity within the meaning of Article 2 of

¹⁴³ OJ (1993) L179/23 *UER* paragraph 45.

¹⁴⁴ OJ (1994) L117/30 *Stichting Kraanverhurr* paragraph 19.

¹⁴⁵ OJ (2002) L257/1 *Mercedes Benz* paragraph 123.

¹⁴⁶ OJ (2003) L255/1 *Methionine* paragraph 237.

¹⁴⁷ OJ (2003) L291/25 *UEFA*.

*the Treaty. Football clubs engage in economic activities and they are undertakings within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement (emphasis added).*¹⁴⁸

The economic activities qualifying for the application of EU competition law are economic activities within the meaning of Article 2 EC. This reference is made to the earlier Treaty of Rome where a principle provision was set out in Article 2. The author of this paper believes the focus upon economic activity in EU competition law could be explained in the traditional aims of the EU system. At its core, EU legislations was agreed to promote a harmonious development of economic activities within Member States and introducing an internal market. Following the principles of the earlier Article 2:

'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.'

Thus, the EU system aims to promote a harmonious development of economic activities. Consequently, the EU legislation has arguably no legitimacy to address other non-economic activities in Member States.

However, before making a limitation of competition law to mere economic activity, this requires a rationale for why other forms of activity should not be subject to competition law.

5.2 Activities typical for the State

The exercise of public powers can clearly have an impact on competitive markets. The practice of monopoly markets for alcohol selling is an obvious example where the use of public powers causes an impact on a potential competitive market. Even though the impact on competition is significant, the special treatment of activities connected with the powers of States follows consequently when looking at the formulation of the competition provision in the Treaty. While the majority of European legislations are generally addressed to Member States, a special feature to Article 101 and 102 is that these address 'undertakings', not Member States as such. Thus, activity that is connected with the exercise of the powers of a public authority should logically not form part of the concept of undertakings. This would make the separation between 'undertakings' and Member States meaningless.

¹⁴⁸ OJ (2003) L291/25 *UEFA* paragraphs 105-106 and 125-131

Competition law refers to legislative attempts to control the behaviour in economic markets for the benefit of consumer welfare. However, this goal has its limits. Admittedly, the EU legislation is based on a compromise between seeking benefits of economic cooperation without removing too much sovereignty for Member States to decide upon their own economy. EU legislation is above all an arrangement for economic cooperation and the competition rules must thus be limited thereafter. This argument finds support in case law. While excluding the competition rules from the activities in *SELEX*¹⁴⁹, the Court held:

*'They are not of an economic nature **justifying** (emphasis added) the application of the Treaty rules of competition'.*¹⁵⁰

Advocate General Maduro opinion in the judgment of *FENIN* supports the same notion.¹⁵¹ Upon the underlying reasoning for the separation between economic activity and activities in the public interest it was held:

*'In seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States. The power of the State which is exercised in the political sphere is subject to democratic control. A different type of control is imposed on economic operators acting on a market: their conduct is governed by competition law. But there is no justification, when the State is acting as an economic operator, for relieving its actions of all control. On the contrary, it must observe the same rules in such cases.'*¹⁵²

The powers of a State are thus not subject to competition law as they are subject to democratic control.

Furthermore, one should bear in mind that State activity is also subject to other forms of control. The exclusion from the concept of undertakings is not unsatisfactory considering the fact that State activity could be subject to other provision in EU law. It is acknowledged, from a EU law perspective, that Article 101 and 102 are not meant to deal with all distortions of competition within a market. These articles are insufficient for such a far-reaching aim, and the Treaty legislator did not intend them to be sufficient. This could be seen already from the existence of Article 107. Since Article 101 and 102 are addressed at undertakings, not Member States, distortions of competition caused by Member States in

¹⁴⁹ Case T-155/04 *SELEX Sistemi Integrati SpA v Commission of the European Communities* [2006] ECR II-04797.

¹⁵⁰ *Ibid* paragraph 51.

¹⁵¹ Case C-205/03 P *FENIN v Commission* [2006] ECR I-06295.

¹⁵² Case C-205/03 P *FENIN v Commission* [2006] ECR I-06295, Opinion of Advocate General Maduro, paragraph 26.

their non-economic activity has to be dealt with in accordance with other provisions, such as Article 107. Article 107 TFEU prohibits state aid in 'any form whatsoever'. Because of its broad formulation, Article 107 is a suitable tool to deal with all different sorts of State activity that distorts competition.

5.3 What is the rationale for excluding activities performed on the basis of solidarity?

Odudu¹⁵³ argues that the rationale for excluding activities performed on the basis of solidarity as a form of distribution, is the lack of a potential to make profit from such activities. He refers to the case of *Albany*¹⁵⁴ for the support of his view:

'In Albany, after finding that a pension scheme was redistributive between those currently employed and those currently retired, Advocate General Jacobs could not: see any -even theoretical- possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle. Nobody would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same. The Advocate General 'consequently [had] some difficulty with the view that the activities of such a scheme could be of an economic nature'.¹⁵⁵

However, it is possible to set out an alternative rationale for the Court statement in *Albany*.

If there is, as held in *Albany*, no private organ prepared to pay for the offering of a service, this would mean that the offering of the service or good is dependent on an initiative from the State. Where there is only the possibility of State activity, there would be no use for competition law to apply, as there is no possibility of a competitive market. The activities of the State should arguably be within the freedom of their State sovereignty, and not controlled by the EU legal system. The EU system is at heart concerned with an economic cooperation between States for the functioning of the internal market. Furthermore, EU competition law should not intrude into the States own organization of services provided on the basis 'national solidarity', as the States are regarded as Sovereign in many aspects. This can be seen from *Cisal di Batistello* and other judgments¹⁵⁶:

'According to settled case-law, EU law does not affect the power of the Member States to organize

¹⁵³ Odudu (2006) page 225.

¹⁵⁴ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751

¹⁵⁵ *Ibid* page 225.

¹⁵⁶ Case C-218/00 *Cisal* [2002] ECR I-00691 paragraph 31, Case C-158/96 *Kobll* [1998] ECR I-1931, paragraph 17, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473.

*their social security systems.*¹⁵⁷

From this view, it is arguable, that the rationale for the exclusion of activities performed on the basis of 'national' solidarity could be identified in the separation of competence between EU law and States. This would make the rationale for excluding activities on the basis of solidarity from the concept of undertakings similar to the rationale for excluding of activities connected to the essential functions of the State – State sovereignty.

A contra argument to this rationale is that the EU Court have not dealt with the cases under the principle of solidarity in the same way as for activities connected to public powers. It shall be argued, however, that this is no strong contra argument because the form in which some of the 'solidarity-activities' have to some extent been different from activities 'essential' or 'typical' for State activity. The Courts have excluded activities 'typical of a public authority' from the application of competition law. The problem is only that it is not necessarily easy to identify what is 'typical' activity of a public authority. It is no common basis for what constitutes an essential function of the State. Since States develop and prioritize different areas within their jurisdiction, some new welfare arrangement within a State might be so original from other types of arrangements in other States that it is difficult to recognize the activity as something that is connected to the 'essential tasks of the State'. An example could illustrate this:

Imagine Swedish authorities were to start up a project called 'playstation3-houses' as an alternative to libraries. The offer gives users the benefits of entrance and use of the playstation3 during opening hours throughout the year for an insignificant payment, and the payment being exclusively used for redistribution to develop the quality of the offer in the playstation3 houses. As more members join in, more games and consoles are offered. While it is easy to agree that protecting the environment is a public task,¹⁵⁸ it could be more disputes on the offering of playstation3 services as part of a community project within a State. If no private firm could profit from running such a project, the author of this paper holds it arguable that it is in such situations for the States themselves to decide upon which welfare projects they want to pursue, without the interference of EU competition law. Thus, the activity should be excluded from the concept of undertakings.

Furthermore, the fact that the activity is not *de facto* performed by the State should make no difference. In accordance with the functional approach, one must look at the nature of the activity and not be focused upon what legal status of the provider of the service or good.

¹⁵⁷ Ibid paragraph 44.

¹⁵⁸ Case C-343/95 *Diego Cali & Figli and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECR I-01547.

On these grounds it is argued in this paper that activities performed on the principle of '*national solidarity*' constitutes activities of national common interest, which as such could be seen as an intra-State affair and therefore should not be subject to EU competition law.

5.4 Summary

As seen, there are good reasons for the ECJ to exclude activities performed on the public powers and activities on the basis of solidarity from the notion of economic activity, thus from the concept of undertakings. Neither the jurisprudence of the ECJ nor the rationale constructed in this section argues that other activities than economic activity should be part of the concept of undertakings.

PART IV

6 IS THERE A SIMPLE TEST FOR DEFINING UNDERTAKINGS?

6.1 Setting out a test

In many fields of law it is tempting to make a distinction between private and public activity. Following the functional approach, a separation between private and public *entities* does not give us a precise approach the concept of undertakings. The Court of Justice has given the instructions of following a functional approach, which must exclude the possibility of separating between private and public bodies. As consistently held, institutional form is irrelevant.

As we have seen, the functional approach separates between economic and non-economic activities. It has been suggested in legal theory that the distinction of economic from non-economic activities is not a question for the judiciary, but rather corresponds to fundamental political and societal choices.¹⁵⁹ However, the Court is depended on having legal criteria to separate an economic from a non-economic activity.

The following sections provide a proposal of four cumulative requirements that can define an undertaking.

¹⁵⁹ Hatzopoulos (2011) page 7.

(1) *Offering goods or services or purchasing for reselling*

It is argued on the basis of the jurisprudence of EU law that the offering of goods and services is a requirement to constitute an economic activity. This condition is repeated in abundant case law and there is little to suggest that an activity could be economic in the absence of the offer of goods or service. The requirement of there being an offering of goods and services is also argued by several authors in legal theory.¹⁶⁰

Some presentations of undertakings discuss the activity of purchasing as a form of economic activity by reference to *FENIN*. However, it is argued in this paper that the activity of purchasing play little role in the discussion of what requirements the Court has set out for when an entity qualifies as an undertaking. Purchasing is only regarded as an economic activity if the purchased products are subsequently used in the offering of goods or services. The decisive element is the subsequently offering of goods or services, not the purchase activity. The question then arises whether one could exclude the whole issue of purchasing from the definition of an undertaking? While this would be logical, the functional approach gives us problems in doing so. The functional approach requires, as seen, always to assess the concept of an undertaking according to the particular activity in question. It is sufficient to be aware that for purchase activity, the functional approach provides a misleading starting point for the assessment of the concept of undertakings. The necessary condition to be defined as an economic activity is the offering of goods of services.

(2) *A potential market in which profits can be made*

To constitute an economic activity, the offering of goods or services is not in itself sufficient. As seen, merely redistribution on the basis of solidarity does not constitute an economic activity. Consequently, the Office of Fair Trading (OFT) holds that conduct amounts to an economic activity when a body is not only supplying a good or service, but when that supply is also of a commercial nature.¹⁶¹ Accordingly, it is argued in this paper that the requirement of there being a potential market in which profit can be made, has to be fundamental in the definition of undertakings.

(3) *Independency – there has to be a designated 'economic unit for the purpose of the subject-matter'*

While excluding dockers from the concept of undertakings, the Court stated as part of its reasoning in

¹⁶⁰ Odudu (2006), Whish and Bailey (2012), Jones and Sufrin (2010).

¹⁶¹ *Public bodies and competition law, A guide to the application of the Competition Act 1998*, December 2011, OFT1389

*Becu*¹⁶²:

'Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law.'

It is argued in this paper that the case law does not provide enough material to state that a requirement of risk is fundamental to the definition of an undertaking. As seen, the ECJ has stated that the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter. Therefore, a requirement that entities must be sufficiently independent as an economic unit is proposed. Such a requirement could explain why employees are not regarded as undertakings when they form part of their incorporated unit. They are not an independent economic unit acting on their own. This harmonizes with the fact that employees may also carry on a business independently of their employer and in connection with such business they *have* been held to constitute undertakings.¹⁶³ By defining a condition of 'economic unit' or 'independency', this sets the definition of undertakings more in line with the single economic doctrine. The single economic doctrine, in short, defines two or several companies as an undertaking by testing whether or not they are independent enough to be regarded as separate undertakings.¹⁶⁴ Where there is no real autonomy in the activity of the firms, they are regarded as a single economic unit, or in the terminology of this paper, a single designated economic unit.

The ECJ has defined an undertaking as *'a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis'*.¹⁶⁵ Arguably, this is what the independency requirement would seek to identify. This makes it clear that there must be a certain amount of resources gathered for there to be an undertaking, but this requirement is not very great.¹⁶⁶

(4) The activity must not be regarded as a typical or essential State function

It is finally necessary to conclude negatively on the State nature of an activity, both in terms of activities essential to the State and activities falling within the principle of national solidarity. This requirement must be interpreted as cumulative to the three other conditions above.

¹⁶² Case C-22/98 *Becu and Others* [1999] ECR I-05665, paragraph 26.

¹⁶³ *Korah* (2007) page 47.

¹⁶⁴ Case C-97/08 P *AKZO Nobel v Commission* [2009] ECR I-8237

¹⁶⁵ Case T-11/89, *Shell International Chemical Company*, [1992] ECR II-00757, paragraph 311.

¹⁶⁶ Sørensen, Iversen, Wegener Jessen, Gram Mortensen and Steinicke (2008) page 40.

7 CONCLUSION

It is certain that the ECJ has so far not clearly set out the elements for defining an undertaking. With respect of predictability, the ECJ should formulate stricter requirements for what constitutes an undertaking. This is a field of law that desirably should provide simple criteria to apply.

It is my belief, that in order for the Courts to better clarify the concept of an undertaking and its boundaries, it is important to accept that Article 101 and 102 are not meant to be able to deal with all distortions of competition within a market. These articles are insufficient for such a far reaching aim, and the Treaty legislator did not intend them to be. This could be seen already from the existence of Article 107. Since Article 101 and 102 are addressed at undertakings, distortions of competition caused by Member States in their non-economic activity has to be dealt with in accordance with other provisions, such as for instance Article 107 setting boundaries for illegal State aid that may harm competition. One should not underestimate the competence to deal with distortion of competition by Member States under the wide formulation of state aid as ‘in any form whatsoever’ in Article 107.

When reaching the difficult areas in defining an entity as an undertaking, it is arguable that the Court should instead consider other legal paths for dealing with the distortion of competition, instead of developing the concept of undertakings to more complex levels following fact specific assessments. One legal pathway could be to qualify the entity as an undertaking, and focus the attention on whether there is any room for exclusion of the competition rules according to Article 106(2) in cases of performance of a service in general economic interest. One should bear in mind also, that some sectors of the economy is only covered by the competition rules to a certain extent, including agriculture and transport.¹⁶⁷

The Courts alternative is to say that the legal area of competition law is complex and that there thus cannot be drawn simple criteria for defining undertakings. In general, as the CAT stated in *The Racecourse Association and others v Office of Fair Trading*¹⁶⁸, ‘[c]ompetition law is not an area of law in which there is much scope for absolute concepts or sharp edges’. If there is no room for a clear cut test in defining undertakings, the conclusion of this paper is that the Court must decide upon the question of undertaking on a case-by-case use based on whether the nature of the activity is arguably within the economic sphere of EU law, or arguably within the State sovereignty sphere.

¹⁶⁷ Bellamy & Child (2001) pages 1081-1133 and 1200-1212.

¹⁶⁸ *The Racecourse Association and others v Office of Fair Trading* (2005) CAT 29, paragraph 167.

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