‘Undertaking’ as a Jurisdictional Element for the Application of EC Competition Rules

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Abstract

This article analyses how certain entities and their activities fall within the ambit of Competition law due to their characterisation as ‘undertakings’. First, it analyses the definition of an economic activity as the main criterion of what constitutes an ‘undertaking’. Second, it examines certain categories of entities which pose problems in their characterisation as ‘undertakings’. Further, it shows how the Court narrowed down an all-encompassing definition of an ‘undertaking’ by adding an element of autonomy to the element of economic activity in order to exclude certain individuals from the application of the competition rules; by incorporating the element of ‘imperium’ to exempt these public bodies whose activities flowed from the State's sovereignty; and recently, by introducing the principle of solidarity as the new criterion for excluding entities from the ambit of Competition law. Finally, this paper advocates that, in light of the decentralisation process, further guidance in clarifying the meaning of ‘undertaking’ is needed.

1. Introduction

It is not surprising that the notion of ‘undertaking’ is a core jurisdictional element for the application of the competition rules. This is evident from the nature of competition itself:

Competition is the relationship between any number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers. Each undertaking having made a commercial decision to place its goods or services on the market, utilizing its production and distribution facilities, will by that act necessarily bring itself into a relationship of potential contention and rivalry with the other undertakings in the same geographical market,

whose limits may be a single shipping precinct, a city, a region, a country, a group of countries, the entire European Community, or even the entire world.1

The competition rules contained in the EC Treaty apply to those main actors of contention and rivalry in the market: ‘undertakings’. In particular, Article 81 EC prohibits restrictive agreements between undertakings, Article 82 EC prohibits the abuse of a dominant position by one or more undertakings and the Merger Regulation controls concentrations between undertakings. It is evidently a *conditio sine qua non* that, for the above provisions of the EC Treaty to apply, there must primarily be some activity (action, agreement etc.) involving an undertaking or undertakings. To this extent the notion of ‘undertaking’ becomes a jurisdictional element for the application of the EC Competition rules delineating the scope of application of EC competition law. There is therefore a vested interest in clarifying what the term ‘undertaking’ entails.

This paper will try to shed as much light as possible on these questions by providing a legal and, when necessary, an economic analysis. The concept of undertaking evolves around two main areas:

(I) *the nature of an undertaking*, which is going to be dealt with extensively hereinafter; namely, what are the main criteria for concluding that any entity is or is not an undertaking and which entities are considered undertakings. The Court’s jurisprudence and definition of economic activity as the main criterion of what constitutes an undertaking will be analyzed. This paper then examines specific categories of entities which pose problems in their characterization as undertakings: employees, individuals, associations (trade unions, trade associations, sporting bodies), public undertakings (state departments, local authorities, universities, companies owned by the state).

(II) *the boundaries of an undertaking*: where does one undertaking end and another one begin? Are a subsidiary and its parent one or two undertakings? What about two state-owned companies or two state departments? The Court’s jurisprudence focuses on the ‘economic unit’ doctrine, i.e. that separate legal entities which form one economic unit constitute a single undertaking rather than several.

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2. **What is an ‘undertaking’?**

2.1. **Performance of an economic activity**

The EC Treaty has provided no definition of this concept for the purposes of competition law. In the absence of a more precise *de jure* definition, the crucial question of whether an entity is to be considered as an undertaking within the meaning of the competition rules is left to be answered by the European Court of Justice (the Court). The Court has approached this term *teleologically* focusing on the subject matter the entity in question is concerned with.

The first definition of the term ‘undertaking’ given by the Court is seen in the *Snupat v. High Authority* case where it held that ‘the concept of an undertaking within the meaning of the Treaty could be identified with a natural or legal person and that, consequently, several companies each having separate legal personality could not constitute a single undertaking within the meaning of the Treaty, even if those companies were economically integrated into the highest degree’. This definition was upheld in *Klöckner-Werke and Others* case, where the Court emphasized similar criteria and added the important economic dimension into the definition. Hence, ‘an undertaking is constituted by a single organization or personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long-term economic aim’. However, both these judgments were delivered within the scope of ECSC Treaty.

In the context of the EC competition rules, the Court’s first definition of the notion of ‘undertaking’ is given in the *Hydroterm/Compact* case. In this case, the Court concluded 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. The Court confirmed this functional approach in the more recent case of Höfner/Macrotron, where it provided a definition that was to become a standard form of words consistently reiterated:

‘The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed’.

In a similar vein, the Court of First Instance defined the term ‘undertaking’ in Enichem v. Commission as an economic entity made up of a collection of physical and human resources being capable of taking part in the commission of an infringement of the kind referred to in Article 85.

As it appears from the substance-oriented approach of the Court, the key feature of an ‘undertaking’ shifts from the criteria associated with the entity’s autonomy or legal status to considerations of economic activity. Organizational features, such as the legal status of the entity and the way of funding are rendered irrelevant as ‘substance prevails over form’ in Community competition law.

The difficulty of such a broad definition lies first in assessing what is precisely covered by ‘economic activity’ and second in the extremely broad coverage of the definition. The Court has tackled these problems by establishing first a general principle encompassing the circumstances under which an activity is to be considered economic and second, by excluding specifically certain activities from the scope of this general principle. In particular, the test used by the Court in determining when an activity is economic can be summarized as follows: ‘an activity is of an economic nature if it faces actual or potential competition by private companies, thus establishing a strong presumption for the economic character of any activity’. This broad definition was given in the case of Schröder v. Land Schleswig-Holstein, where the Court was required to determine whether an activity involving the sale of refugees was economic.

8. Ibid., at para. 11.
10. Ibid., at para. 21.
11. It should be noted that the Commission also gave a similar definition in the Polypropylene, [1986] OJ L230/1.
13. Ibid., p. 1632.
14. It is noteworthy to mention that in C-392/92, Schmidt v. Spar- und Leihkasse der früheren Amtsterritorien, Kiel and Cronshagen, [1994] ECR I-1311, the Court went so far as to equate the transfer of an activity with the transfer of an ‘undertaking’. For further elaboration, see G. More, ‘The concept of “undertaking” in the Acquired Rights Directive: the Court of Justice under pressure (again)’, (1995), 15 Yearbook of European Law.
understanding of the term 'economic activity' is a consistent feature of the Court’s jurisprudence.

Firstly, in Höfner/Macrotron, the Court qualified the German Employment Office as an undertaking because it deemed the public procurement activities to be of an economic nature. ‘The fact that the employment activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily carried out by public entities.’ This line of reasoning was further upheld in the Job Centre Coop case, where the public placement offices were found to be ‘undertakings’ since their activities in question were of economic nature and as such ‘subjected to the laws of a free market economy’. Similarly, the Commission has reiterated this approach by considering ‘economic activities those activities which might be carried on, at least in principle, by a private enterprise for profit’.

Hence, the term ‘economic activity’ has been clarified in broad terms by both the Court and the Commission as activities that can generate actual or potential competition. However, one cannot fail to notice the drawback of such a general definition, namely that it brings into the ambit of competition law all activities since nowadays they all can be and most of the time are also performed by private companies.

It will be shown below that, in order to limit the spectrum of competition law, the Court has developed various exclusions and carve-outs from this broad notion of ‘undertaking’ and economic activity. Some categories are excluded by virtue of their status (going against the Court’s general principle that status is irrelevant); others, such as state entities are taken out of the ambit of the notion of ‘undertaking’ (and hence outside the scope of the competition rules) whenever they exercise activities that are considered state ‘imperium’.

2.2. Economic activity and specific categories of private undertakings

2.2.1. Companies as undertakings

Although the EC Treaty provides a set of legal instruments in order to prohibit the distortion of competition by various ‘undertakings’, it nonetheless fails

17. Ibid., at para. 22.
21. ‘To a certain extent, this is even true of areas such as justice. Indeed, an increasing number of disputes on civil and commercial matters is settled through alternative dispute settlement systems, in particular by private arbitration.’ See fn. 21, at p. 1046.
to provide a definition of what the term ‘undertakings’ entails. A brief linguistic comparison shows that the word used in the languages of the founding Member States, from which the English version was translated, for the notion of ‘undertaking’ is simply another expression for the term ‘business’, ‘enterprise’, ‘company’ or ‘firm’. In these language versions, it is evident that primarily companies/enterprises are to be considered as ‘undertakings’ within the scope of competition law.

However, as discussed above, the Court adopts a functional approach when it comes to the application of the competition rules and the notion of undertaking, which is of course uniformly applied. In this regard, the concept of ‘undertaking’ is not identical with legal personality for the purpose of company or fiscal law. Thus, under the Court’s definition, a company that for some reason does not perform any economic activities will not be considered as an undertaking.

Indeed, even though companies will almost always fall within the realm of competition law (companies are by definition incorporated in order to perform economic activities), there are some rare exceptions when companies have been held by the Court not to be undertakings. This was the case of Diego Cali where a private company was held by the Court not to be an ‘undertaking’ because it performed a task in the public interest, namely the protection of the marine environment, instead of engaging in commercial activities.

Companies should not therefore be automatically considered as undertakings simply because of their legal status as companies. Finally, corporate personality is even more misleading when it comes to assessing whether each separate legal company is a separate undertaking for the purposes of competition law.

2.2.2. Individuals as undertakings
As is appreciated from the Court’s jurisprudence, the definition of an ‘undertaking’ is basically rested on an analysis of what constitutes an economic activity. As we saw, in the case of companies, legal personality is irrelevant. However, as the case law in relation to individuals will demonstrate, a clarification of the legal status of the entity in question is sometimes needed.

The entity engaged in an economic activity must at the same time enjoy a certain degree of autonomy in order to constitute an ‘undertaking’ within competition law. To this end, the Court in Vandevenne and Others case considered an ‘undertaking’ to be ‘an autonomous natural or legal person, irrespective of legal form, regularly carrying on a transport business and

emPOWERED to organize and control the work of drivers and crew’. 25 It is
important, therefore, to emphasize the autonomous nature of any definition
of ‘undertaking’ within the scope of the competition rules.

2.2.2.a. Employees. Employees do not constitute ‘undertakings’ within the
meaning of competition law since they lack the requisite independence that
is necessary in order to be qualified as such.

This line of reasoning is evident in the Bécu26 case, where the Court held
that ‘the employment relationship … is characterized by the fact that they
dockers) perform the work in question for and under the direction of each
of those undertakings … Since they are, for the duration of that relation-
ship 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’. 27 Similarly, in Suiker Unie28 case, the Court stated that ‘employees form
an economic unit with their employing undertaking. Auxiliary organs forming
an integral part of the principal’s undertaking cannot be regarded as undertakings’.29

Hence, employees are not ‘undertakings’ when they act in their capacity
as employees; they merely act for their employer and are part of its under-
taking. Nevertheless, one might argue that since employees offer services in
respect of remuneration, an activity clearly of an economic nature similar to
the sale of goods, they should be regarded as ‘undertakings’ for the purposes
of competition law.

In this respect, the Opinion of Advocate General Jacobs in the Albany30
case is of relevance. The AG explained that to include ‘employees’ within
the scope of ‘undertaking’ would mean bending the boundaries that the Treaty
imposes. He further argued that the system of competition law is not adapted
to be applicable to employees as the wording of the Articles shows that they
clearly apply to economic actors engaged in the supply of goods or services.
In particular, he stated that ‘dependent labor is by its very nature the opposite
of the independent exercise of an economic or commercial activity. Employees
normally do not bear the direct commercial risk of a given transaction. They
are subject to the orders of their employer. They do not offer services to
different clients, but work for a single employer. For those reasons there is a
significant functional difference between an employee and an undertaking

25. Ibid., at para. 9.
27. Ibid., at para. 26.
29. Ibid., at para. 542.
CMLR 446.
providing services. That difference is reflected in their distinct legal status in various areas of Community or national law.\(^{31}\)

In other words, employees due to the lack of independence in making decisions and bearing the consequences of the financial risks involved in the exercise of their activities are not considered to be ‘undertakings’. Instead, employees are considered to be the part and parcel of their employer's undertaking with which they form a single economic unit. In these situations, it is submitted that the rules of competition should be applied to the economic unit as a whole rather than to each entity individually. In effect, both the Court and the Commission have always imputed in the form of fines to the employer and the employees respectively, the undertaking's infringement is always imputed to the former as he or she had the power(s) to know and to prevent such an outcome.

2.2.2.b. Self-employed persons. It may be well established that employees are sheltered from the applicability of the competition rules, as they can not be considered ‘undertakings’ and as such subjects of the competition law. However, this conclusion does not render all natural persons outside the scope of competition law. On the contrary, natural persons engaging in business activities in their own right are ‘undertakings’ whose actions are monitored by the competition rules.

In the Reuter/BASF\(^ {32}\) case, the Commission held that an employee selling shares in a company he created and of which he was managing director was an ‘undertaking’. In the Vaessen/Morris\(^ {33}\) case, the Commission found that an inventor who may enter into anti-competitive agreements with respect to the exploitation of his invention was an ‘undertaking’. Moreover, in the RAI/Unitel\(^ {34}\) case, the Commission stated that a world-class opera singer was to be treated as an ‘undertaking’. In the same lines, in the Reyners\(^ {35}\) case, a lawyer was found to be sufficiently commercial to be subjected to the rules of competition as an ‘undertaking’.

More importantly, in the Commission v. Italy\(^ {36}\) case, the Court classified the Italian customs agents as undertakings. In this case, the Court’s reasoning was based on the fact that the activities of customs agents were economic since they were done in exchange of remuneration and since the customs agents had assumed the financial risks involved in the exercise of their profession.\(^ {37}\)

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37. Ibid., at para. 58.
This line of reasoning was further upheld in the Pavlov and Others case, where the Court ruled that self-employed medical specialists are to be classified as 'undertakings'. Natural persons, however, can also perform activities falling in their personal sphere and, in this case, they are not undertakings. Advocate General Jacobs stressed this in Pavlov: "where natural persons are classified as undertakings, it is correct to distinguish between activities related to their personal sphere. Contrary to legal persons who do not have a "private life", natural persons may act in their capacity as final consumers. Since Articles 85 et seq. apply only to "undertakings", natural persons acting in the latter quality are sheltered from the competition rules."

Subsequently, any natural person that carries on an economic activity with a sufficient degree of independence can and will be considered an 'undertaking' within the meaning of EC competition rules. To this end, one could for example argue that an individual sportsman/woman constitutes an 'undertaking' since he/she pursues an economic activity. This argumentation could be extended to the team sportsmen as well, when the latter negotiate the terms of their contracts, the renewal of their contracts or their transfer for the simple reason that they act on their own right protecting their own interests. However, one should refrain from elevating this reasoning to a general 'rule of thumb' since the decisive criterion every time is the economic nature of the relevant activities and not the status as such of the person concerned being either an individual sportsman or a team player.

Finally, it should be briefly mentioned that employers can be also 'undertakings' and as such within the ambit of competition law. Employers carry on economic activities, namely employing persons to work for them. As the Albany case shows, employers are considered to be 'undertakings' even when they are engaged in collective bargaining.

In conclusion, natural persons engaging in business activities can be regarded as 'undertakings' to the extent that they take on financial risks indicative of a genuine exercise of trade. In addition, the natural persons concerned should be engaged in activities related to their professional activity rather than activities of final consumption in order for the competition rules to apply.

40. 'It should be noted, as a preliminary point, that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty,' C-36/74, Valrave and Koch v. Union Cycliste Internationale, [1974], ECR 1405 at para. 4. C-415/93, Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others, [1995], ECR I-4921 at para. 73. C-176/96, Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), [2000], ECR I-2681 at para. 32.
2.2.2.c. Agents. In many cases, an ‘undertaking’ might choose to enter into a relationship with a commercial agent in order for the latter to distribute his goods or services and to introduce him to customers. A commercial agent, thus, negotiates transactions on behalf of the principal either in his own name or in the name of the principal. The relationship as such between a principal and his agent falls outside of the scope of competition law since an agent is not considered an ‘undertaking’ on his own right due to his lack of independence in making decisions. This argument is sustained in the Commission’s Notice on Vertical Restraints. The distinguishing factor between commercial agents and independent traders seems, thus, to be the degree of risk that is involved in the activities of the agent.

Nevertheless, as the subsequent case law will demonstrate, the earlier 1962 Notice has in fact caused substantial difficulties of interpretation. In the Pittsburgh Corning Europe case, the Commission stressed that in examining whether there was in fact an agency relationship, it would look at the ‘actual relationship’ and not at its ‘legal form’. The Commission stated that it had never indicated in its Notice that ‘it would consider solely the outside appearance of an agency relationship without considering the true character of legal acts, relations between undertakings, and economic conditions’.

In a similar vein, the Court prohibited restrictive agreements between sugar manufacturers and large business houses that acted both as agents and as independent dealers under Article 85(1) EC Treaty. The Court held that ‘the creation of such an ambivalent relationship, which in respect of the same commodity only gives the trader the opportunity of continuing to operate independently to the extent to which it is in the interest of his supplier for him to do so, cannot escape the prohibition of Article 85 no matter how such a relationship is regarded under national law’. In the Vlaamse Reisbureaus case, the Court decided that travel agents operating in the name and on behalf of tour operators were nonetheless independent traders since there was no exclusivity between them and the tour operators. Namely, they worked for

42. In this regard, agents could be paralleled with employees since both are not considered ‘undertakings’ due to the lack of independence in their decision-making.
44. ‘The Commission’s Notice on Commercial Agency of 1962 implied that the assumption of risk was the decisive factor. However, case law of the ECJ suggests that the auxiliary nature of the agent’s function is more important.’ S. Beeston and T. Hoehn, ‘Boundaries of the Firm in EC Competition law’ in J. Crayston, European Economics and Law, Competition-Trade-Single Market, 1999, Palladian Law Publishing, p. 34.
46. Ibid., at p. 37.
many tour operators and tour operators were selling their product through many travel agents.

Moreover, in Aluminium Imports from Eastern Europe, the Commission suggested that when a company enters into a restrictive agreement by its own will as an independent economic operator, it would be still subject to Article 81(1), even if it were acting as an agent. In addition, the Court prohibited a contractual clause restricting competition between a principal occupying a dominant position and his agent as it constituted an abuse within the scope of Article 82 EC Treaty. Finally, in the BKA/VW case the Advocate General Tesuro summarized the Commission's attitude to agency by outlining three situations where Article 81 would apply to these kind of relationships. Namely, 'first, when the agent bore, at least in part, the financial risks involved; second, when the agent competed on its own account directly against its principal in the same market; third, when the agent acted for a number of competing principals in the same market'.

To sum up, both the Court's and the Commission's approaches in relation to the status of an agent under competition law have been ambiguous. They both accept that the test for an agent to fall outside the scope of competition law is to be integrated into the undertaking of the principal. However, this test is not easy to apply since the decisive factor, namely the 'integration into the principal's undertaking' is something which can be also easily achieved by independent dealers.

The Commission has now provided in its new Guidelines on Vertical Restraints language that aims to clarify the scope of the agency relationship. By these guidelines, it is now safe to assume that the main test of an integrated agent is that it does not bear the financial and commercial risks of the transaction. An agent will be treated, however, as an independent trader if he contributes to the costs relating to the supply/purchase of the contract goods or services; or if he is obliged to invest in the advertising budgets of the principal; or if he maintains stocks at his own risk or organizes a distribution network with market specific investment in equipment, premises or personnel.

With these precautionary remarks in mind, it could be concluded that an agent when acting as an auxiliary of his principal in the course of business transactions falls outside the scope of an 'undertaking' and thus, outside the realm of competition law.

52. C-266/93, BKA/VW [1996] 4 CMLR 505.
53. Ibid., at p. 514.
54. Ibid., at paras. 12–20.
2.2.3. Associations as ‘undertakings’
As the Court’s and the Commission’s case law has exemplified, the notion of ‘undertaking’ encompasses all the activities of an economic nature. In principle, therefore, the legal personality of the entity in question is irrelevant because the focus is on the activities or functions of each entity. In fact, however, as the analysis in relation to employees and agents has shown, the examination of what constitutes an ‘undertaking’ is not so straightforward. This is also illustrated when the status of associations or of associations of ‘undertakings’ is under view.

Associations exist in different forms and sizes operating in every sector. Their importance is reflected in the wording of the Treaty, particularly Article 81(1) expressly mentions that ‘decisions by associations of undertakings that have as their object or effect, the prevention, restriction or distortion of competition within the Common market’ will be prohibited. The question remains which associations are considered to be ‘undertakings’ themselves or associations of ‘undertakings’ and as such within the ambit of the competition rules. To this end, our analysis will be focused on four categories, namely trade unions, professional associations, sporting bodies and trade associations.

2.2.3.a. Trade unions. A trade union is an association of employees. Under the Court’s jurisprudence, which was analyzed above, employees when they act in their capacity as ‘employees’ are not considered to be ‘undertakings’. By the same token, therefore, one may conclude that a trade union, which is actually representing employees, cannot qualify as an association of ‘undertakings’. It is, however, possible for a trade union to qualify as an undertaking in its own right.

This line of reasoning was suggested by the Advocate General and it was further upheld by the Court in the *Albany*55 case. In that case the AG made an important distinction in relation to trade unions. He put forward the argument that trade unions, although they cannot be considered ‘undertakings’ when they represent their members (the employees), they nonetheless can come within the ambit of competition law when they act as themselves. That is to say, trade unions may be regarded as ‘undertakings in so far as they themselves engage in an economic activity’.56

In particular, the AG stressed that ‘it must be borne in mind that an association can act either on its own right, independent to a certain extent


of the will of its members, or merely as an executive organ of an agreement between its members. In the former case its behavior is attributable to the association itself, in the latter case the members are responsible for the activity. ... With regard to trade union activities one has therefore to proceed in two steps: first, one has to ask whether a certain activity is attributable to the trade union itself and if so, secondly, whether that activity is of an economic nature’.57

Consequently, a trade union which is engaged in commercial activities other than those which it has to perform as an ‘executive organ’ of the will of its members shall be considered as an ‘undertaking’ whose actions will be supervised by the competition rules. Naturally, a trade union will be categorized as associations of ‘undertakings’ even if it is only representing the agreements between its members when the latter are ‘undertakings’ themselves. This is the case, for example, of associations of employers that are considered associations of ‘undertakings’.

2.2.3.b. Professional association. Professional associations of self-employed persons although in principle might be considered as ‘undertakings’, in fact they have rarely been subjected to the procedures of competition law. Nevertheless, in the COAPI\(^8\) case, the Commission held that the Spanish association of industrial property agents is an association of ‘undertakings’ under competition law, notwithstanding the fact that the ‘COAPI constitutes a corporate entity governed by public law and is entrusted with regulatory functions under Spanish law’. Moreover, the Commission, in the EPI Code of Conduct\(^9\) case, decided that professional disciplinary bodies could qualify as associations of ‘undertakings’, even when their members are technically qualified professionals.

In a similar vein, the Court in the Pavlov and Others\(^60\) case held, ‘the fact that a professional organization is governed by public law statute does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. So, the legal framework within which an association decision is taken and the legal definition given to that framework by the national legal system are irrelevant as far as the applicability of the Community rules on competition and, in particular, Article 85 are concerned’.\(^61\) The Court reaffirmed its approach to professional associations in Wouters, Savelbergh, Price Waterhouse v. Algemene Raad van de Nederlandse

61. Ibid., at para. 85.
Orde van Advocaten\textsuperscript{62} case, where it held that the Bar of the Netherlands acts as a regulatory body of a profession, the practice of which constitutes an economic activity and as such it must be regarded as an association of undertakings within the meaning of Article 81(1) of the Treaty.\textsuperscript{63}

In the light of the above cases, one could therefore conclude that professional organizations fall within the scope of competition law since they constitute associations of ‘undertakings’. In addition, it is submitted that by analogy to the case law on trade unions, professional associations could also qualify as ‘undertakings’ in their own right when they engage in economic activities. Such a conclusion is in conformity with the general definition of an ‘undertaking’, which accepts any entity carrying on commercial activities and with the Court’s and Commission’s jurisprudence.

2.2.3.c. Sporting bodies. In the wake of the ‘commercialization’ of sport, the Commission has confirmed that sport is subject to Community law. In particular, the fast growth of economic activities surrounding sport, such as the increase in salaries and transfer fees of professional sportsmen, the rise in the value of broadcasting rights and an increase in sponsorship and advertising costs,\textsuperscript{64} has put sport in the agenda of the Commission’s review.

Although sport is considered to be a ‘special case’, it cannot be immune from the supervision of competition rules. This argument was upheld in the \textit{Walrave and Koch}\textsuperscript{65} case, where the Court stressed that the business of sport is an economic activity and as such falls within the realm of competition law. However, sport entails a special character that must be taken into consideration when applying competition law. To this end, the Commission in applying competition rules to sports, is seeking to distinguish as clearly as possible between compliance with the principle of competition and the requirements of a sports policy that meets the unique features: the interdependence between competing adversaries, the need to ensure uncertainty of competition results and the socio-cultural objectives. The Commission will try to put a stop to the restrictive practices of sport organizations, which have a significant economic impact and which are unjustified in light of the goal of improving the production and distribution of sport events or with regard to the specific objectives of a sport.\textsuperscript{66}

The approach of the Commission is envisaged in two cases related to the ticketing of sport events. Firstly, in the \textit{Distribution of Package Tours during Victoria Louri\textsuperscript{156}}

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\item[63.] Ibid., at para. 71.
\item[64.] J-F. Pons, ‘Sport and European Competition Policy’, 1999 Fordham Corp. L. Inst. P. 76 (B. Hawk, ed.).
\item[66.] See footnote 68, p. 80.
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The 1990 World Cup case, the Commission held that the FIFA (Federation of Sports Association), the FIGC (Italian football Federation) and the Local organizing committee (a body set up jointly by FIFA and the FIGC) are 'undertakings' to the extent that they carry on economic activities and as such they fall within the ambit of the competition law. In a similar vein, the Commission decided in the 1998 World Cup Finals case, that the CFO (Comité Français d'Organisation) was an 'undertaking' that had abused its dominant position contrary to Article 82 EC Treaty by discriminating on grounds of nationality.

Furthermore, in relation to the area of broadcasting of sport events, the Commission considered whether the FIA (Fédération Internationale de l'Automobile) could qualify as an 'undertaking' and as such be responsible for breaching Article 82 EC Treaty when granting the exploitation of TV rights of Formula One and of some other important international motor-sport events. Moreover, as it appears from the Deliège case, the Court has accepted the Commission's approach in relation to sporting bodies. In that case, the AG went one step further by likening a judoka to a company and its federation to associations of companies, even though in the end he decided that an infringement of competition could not be established due to insufficient information.

In conclusion, as it appears from the above-mentioned jurisprudence, sporting bodies are qualified as 'undertakings' to the extent that their activities are of an economic nature. 'Sporting associations would now be better advised to adapt their arguments in order to win autonomy for their role in fixing “the rules of game” while accepting subjection to the control of EC law in more obviously economic realms. Both the Court's rulings and the evolving Commission practice exhibit readiness to acknowledge the special concerns of the sports sector, albeit not to the extent of conceding that its rules entirely escape the jurisdictional reach of the EC.'

2.2.3.d. Trade associations 'proper'. A trade association 'proper' is an association of the kind with which competition law is usually concerned and whose activities are carefully scrutinized. Specifically, 'a trade association is

72. The clarification has been added by A. Riesenkampff and S. Lehr, 'Membership of Professional Association and Article 85 of the EC Treaty' in (1996), 19 World Competition, Kluwer Law International.

Apparently, as trade associations are considered associations of ‘undertakings’ and as such are subjected to the competition rules, their objectives and activities might be prohibited if they have as their object or effect the restriction or distortion of competition. To this end, the Commission held\footnote{London Sugar Futures Market Ltd. (1985) OJ L369/25.} that the conditions of membership in the association must be clear, objective and non-discriminatory in order to comply with the Article 81 EC Treaty. In addition, the Commission ruled\footnote{Fatty Acids, (1987) OJ L3/17.} that information agreements would violate Article 81(1) if the resulting knowledge of market conditions was likely to strengthen coordination between the participants by enabling them to react efficiently to each other’s actions and thus lessen the intensity of competition.

What is more important, however, in the case of trade associations is the lack of any boundaries between the associations and their members which is illustrated when one tries to answer the question of where the responsibility of an infringement would/should be attributed to, and a fine imposed upon.\footnote{The lack of any boundaries between the trade associations and their members was envisaged for the first time in C-246/86, \textit{SC Belasco and Others v. Commission} [1989], ECR 2117, whereby the Court approved the Commission’s decision to fine also the members and not just the association. In a similar vein, the members were held to be jointly and severally liable with the Finnboard (the Finnish board mills association) in \textit{Cartonboard} (1994) OJ L243/1.} In the \textit{Cement}\footnote{Cement (1994) OJ L343/1.} case, the Commission established responsibility of the individual members of an association on the grounds that membership in a trade association, by definition, implies cooperation within the framework of the association’s activities.\footnote{Similarly, in C-240, 241, 242, 261, 262, 268 and 269/82, \textit{Stichting Sigarettenindustrie and Others v. Commission} [1985], ECR 3831, the Commission imposed fines on all the applicants, except the SSI, for participating in the agreements to raise retail prices.} Hence, the Commission will tend to refer to the members of the association, especially when the latter lacks legal personality.\footnote{In C-395/36, \textit{Compagnie Maritime Belge} [2000], ECR I-1365, the CFI (T-24-26 and 28/93) held on appeal from CEWAL that since the trade association had no legal personality, the Commission was entitled to fine its members. The ruling was eventually overturned by the ECJ \textit{only} on the ground that the Commission’s intention to fine the individual members was not clear from the statement of objections.}

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its decisions for practical reasons, namely the decision will be more easily enforced and the fines will be collected. However, the Commission is in no way prevented from imposing fines on the trade associations alone, thus excluding their members, if the factual situation of a given case allows it.

On the other hand, it should be mentioned that the Article 81(1) EC Treaty applies to the decisions of associations of ‘undertakings’, i.e. the trade associations themselves. In particular, the Commission came to the conclusion that Article 81 applies to trade associations that can impose regulatory measures. In addition, the Court held that also agreements between trade associations could fall within the scope of Article 81 although they are not expressly mentioned.

In the light of the above, a trade association ‘proper’ will normally fall within the scope of the competition rules by virtue of its being an association of undertakings as well as when it carries on economic activities in its own right. The members of a trade association will also not be sheltered from the application of the competition rules since they too will be considered ‘undertakings’ and will normally be held jointly and severally liable together with the association for competition law infringements.

2.3. Economic activity and the State/public undertakings

As one can appreciate from the Court’s established definition, any entity which engages in an economic activity regardless of its legal status and the way it is financed can be considered as an ‘undertaking’ for the purposes of competition law. To this end, the majority of commentators agree that the competition rules apply to all entities involved in commercial practices irrespective of whether they are private or public. Hence, the scope of an ‘undertaking’ is so broad that it encompasses every body, private or public

80. In T-213/95 and T-18/96 Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. Commission [1997], ECR II-1739, due to the lack of financial capacity from the part of the association (FNK), its members were held liable to pay the fines despite the fact that they were not defendants themselves.
81. The members of the association will be also held responsible even if the association has legal personality when the latter has entered into agreements with third parties according to Franco-Japanese Ball-Bearing Agreements, (1974) OJ L343/19.
82. In T-39 and 40/92, Groupement des Cartes Bancaires v. Commission [1994] ECR II-49, the amount was calculated on the member’s turnover, but the association had to pay.
85. ‘Legally this conclusion follows from the unqualified use of the term “undertakings” in both Article 85 and 86 from the fact that the exception of certain undertakings from these and other Treaty rules in the circumstances envisaged by Article 90(2) would be devoid of purpose were these rules not themselves applicable to all undertakings in the first place.’ A.C. Page, ‘Member States, Public Undertakings and Article 90’ (1982), 7 E.L. Rev., Sweet & Maxwell, p. 21.
including the State itself and its agencies when those exercise commercial activities as opposed to sovereign powers.

However, such a broad definition is bound to cause concerns. In particular, the State or State-owned entities can have a hybrid status. That is to say, that they are capable of carrying out activities flowing from their sovereignty, and which consequently are outside the ambit of competition law or they might be engaged in economic activities, which are by definition within the supervision of competition rules. Thus, it is necessary to distinguish between these two kinds of activities, as the application of competition law is dependent on the nature of these activities.

2.3.1. ‘Imperium’ versus ‘economic activity’

‘When assessing activities of state bodies the Court has insisted on the distinction between the role of the state as public authority, exercising imperium, and its other functions’.86 It is therefore imperative for the application of the competition law to distinguish between the public bodies when those act as public authorities and/or as public undertakings. This distinction rests on the previous differentiation, of a functional nature, between the exercise of economic activities in the public sector and the exercise of regulatory functions of such activities by the public authorities,’87 The State and its bodies, therefore, can have a twofold capacity; they might exercise activities flowing from their sovereignty by which they enjoy prerogatives outside the general law or they might carry on economic activities. A distinction between these two kinds of State’s activities is necessary, as it is the decisive factor for the application of competition law.88

To this end, acts that emanate from the exercise of the State’s imperium are considered non-economic and as such outside of the scope of competition law. This line of reasoning is exemplified in the Banchero89 case, where the Court decided that the authorization of the opening of tobacco outlets ‘amounts in effect to the exercise of a State right and not to an economic activity stricto sensu’.90 Hence, it is of no avail to object that the exercise of imperium is always sheltered from the application of the competition rules.

Nevertheless, it should be clarified here that the exercise of core public authority functions and the exercise of activities that serve the general

88. ‘The general, internal market and competition rules do not apply to non-economic activities and therefore have no impact on services of general interest to the extent to which these services constitute non-economic activities.’ Notice on Services of General Interest, [2001], OJ C17/4, p. 9, at para. 28.
90. Ibid., at para. 48.
economic interest are two different terms subjected to different rules. Whereas the exercise of imperium can by definition never be an economic activity, activities which serve the general economic interest are, by virtue of Article 90(2), subject to the competition rules unless and to the extent to which it is shown that their application is incompatible with the discharge of their particular tasks. Consequently, activities serving the general economic interest are considered economic and as such fall within the spectrum of competition law, but at the same time they might be exempted from the applicability of the competition rules on the basis of article 86(2) EC Treaty.

Our analysis will therefore turn to the examination of entities in determining when the latter are to be considered public ‘undertakings’ and as such within the ambit of competition law.

2.3.2. The State as an ‘undertaking’

The status of the State in relation to the application of competition law is slightly puzzling. As it was previously mentioned, the State has a twofold capacity; it might act as a public authority exercising its regulatory powers and as a public undertaking carrying on commercial or industrial activities. In order thus to clarify the ambiguous status of the State ‘it is necessary, in each case, to consider of the State and to determine the category to which those activities belong’. However, it is of no avail to object that stricto sensu States are not ‘undertakings’ to the extent that they exercise their imperium since in this area they face neither actual nor potential competition by private companies. Hence, although States are bound to respect the rules of competition and might be held liable to infringement proceedings when they fail to do so, nonetheless they cannot be subjected to the competition rules at least in as far as the performance of their sovereign or administrative functions are concerned.

On the other hand, it is an unclarified issue whether a State when being directly party to a commercial agreement with another ‘undertaking’ can be considered as an ‘undertaking’ as well. Such an assertion would seem to be compatible with the broad definition of an ‘undertaking’ that encompasses

95. ‘This means in the first place that matters which are intrinsically prerogatives of the State (such as ensuring internal and external security, the administration of justice, the conduct of foreign relations and other exercises of official authority) are excluded from the application of competition and internal market rules. Therefore, Article 86 and its conditions do not come into play.’ Notice on Services of General Interest, [2001], OJ C17/4, p. 9, at para. 28.
any entity as long as it is involved in commercial or economic activities. And apparently, it is verified in the French State/Suralmo case, in which the Commission treated a patent license granted by the French State as falling within the scope of Article 81(1) (ex Art. 85(1)) EC Treaty.

2.3.3. Regional and local authorities, other statutory bodies and international organizations

The rationale behind the classification of the State either as a public authority or as a public undertaking seems to apply also in relation to the similar categorization of the regional and local authorities, of other Statutory bodies and of International Organizations.

Therefore, regional and local authorities to the extent they carry on economic activities should be treated as ‘undertakings’ in conformity with the rationale of competition law. This approach was upheld by the Commission in the NAVEWA/ANSEAU case, where certain local water authorities as members of the ANSEAU association were found to be ‘undertakings’ and as such were fined for infringement of Article 81(1).

However, it should be mentioned that despite the Court’s and the Commission’s jurisprudence, Article 2(1a) of Directive 2000/52 EC categorizes regional and local authorities as ‘public authorities’ rather than ‘public undertakings’. Similarly, in the Bodon case, the Court found that the French communes which concluded contracts for concessions were public authorities and as such outside the ambit of competition law. Nevertheless, the Court’s ruling was based on the fact that the French communes were operating a public service within their capacity as public authorities.

Thus, as it is illustrated from the relevant case law, local and regional authorities are subjected to the rules of competition to the extent that they carry on commercial or economic activities.

In a similar vein, the classification of statutory bodies follows this line of reasoning. Namely, other statutory bodies performing quasi-governmental functions could be considered as ‘undertakings’ to the extent that they are involved in commercial activities.

The Court reaffirmed its broad understanding of the concept of ‘undertaking’ that is directly linked with the performance of an economic activity in Höfner v. Macrotron. In this case, the German Employment Office (the Bundesanstalt für Arbeit), a public body entrusted with the right to act as an intermediary between employers and persons seeking employment, was found

to be an 'undertaking'. The rationale of the Court’s ruling was rested on the fact that employment procurement activities were of an economic nature irrespective of not being subject to direct remuneration. This ruling was upheld in a similar case, \(^{101}\) in which the Italian placement offices, although non-profit making and acting in accordance with the principle of national solidarity were subjected to the rules of competition. Furthermore, in *Nungesser v. Commission*, \(^{102}\) the Court found that the French national institute for agricultural research was to be treated as an 'undertaking'.

Following the Court’s example, the Commission held in the *Airport of Brussels* \(^{103}\) case that the public body responsible for the safety of air transport as well as for the management of the Brussels national airport was an 'undertaking' in regard to the construction, maintenance and operation of the airport.

By the same token, the analysis of the status of international organizations provides similar conclusions. In particular, the Court has not hesitated to 'lift the veil' in order to discover whether international organizations should be subjected to the competition rules. However, this analysis requires considerable thought since a clear line between acts *de jure gestionis* and acts *de jure imperii*, which is the decisive factor for the categorization of public bodies in general, is not easily drawn. To this end, the Court looks at the substance of the organization's structure and decision-making in order to decide whether to equate them to the structure and decision-making of 'undertakings' or of associations of 'undertakings'. So, certain international organizations, which are directly engaged in the exercise of commercial activities, would be considered as 'undertakings' or associations of 'undertakings'.

Nevertheless, 'the general rule is that international organizations are associations of States involved in regulatory activities and not the direct exercise of economic activities.' \(^{105}\) The Court upheld this rule in the *Eurocontrol* \(^{106}\) case, in which it found that the international organization was to be regarded as a public authority acting in the exercise of its powers. In this case, the international organization established by the Convention on International Civil Aviation was entrusted with ensuring the supervision of the Benelux countries and of Northern Germany and with the provision of air traffic services. The Court, thus, concluded that 'this organization carries out on behalf of the Contracting States, tasks in the public interest aimed at con-

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103. *Airport of Brussels*, (1995) OJ L216/8. See also case *Spanish Courier Services*, (1990) OJ L233/19, in which the Spanish post office, although it formed part of the State’s general administration was found to be an 'undertaking'.
104. For example, the IATA for air transport and the UPU for postal services.
tributing to the maintenance and improvement of air traffic safety. \(^{107}\) 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 of supervision of air space which are typically those of a public authority. \(^{108}\)

In conclusion, the Court has remained loyal to its reasoning of when an entity should be considered as an ‘undertaking’ and in the case of international organizations; namely the status of the organization should be considered in relation to the activities that it undertakes in each and every occasion.

2.3.4. Universities as ‘undertakings’

Universities, either public or private, form a special category of potential ‘undertakings’ within the spectrum of competition law. \(^{109}\) Firstly, a clarification of the status of universities is in place. ‘Universities are problematic. They act as employers and providers of the public service of education … As a result of the ruling in Foster, it is clear that no definite categorization of universities can be given for the purposes of Community law.’ \(^{110}\)

Nonetheless, the difficulty in distinguishing between public and private universities is not an obstacle for the application of the competition rules since the latter since the latter consider the legal status of the entity immaterial. Thus, in determining whether universities could constitute ‘undertakings’, the question whether education is a service of an economic nature should be answered.

To this end, the Court rejected in the *Humbel*\(^ {112}\) case to consider courses of secondary education, provided under the national education system, a service of an economic nature. It held that the educational services provided have as an aim not to engage in a gainful activity, but to fulfill duties towards the population in the social, cultural and educational field. On the other hand, in the *Wirth*\(^ {113}\) case, the Court concluded that courses offered by private institutions might be services within the meaning of Article 50 (former Article 60) EC Treaty.

Turning now to the field or competition, given the remunerative nature of educational services provided by private universities (as it was illustrated

\(^{107}\) Ibid., at para. 27.

\(^{108}\) Ibid., at para. 30.

\(^{109}\) However, the Court has not examined the topic of universities within the ambit of competition law, so our analysis is drawn by conclusions made in the area of freedom to provide services.


\(^{111}\) The difficulty in classifying the status of universities is also illustrated in C-380/98, The Queen v. H.M. Treasury, ex parte The University of Cambridge [2002], ECR I-8035 whereby the listing of ‘universities’ as bodies governed by public law was challenged.


in the *Wirth* case), private universities could be qualified as 'undertakings'. Indeed, their activities are of an economic nature and are subjected to the laws of a free market economy. Services provided by public universities may also be considered as services of an economic nature, especially if remuneration in the form of tuition fees is involved, since they 'face actual or potential competition' by private universities. 'Education has not always been, and is not necessarily, carried out by public universities.' 114

Thus, public universities could be considered as 'undertakings' within the supervision of competition law, but at the same time they might be exempted from the applicability of competition rules under Article 86(2) EC Treaty as operating services of a general economic interest (which will be examined in greater detail below).

2.3.5. *Companies owned by the State*

The concept of 'undertaking' specifically encompasses companies owned by States. Indeed, the Treaty envisages that Member States have the right to incorporate public companies and engage in various economic activities. This area was largely covered by Article 222 EC Treaty, in which it was clarified that 'this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. Thus, Member States had the right to govern certain enterprises rendering them in this manner to be public 'undertakings'.

In addition, it is clear from the wording of Article 86 of the EC Treaty that the competition rules apply to public undertakings. The question, thus, is which entities are considered as public undertakings. Determining the meaning of 'public undertakings' is a two-step process; first, the question of whether the entity concerned is carrying on economic activities, thus, satisfying the criteria of 'undertaking' should be answered; and second, the issue of whether this 'undertaking' is public should be examined. The EC Treaty has not provided with a definition of what and when an 'undertaking' is deemed to fall within the public arena.

To this end, the Court in the *Transparency Directive*115 case has clarified the concept of a 'public undertaking'. Article 2(1b), (2) of Directive 2000/52/EC116 defined as 'public undertaking' 'any undertaking over which the public authorities may exercise directly or indirectly a dominant

114. Paraphrasing the wording of paragraph 22 of the *Höfner v. Macrotron* case.
influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

Therefore, the definition provided covers a wide range of bodies engaged in public economic activity since its key concept is control by the State. An example of 'this highly valued instrument of national economic policy which many politicians would consider public enterprises to be' is given in the Sacchi case. In this case, the Court held that the Italian Broadcasting Authority, RAI, was a 'public undertaking' due to the fact that it was under the control of a state holding company, IRI.

However, the position of public enterprises is not so straightforward and can be looked at from many ways. In particular, a public enterprise could constitute a normal commercial 'undertaking'. In this case, it would be examined under Article 82 EC Treaty since it will often hold a national monopoly and thus occupy a dominant position within the common market.

On the other hand, a public enterprise is considered to be part of the government machinery and as such it carries to some extent the same obligations as governments. In this respect, it should be examined not under Article 81 and 82 EC Treaty, but in accordance with Article 86 EC Treaty. Finally, public enterprises as an extension of State should be also subjected to rules directed at governments as an indirect consequence.

Furthermore, it is noteworthy to mention that the competition law extends its jurisdiction also to private entities, which are found to be 'undertakings', that are granted by the State certain special or exclusive rights. These so-called 'privileged undertakings' fall within the spectrum of competition rules indirectly due to the fact that 'the State has deliberately intervened to relieve the undertaking concerned wholly or partially from the discipline of competition, and must bear responsibility for the consequences'. Examples of 'privileged undertakings' are found in the ERT case, where the Greek radio and television company, which had been given by the State the monopoly over broadcasts, was challenged. Similarly, in the RTT v. GB/INNO case,

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117. 'A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking: (a) hold the major part of the undertaking’s subscribed capital; or (b) control the majority of the votes attaching to shares issued by the undertakings; or (c) can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body.' Ibid., in Article 2(1b), (2) of Directive 2000/52/EC.


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the Belgian national telephone company was held to be a 'privileged undertaking' whose actions were examined under competition law.

In addition, the *Merci convenzionali Porto di Genova* case, the Court held that the 'port undertaking' was to be subjected to the competition rules. Thus, the competition law catches state involvement, in the form of 'privileged undertakings', in economic activity.

2.3.6. 'Undertakings' under Article 86(2) EC Treaty

In the light of the above mentioned, it can be concluded that the competition law has a wide scope encompassing 'any entity engaged in economic activities irrespective of its legal form and the way it is financed'. This conclusion is also reinforced by the inclusion in the EC Treaty of Article 86(2). This article provides that certain undertakings fall within the spectrum of the competition rules, but at the same time they might be exempted because the services that they carry on are of a general economic interest. The question therefore arises as to which 'undertakings' are covered by this exception.

Once more, the Court has avoided to provide a clear-cut definition of the categories of 'undertakings' covered by Article 86(2), but it has stressed that this category should be strictly defined as the latter forms part of a derogation of the Treaty provisions. The Court's ambiguous approach to these 'undertakings' is illustrated in the *Hein* case. In this case, the Court ruled that: 'an undertaking which enjoys certain privileges for the accomplishment of the tasks entrusted to it by law, maintaining for this purpose close links with the public authorities, and which is responsible for ensuring the navi-gability of the State's most important waterway, may fall within this provi-sion'.

However, the Court also held that it is not relevant whether the undertaking is public or private as long as the service entrusted to it has been assigned to it by an act of a public authority. This act, although it should not be in any particular form, must be attributed to the relevant 'undertaking' by the State with some necessary steps. It appears thus that in order to elaborate on the concept of 'undertakings' within the concerned provision, the nature of the services which these 'undertakings' are entrusted with should be clarified.

The concept of services of 'general economic interest' has been quite difficult to define. It has been submitted that the phrase 'general economic

126. Ibid., at p. 730.
interest’ within the scope of Article 86(2) should be paralleled to the notion
of ‘public interest’.129 This approach is envisaged in the Opinion of the
Advocate General in the Dusseldorp130 case, where he said that: ‘the reason
for the assignment of particular tasks to undertakings is often that the tasks
need to be undertaken in the public interest but might not be undertaken,
usually for economic reasons, if the service were to be left in the private
sector’.131

Furthermore, Deringer132 suggests certain criteria that might provide
useful guidance in determining when services are of ‘a general economic
interest’. In particular, he provides the following criteria: ‘the imposition of
a duty upon the undertakings which cannot be varied by it unilaterally; the
importance of the service, failing its provision by the undertaking the State
would have to provide it itself; the detention by the State of supervisory
powers over the undertakings in relation to the provision of the service; and
the availability of the service to all users on the same basis and under the
same conditions’.133 The consequence of these requirements is to limit the
scope of the exception, an effect welcomed by the Court as the relevant case
law demonstrates.

The Court, thus, found in the Ahmed Saeed134 case that airlines, which
were required by the public authorities to operate on non-commercial routes,
were ‘undertakings’ entrusted with a service of ‘general economic interest’. A
similar conclusion was reached in the Almelo135 case, where the Energiebedrijf
IJsselcentrale had the task of ensuring the supply of electricity in part of the
national territory. In addition, in the Corsica Ferries136 case, the Court held
that the mooring operations were services of ‘general economic interest’. 
Finally, in Corbeau,137 the Régie des Postes was considered to be an ‘undertak-
ing’ entrusted with a service of ‘general economic interest’.

On the other hand, the Court in Merci Convenzionali Porto di Genova138

129. In the Notice on services of general interest, [2001] OJ C17/4, the services of general economic
interest are defined as ‘market services which the Member States subject to specific public service
obligations by virtue of a general interest criterion’ at p. 23.
130. C-203/96, Chemische Afvalstoffen Dusseldorp BV v. Minister van Volkshuisvesting, Ruimtelijke
131. Ibid., Opinion of AG, at para. 105.
132. A. Deringer, The Competition Law of the European Economic Community: A Commentary on
133. Ibid., at p. 248–249.

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clarified that the concept of services of ‘general economic interest’ is not all encompassing by excluding from its ambit the exclusive right of unloading and transship cargoes.

Furthermore, as the wording of the Article 86(2) EC Treaty shows, even if an ‘undertaking’ is entrusted with a service of a ‘general economic interest’, in order to be exempted it still has to show that compliance with the Treaty rules would ‘obstruct the performance’ of its tasks. Thus, in the British Telecom\textsuperscript{139} case the Court held that Italy had failed to prove that the application of the competition rules to BT would prejudice the accomplishment of the latter’s tasks.

However, as the Corbeau\textsuperscript{140} judgment illustrates, the Court has softened its approach to this requirement of proportionality. In this case, the Court concluded that the Belgian post office was an ‘undertaking’ entrusted with a ‘general interest’ service and accepted that some restriction of competition might be necessary in the sake of the market equilibrium. This approach was reinforced in the Commission v. Netherlands\textsuperscript{141} where the Court stated that the phrase ‘obstruct’ does not mean that the survival of the concerned ‘undertaking’ should be under threat. Finally, in order for the exception to apply, the development of trade should not be affected to such an extent as would be contrary to the interest of the Community. Although this provision limits the scope of the exemption, it must be noted that some effect on trade is a necessary and accepted consequence derived from the existence of the exception.

Thus, when faced with entities that operate services of general economic interest the Court usually finds that they are ‘undertakings’ and then that their activities should be assessed pursuant to Article 86(2) of the Treaty.

\textbf{2.3.7. A new category of non-undertakings?}

The Court has not followed this reasoning consistently in its recent jurisprudence but has decided to exclude certain entities from the competition rules by holding that they are not undertakings in the first place. In particular, the Court has taken a different approach when considering health, pension and other insurance services’ undertakings. ‘It has excluded the provision of social insurance services, to which affiliation is compulsory, altogether from the ambit of Community competition law on the basis of the “solidarity principle”.’\textsuperscript{142}

To this end, the Court has failed to distinguish between two relevant issues: ‘jurisdiction (i.e. does a particular activity fall within the scope of Article 81

\textsuperscript{139.} C-41/83, Re British Telecommunications: Italy v. Commission [1985] ECR 873.
\textsuperscript{140.} Cited above, fn. 137.
and 82, i.e. are the entities performing the activity ‘undertakings’? and justification (i.e. is the activity justified under Article 86(2))?’. 143

The Court has used the new approach in cases involving social insurance by referring to the notion of solidarity. The notion of solidarity provides for a ‘transfer of wealth, not based on insurance principles, among members of a given risk group or among different groups’.

The Court therefore uses the principle of solidarity in all its forms in determining whether the relevant ‘social entities’ are to be considered ‘undertakings’ within the meaning of competition law. Thus, in *Poucet and Pistre*,144 the Court held that the social security schemes to which affiliation was compulsory were not to be considered as ‘undertakings’ for the purposes of competition law. Specifically, the Court found that the ‘sickness funds, and the organizations involved in the management of the public security system, fulfil an exclusively social function. That activity is abased on the principle of national solidarity and is entirely no-profit making. The benefits paid are statutory benefits bearing no relation to the amount of contributions. Accordingly, that activity is not an economic activity and, therefore, the organizations to which it is entrusted are not undertakings within the meaning of Articles 81 and 82 of the Treaty’.145

Recently, the Court reiterated its approach in the *Cisal di Battistello v. INAIL*146 case, where it held that the relevant insurance scheme fulfilled an exclusively social function and as such it could not be regarded as an ‘undertaking’ within the meaning of competition law. In particular, the Court concluded that ‘the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterizes such an insurance scheme is essential for the financial balance of the scheme and for the application of the principle of solidarity, which means that benefits paid to the insured persons are not strictly proportionate to the contributions paid by them … It follows that its activity is not an economic activity for the purposes of competition law and that this body does not therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty’.147


145. Ibid., at paras. 18, 19.

146. C-218/00, *Cisal di Battistello Venanzio and C. Sas v. Istituto nazionale per lassicurazione contro gli infortuni sul lavoro (INAIL)* [2002], to be published.

147. Ibid., at paras. 44, 45.
Similarly, in the Van Schijndel\(^{148}\) case, the Advocate General\(^ {149}\) concluded that the scheme in question in its relation with its members is not an ‘undertaking’ within the competition law. However, the Court declined to address the issue for procedural reasons.

On the other hand, in FFSA\(^ {150}\), the Court reached a different conclusion based, however, on the same line of reasoning. It held that the scheme in question irrespective of the fact that it pursued a social objective and it lacked any profit motive was an ‘undertaking’ since the degree of solidarity was insufficient to remove the scheme from the scope of the competition rules.

In addition, in the cases Albany, Brentjens and Drijvende Bokken\(^ {151}\), the Court considered the ‘independent decision-making regarding the level of contributions and benefits, the financing mechanism based on capitalization and the potential competition from third private insurers via the exemption mechanism’ as ‘yardsticks’ in deciding the status of the relevant scheme. After examining the above features, the Court concluded that the degree of solidarity was insufficient in order to shelter the schemes from the supervision of competition law. In particular, the Court held that ‘the various manifestations of solidarity which are present in the Dutch pension schemes are not sufficient to deprive the sectoral pension fund [at issue] of its status as an undertaking within the meaning of the competition rules of the Treaty’\(^ {152}\).

Similarly, in the Pavlov\(^ {153}\) case, the pension fund was found to be an ‘undertaking’\(^ {154}\) since it determined the amount of contributions and benefits it provided, it operated on the basis of capitalization, the amount of benefits depended on the performance of investments which it made and finally, it was subject to the supervision of the Insurance Board. It was irrelevant in

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149. It should be mentioned that the AG Jacobs reconsidered his point in the subsequent case of Albany, see fn. 143.


152. Ibid., Albany and Brentjens at paras. 81–86 and Drijvende Bokken at paras. 71–76.


154. Similar facts in C-22/98, Van der Woude v. Stichting Beatrixoord [2000] ECR I-7111 provided similar results. In this case, the IZZ (Sickness Insurance Institute for the hospital sector) was found to fall within the scope of competition law. However, the entity did not enjoy a legal exclusive right, but the employee who wanted to be insured elsewhere had to pay the contribution all by himself whereas his employer would have paid 50 per cent of the contribution if he was affiliated with the entity designed by social partners.
that regard that the pension fund in question was not profit-making and that it operated on the basis of the principle of solidarity.\textsuperscript{155}

In conclusion, the Court seems to exclude from the application of the competition law social security schemes to which affiliation is compulsory. Its reasoning is summarized in the \textit{García}\textsuperscript{156} case, where it is stated that: 'social security schemes such as those in issue in the main proceedings, which are based on the principle of solidarity is applied and that their financial equilibrium is maintained'.\textsuperscript{157}

This approach leaves unanswered the question of why the Court fails to distinguish between jurisdiction and justification. There are valid reasons why these schemes, which encompass a great amount of solidarity, should be protected under Article 86(2), but there are many question marks as to whether their exclusion from the Treaty is the right way.

3. Conclusion

The notion of undertaking is a key jurisdictional tool for the application of the EC competition rules. Various entities perform a plethora of activities in everyday life. Whether these entities and their activities fall within the ambit of EC competition law depends on their characterization as 'undertakings'.

An analysis of whether one or more entities form a single undertaking is, in addition, crucial in order to know which competition rules will apply (Articles 81 or 82) and how they will apply (calculation of market share and turnover, black exemptions, imputation of fines etc.). As the EC Treaty has failed to provide a definition of what the concept of an 'undertaking' entails, the notion has been clarified over the years through the Court’s jurisprudence and academic analysis.

As in other area of Community law, the Court has followed a functional approach which, in its origins, provided for an extremely wide interpretation of the notion of undertaking and hence for an extremely wide application of the competition rules. The Court established the 'economic activity' doctrine whereby 'an entity is qualified as an undertaking when it engages in economic activities'. This definition covered companies, individuals, the State and State-owned entities.

Again, as in other areas of Community law (such as the free movement of goods), the Court increasingly had to narrow down its originally wide definition and to establish carve-outs and exceptions. First, the Court added an element of autonomy to the element of economic activity in order to exclude certain individuals from the application of the competition rules.

\textsuperscript{157} \textit{Ibid.}, at para. 14.
Thus, employees, agents and trade unions could only be undertakings on autonomy in their decision-making. Employees, therefore, were consistently held to lack the requisite autonomy and to fall outside the notion of undertaking and hence outside the ambit of the competition rules.

By the same token, both the Commission and the Court established an additional criterion in relation to public undertakings limiting in this manner the broad scope of the notion of ‘undertaking’. In particular, they held that public entities would not constitute undertakings and hence would be immune from the application of competition law when they exercise activities which, albeit seemingly of an economic nature, are closely related to the exercise of the State’s imperium, i.e. activities flowing from the State’s sovereignty. As a result, a distinction was made in each case between public bodies acting as public undertakings (purely economic activities) or as public authorities (exercise of imperium).

Recently, the Court faced with some politically sensitive areas such as social security has added further exceptions. To this end, the Court introduced a novel category by establishing that social security, health and pension schemes, when based on the principle of solidarity are to be excluded from the scope of competition law because they are not ‘undertakings’. In this way, ‘… the Court has departed from the functional approach. It has excluded the provision of social insurance services, to which affiliation is compulsory, altogether from the ambit of Community competition law on the basis of the ‘solidarity principle’. In effect, the Court has thereby added a fourth category to the previously existing (1) non-economic activities involving the exercise of imperium, (2) economic activities fully subject to competition law, and (3) economic activities of general interest subject to Article 86(2).’

Instead of assessing the nature of these services, which are undoubtedly economic and then review whether these services are of a general economic interest and as such justified under Article 86(2) EC Treaty, the Court rather excludes them altogether from the ambit of the competition law. This line of reasoning echoes back to the Keck and Mithouard case law, where the Court, having started from a very wide jurisdictional definition, had to limit the scope of the ‘free movement of goods’ provisions, such as the extended ambit of the mandatory requirements, by formulating certain criteria so as

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to render measures on 'selling arrangements' outside the scope of the Treaty Articles.\textsuperscript{160}

Given its key jurisdictional role, one would expect that the notion of 'undertaking' would be sufficiently precise and uncomplicated after almost half a century of application of the EC competition rules. The Court has indeed provided the basic doctrines and concepts, which enable the legal and business community to assess with relative certainty whether an entity ought to be classified as an undertaking.

However, as in other areas of Community law, the Court’s functional approach leaves some questions unanswered. This approach ultimately provides the Court with a flexible jurisdictional tool which enables the Court (as in the recent social security cases) to exclude whole areas of activity from the application of the competition rules. As EC competition law will be increasingly used in the national courts, the notion of undertaking should be expected to be analyzed further in order to avoid diverse application of the competition rules in the various Member States. Further guidance in the form of perhaps a Commission Notice or through a Court judgment may be required.

\textbf{References}


\textsuperscript{160} In conformity with this parallelism, K. Mortelmans in ‘Towards convergence in the application of the rules on free movement and on competition?’ in (2001), 3 CMLRev., pp. 613–649 provides as an example of the already existing convergence of the free movement rules and the competition ones the ‘at the gate’ restrictions, namely the tangible restrictions which fall outside the scope of the prohibition if they fulfil the dual requirement of ‘nature and purpose’ envisaged in the \textit{Brentjens} and \textit{Van der Woude} cases.
'Undertaking' as an Economic Activity Regarding EC Competition Rules

Articles


Victoria Louri


Commission’s directive, guidelines and notices