

WHAT HAS CHANGED IN EUROPEAN CONCEPT OF UNDERTAKING? FROM "FENIN" TO "EASY PAY" / Katarína Kalesná

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Abstract: *Competition is the main self-regulatory principle of the market in general, internal market included. Competition law has the form of general clauses making its application dependant on the correct interpretation of general concepts. Core competition rules of the Functional Treaty („TFEU“) are addressed to undertakings; undertaking thus belongs to key concepts of competition law. Interpretation of this concept is decisive for the scope of competition rules application. So, the article explores different approaches of the case law to the interpretation of the concept of undertaking based on economic activity. It compares the FENIN doctrine and the new functional test of separability developed in EASY PAY. It drives attention to the impact of this new test for the evaluation of procurement activities under competition scrutiny.*

Key words: *Competition; undertaking; economic activity; public procurement*

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1. INTRODUCTION

Creation of internal market belongs to main goals of the European Union emphasizing economic fundament of the European integration. Competition is, referring to economic theory, the main self-regulatory principle of the market in general, internal market included. If there is no competition, there is a risk of collapse of the market. Therefore, it is necessary to protect competition as an institution.

Based on OECD data, about 14% of GDP is covered by goods/services obtained by means of public procurement for public sector. As an important part of the internal market, public procurement has to comply with its principles and has to be open to competition. Public procurement law and competition law are therefore understood as two regulatory systems of the internal market.

Competition law (antitrust), as far as legislative technique is concerned, has the form of general clauses, both in EU law and on the national level. This technique is based on the use of general concepts making legal regulation flexible. On the other hand, its application depends on the correct interpretation of general concepts. So, the legal regulation can remain unchanged, but the real contents may be varied.

2. CONCEPT OF UNDERTAKING

2.1 Functional Approach

Core competition rules in Art. 101-102 TFEU as regulation of the most important antitrust institutes – agreements restricting competition, abuse of a dominant position – are addressed to undertakings. Undertaking thus belongs to the key concepts of competition law. As a matter of fact, there is no legal definition of this concept in the respective regulation; TFEU leaves its interpretation in these and similar cases to case law. Interpretation of the concept of undertaking in relevant case law thus determines the scope of application of the competition rules, being applied only on subjects fulfilling criteria laid on undertakings.

In the absence of definition in the Treaty or elsewhere in the legal regulation case law has developed a broad and functional definition of undertaking embracing „*any legal or natural person engaged in some form of economic or commercial activity, whether in the provision of goods or services, including cultural or sporting activities...*” (Steiner and Woods, 2009).

With reference to Court’s decision in Shell case (T 11/89) undertaking was understood as „*an economic entity...following an economic aim*”; „*irrespective of its legal status and the way in which it is financed*”,¹ covering also public undertakings. Competition rules do not apply to the exercise of public powers. So, it can be concluded, an undertaking is „*every entity (economic unit) that performs an economic activity.*” (Blažo, 2014).

2.2 FENIN doctrine

Apparently, the concept of undertaking is closely linked to the concept of economic activity. In this respect „*it is not necessary that the activity be pursued with a view to profit.*” (Steiner and Woods, 2009). The notion of undertaking was reconsidered by the Court of First Instance (CFI) under the so-called FENIN doctrine. In this case FENIN, the Spanish association of undertakings providing healthcare goods and medical equipment complained that Spanish National Healthcare System (SNHS) comprising health bodies, hospitals, etc. that purchased their requirements through FENIN abused its dominant position imposing among other business practices a delay on payments. The complaint was rejected by the Court as SNHS is not an undertaking carrying on economic activity „*characterised by the business of offering goods or services in a particular market, rather than the simple fact of making purchases. Provided that the purpose for which goods purchased are subsequently used is a part of an economic activity, then the purchase itself is an economic activity.*” (Steiner and Woods, 2009). That was not the case of SNHS as it purchased goods serving to public end. It was not considered to be an undertaking as it „*operated on the principle of solidarity financed by social security contributions and offered a free service to the general public, which is not an economic activity.*” (Steiner and Woods, 2009). The described FENIN case is considered to be controversial not only because of its definition of undertaking but also due to the impact of public buyer power on competition, especially taking into account economic dependence of FENIN, „*because more than 80 percent of its turnover came from SNHS, and there was no feasible purchasing alternative.*” (Prieto, 2020).

¹ CJEU, judgment of 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH., C-41/90, ECLI:EU:C:1991:161.

2.3 Impact of the FENIN Case

Apparently, interpretation of the economic activity in the FENIN case influenced not only case law in the EU² but also case law in the Member States. There was a series of decisions/judgments concerning public health insurance e.g. in the Slovak Republic, where the fulfilment of the economic activity criterion decisive for qualification as undertaking led to different conclusions concerning question whether health insurance corporations carrying on public health insurance are/are not subject to competition rules. In this regard L. Lapsanský states that recently was the question whether public health insurance agencies are subject to the Act on Protection of Competition addressed three times with different conclusions in 2008, 2009 and finally 2018. (Lapšanský, 2018).

There are two conflicting opinions in this regard: On the one hand health insurance corporations dispose of the great volume of financial sources what gives them appreciable bargaining power, e.g. in relation to hospitals etc., on the other hand, an opposite opinion derived exactly from the FENIN case: the main criterion for evaluation of economic activity in this case is a determination of solidarity, obligatory participation on system of health insurance and regulation of contributions to this system. So, it is quite evident, that economic activity qualifying undertaking as entity subject to competition rules depends on the interpretation of this concept and selection of different criteria used for this interpretation (Kalesná, 2019).

FENIN judgment was reflected also in legal writing (Patakyová, M. 2020). It was criticised for its controversial character leading e.g. to exclusion of public procurement activities of the contracting authorities from the competition rules (Prieto, 2020).

2.4 EASY PAY

CJEU judgment in EASY PAY³ brings a new test used for exploring economic activities of economic subjects engaged in activities composed of those that have/have not economic character.

2.4.1 Facts of the Case

In this case „Easy Pay“ AD and „Finance Engineering“ AD, undertakings that hold a licence issued by Bulgarian Communications Regulation Commission entitling them to offer postal money order services, complained that the Order on pensions of 10 March 2000 conferring exclusive right on „Balgarski poshti“ wholly owned by the Bulgarian State to pay retirement pensions by postal money order, restricts their rights as postal operators and is detrimental to free competition. When the Order on pensions was adopted, „Balgarski poshti“ was the only body authorised under Postal Services Act (PSA) to provide the universal postal service which included money orders.⁴

Due to the amendment of PSA „Balgarski poshti“ lost its monopoly for postal money orders that were no longer included in the universal postal service.⁵ In spite of that Order remained unchanged. The main argument of the Council of ministers was, that granting and payment of pensions cannot be qualified as an economic activity being

² CJEU, judgment of 26 March 2009, SELEX Sistemi Integrati SpA v Commission, C-113/07 P, ECLI:EU:C:2009:191; CJEU, judgment of 12 July 2012, Compass-Datenbank GmbH v Republik Österreich, C-138/11, ECLI:EU:C:2012:449.

³ CJEU, judgment of 22 October 2015, "EasyPay" AD and "Finance Engineering" AD v Ministerski savet na Republika Bulgaria and Natsionalen osiguritelnen institut, C-185/14, ECLI:EU:C:2015:716.

⁴ *Ibid.*, para. 23.

⁵ *Ibid.*, para. 24.

a part of the state social security functions. As a public service activity, it is not caught by competition law.⁶ The Court of the first instance dismissed the action as unfounded based on the argument of discretion flowing from Art. 106 of the Social Security Code as far as selection of a company entrusted with this function is concerned.⁷ The Supreme Administrative Court acting on appeal of the parties decided to stay proceedings and addressed a request for a preliminary ruling to CJEU. This request concerned interpretation of Directive 97/67/EC (postal services) and secondly interpretation of Art. 106 and 107 TFEU.⁸

2.4.2 Findings of the CJEU

The CJEU concluded that money order service does not fall within the scope of the respective Directive. Concerning the question of state aid provisions of TFEU, the CJEU pointed out that competition law rules are addressed to undertakings. The concept of undertaking covers any entity engaged in an economic activity irrespective of its legal status and the way in which it is financed; economic activity consists in offering goods and services on a given market.⁹ According to CJEU the public social security system based on the principle of national solidarity (non-profit –making) fulfils exclusively social function.¹⁰ The CJEU stressed that the activity of „Balgarski poshti“ carrying out money order operations could avoid qualification as an economic activity only if it is inseparably connected with the national pensions system.¹¹

Having in mind that Order on pensions enables an alternative payment of pensions through banks, the CJEU concluded that money orders of „Balgarski poshti“ are not the sole method of payment of the retirement pensions. That indicates, that these operations may be separable from the sole pensions system and may be understood as an economic activity.¹² From fulfilment of the criterion of economic activity flows that articles of the TFEU on state aid addressed to undertakings can be applied on the activity of money order operations of „Balgarski poshti“ and consequently granting an exclusive right on operations of this kind to „Balgarski poshti“ is to be understood as an advantage under Art. 107 (1) TFEU,¹³ but it is not caught by this provision if it constitutes a service of general economic interest.¹⁴

2.4.3 Impact of the Case EASY PAY

Apparently, the key question addressed by this CJEU judgment is linked to the concept of undertaking. Compared to FENIN case where economic activity as a key feature of undertaking depended on subsequent use of goods/services, in EASY PAY the crucial issue to be solved was, „*whether the activity of money order operations for the payment of retirement pensions is separable or inseparable from the provision of pension funds itself.*“ (Sánchez Graells and Herrera Anchustegui, 2015).

According to the findings of the Court the retirement pensions were paid not only through money order services, but also by bank transfer (53 %). That was quite indicative

⁶ *Ibid.*, para. 25.

⁷ *Ibid.*, para. 26.

⁸ *Ibid.*, para. 27.

⁹ *Ibid.*, para. 37.

¹⁰ *Ibid.*, para. 38.

¹¹ *Ibid.*, para. 40.

¹² *Ibid.*, para. 42-43.

¹³ *Ibid.*, para. 44.

¹⁴ *Ibid.*, para. 52.

for the Court that money order services should be understood only as a means/method¹⁵ for payment of retirement pensions that can be separated from the retirement pensions scheme itself. So, „*the test employed by the CJEU appears to rest on a functional distinction.*“ (Sánchez Graells and Herrera Anchustegui, 2015).

So, although there is undoubtedly a connection between the tool used for payment of retirement pensions and the retirement pensions scheme itself that would be sufficient for the formalistic approach of the previous case law (Sánchez Graells and Herrera Anchustegui, 2015) in EASY PAY the mere connection is no more sufficient; separability of both services is decisive for understanding what has to be considered as an economic activity and what not. Whereas pensions system granted through contributions serves the fulfilment of social function (Sánchez Graells and Herrera Anchustegui, 2015), the way the pensions are paid has the characteristics of an economic activity. Consequently, this activity should be subject to competition rules, provisions concerning state aid included. So, conferring an exclusive right to carry out this service has to be analysed under state aid rules and SGEI requirements (Sánchez Graells and Herrera Anchustegui, 2015).

Carrying on economic activity is, of course, indispensable for subject to be qualified as an undertaking. And only undertaking is an addressee of competition rules. In this regard has a new concept of undertaking derived from a broader interpretation of economic activity significant consequences for the public entities and their activities in sphere of public procurement and elsewhere. As far as public procurement is concerned, under FENIN doctrine pure purchasing activities were excluded from the concept of economic activity; therefore contracting authorities were not subject to competition rules although „*public buyer power is likely to have adverse effect on competition, despite pursuing a public end.*“ (Prieto, 2020).

Furthermore, Sanchez Graells and Herrera Anschustegui argue that new approach introduced by EASY PAY allows „*for procurement to be carried out as a self-standing (economic) activity with no clear or direct connection to any downstream activity, particularly through the use of central purchasing bodies...*“ (Sánchez Graells and Herrera Anchustegui, 2015). Central purchasing bodies can act under Directive 2014/24 as agents or wholesalers. Agent acts by „*awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities*“,¹⁶ whereas a wholesaler resells the acquired goods to a contracting authority. This can even be a profit-making activity (Sánchez Graells and Herrera Anchustegui, 2015). Both agent and wholesalers who cannot influence the further use of the procured goods, should be understood as undertakings based on the argument of separability of their economic activity from the subsequent use of the goods (Sánchez Graells and Herrera Anchustegui, 2015).

3. CONCLUSION

Recent case law represented by CJEU judgment in EASY PAY has far-reaching consequences. In comparison with FENIN doctrine and its narrow interpretation of the concept of undertaking as an addressee of competition rules EASY PAY has introduced a new functional analysis based on assessing of separability/inseparability of the

¹⁵ *Ibid.*, para. 42-44.

¹⁶ Recital (69) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024> (accessed on 18.09.2021).

services concerned. This new test is decisive for understanding what has to be considered as an economic activity, key feature of undertaking. Distinguishing between economic and non-economic activities enables a broader definition of economic activity compared to the FENIN case. That means more cases can be analysed under competition scrutiny as more subjects are qualified as undertakings. This might be significant for strengthening of competition in internal market in general.

Test developed in EASY PAY is particularly important for public procurement. After EASY PAY there is no ground for exclusion of public procurement from the competition scrutiny as it was the case under FENIN doctrine. If there is no inseparable connection between public procurement and subsequent use of the purchased goods/services, public procurement has to be analysed under competition rules.

This is especially significant for central purchasing bodies acting as agents/wholesalers for other subjects in central purchasing systems being a substantial part of the modernization of public procurement in the European Union. Although central purchasing can bring many benefits for public procurement (lowering of prices, reduction of administrative costs, etc.), it can be also harmful for competition, especially when aggregation of demand and improper application of bargaining power (resulting possibly in fall in prices under competitive level) combined with absence of purchasing alternatives leading to economic dependence (as indicated in FENIN case) forces economic operators to leave the procurement market. Afterwards, there is reduction in number of competitors, mainly small and medium enterprises, taking part in future public procurement procedures. Therefore, it is necessary to apply competition principles also in central purchasing schemes to avoid excessive concentration of bargaining power and its detrimental impact on market structure. Getting acquainted with the effects of monopsony and monopsony-like situations in procurement market could be also a good inspiration for further education in process of professionalization of public procurement.

Finally, not to forget is the question of legal certainty. Establishing a new separability test could bring more legal certainty not only for undertakings acting on procurement markets, but it could exclude divergences in the case law in general, e.g. in the health care system.

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