

9 June 2006

The Concept of Undertaking in Education and Public Health Systems

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1. Introduction

Member states finance public universities or research establishments and hospitals. Since public measures only constitute state aid when the recipient is classified as an undertaking, the question whether the above-mentioned establishments are covered by the concept of an undertaking is crucial for the application of Article 87 (1) EC.

At a first glance, the answer to this question seems to be simple. One just has to apply the definition of the concept of an undertaking and determine whether the activities carried out by a university or hospital can be considered to be “economic”.

The purpose of this short paper is to explain under which conditions a university, a research organisation or a hospital is an undertaking and under which conditions it is not. Like other areas of competition policy there is a dividing line which is not always clear and which shifts from time to time following rulings of the courts of the European Union.

Our main finding is that, with the exception of activities belonging to the exclusive competence of the state, activities are non-economic not because of inherent characteristics but because of the terms on which they are provided. These terms preclude remuneration or “consideration” that would generate profit or cover the costs of supply and therefore make it impossible for a market to exist in which they can be voluntarily offered.

2. The Concept of an Undertaking in the Case Law of the Court of Justice

The landmark case on the concept of an undertaking in competition law is the *Klaus Höfner* case² where the ECJ defined an undertaking as “*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*”. From this definition it is clear, that the only decisive factor in determining whether an entity is an undertaken is the entity’s engagement in an “economic activity”.

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² Case C-41/90, *Klaus Höfner*, [1991] ECR, I-01979, Para.21.

It is irrelevant that it may concern a private or public³ entity, a non-profit or profit entity, or even only one individual who is engaged in the activity in question.

According to settled case law an “economic activity” is “*any activity consisting in offering goods and services on a given market*”.⁴ An economic activity presupposes the assumption of risk for the purpose for remuneration.⁵ Remuneration constitutes consideration “*normally agreed upon between the provider and the recipient*”⁶ (It is worth noting that Article 49 of the EC Treaty refers to freedom to provide services and Article 50 stipulates that these services are those for “remuneration”).

This suggests that an economic activity is the voluntary offer of goods and services under conditions that generate profit or return or at least cover the costs of the goods and services in question.⁷

For some activities there cannot be a market because they belong to the sphere of exclusive competence of the state, such as the issuing of passports or birth certificates, irrespective of the fact that normally one has to pay to obtain such documents. Moreover, only the state has the prerogative to impose regulatory requirements such as broadcasting or banking licensing. Not only are these activities reserved for the state, one cannot obtain certificates or licences unless one qualifies by satisfying certain legal criteria or fiduciary requirements.⁸

It follows that an activity is non-economic when there can be no market for comparable goods & services either because there is no voluntary participation or interaction or transactions by sellers and buyers (because costs cannot be covered) or because the state has reserved it for itself.⁹

Therefore, with the exception of the activities that are reserved for the state, the decisive issue is not any inherent quality of the activity but whether there can be a market for it where the provision of a product covers its costs so that sellers or investors would have an incentive to supply it. This is not a question of whether the price is high enough or not, but whether the buyer, consumer or beneficiary pays at all a price that constitutes remuneration or consideration by covering the cost of the product or corresponding to the value of the product.

³ In *Commission v Italy* (Case C-118/85, [1987] ECR, I-02599, Para.7), the ECJ held that the state can also engage in economic activities.

⁴ Case C-35/96, *Commission v Italy*, [1998] ECR, I-03851, Para.36. See also, Case C-180/98 to C-184/98, *Pavel Pavlov and Others*, [2000] ECR, I-6451, Para.75; Case C-222/-4, *Ministerio dell'Economica e delle Finanze*, Judgement of 10 January 2006, Para.108.

⁵ Case C-184/98, *Pavel Pavlov and Others*, [2000] ECR, I-6451; C-475/99, *Ambulanz Glöckner*, [2001] ECR, I-09089

⁶ Case C-263/86, *Humbel and Edel*, [1988] ECR, I-05365, Para.17.

⁷ Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, [1993] ECR, I-00637

⁸ Case C-30/87, *Bodson*, [1988] ECR, I-2479; Case C-364/92, *Eurocontrol*, [1994] ECR, I-43; Case C-96/94, *Centro Servizi Spediporto*, [1995] ECR, I-2883.

⁹ Commission Decision of 6 April 2005, N 244/2003, United Kingdom – *Credit Union Provision of Access to Basic Financial Services – Scotland*.

In conclusion, many similar activities can be both economic and non-economic depending on the terms on which they are provided, as for example, education (private tuition v public schooling), health care (private clinics v public hospitals), pensions (private schemes v compulsory social insurance), rescue and emergency services (privately arranged v publicly and freely provided) or research funding (in the form of investment v granted to worthy or promising projects).

3. The Non-Economic Nature of Public Education

In *Humbel and Edel*¹⁰ the ECJ held that the establishment and maintenance of a public education system belongs to the duties of the State towards its citizens and that the State in fulfilling this duty is “*not seeking to engage in gainful activity*”. The fact that sometimes enrolment fees have to be paid does not change the nature of these activities. It follows, that activities within the public education system, especially if it is compulsory or open to all, can not be classified as “economic activities”.

Conversely, education which does not fall within the scope of the public education system is of an economic nature.

4. The Economic Nature of the Public Education System

In 2002 the Dutch authorities granted a subsidy to a consortium (OEC) of several universities which aims at the development and implementation of an electronic learning environment and the development of on-line teaching material for education establishments and business.¹¹ In analysing the state aid, the Commission examined whether the OEC engaged in economic activities. It first referred to the case law of the Court of Justice establishing that activities carried out by the state in fulfilling its duties under the public education system are not considered to constitute economic activities. It then concluded that the consortium was operating within the framework of this system because of the fact that it assisted the state in carrying out its responsibilities, that it was a non-profit foundation established under public law and that all participating establishments were covered by the “Wet Hoger Onderwijs” (Higher education Act).

This decision suggests that a public entity is not engaging in an economic activity as long as it operates within the framework of the public education system.

A more recent Commission decision concerning an Italian aid measure, however, seems at first glance to question the non-economic nature of activities carried out in the framework of the public education system. The decision concerned an Italian aid scheme which was implemented for the reform of training institutions. The Commission reiterated the case-law concerning public education systems, but also pointed out that “*the concept of economic activity is an evolving concept*”, and if a member state decides to transfer certain tasks which usually fall within its sovereign powers to undertakings

¹⁰ Case C-263/86, *Humbel and Edel*, [1988] ECR, I-05365, Para.18.

¹¹ Commission Decision of 15 January 2002, NN 152/2001, Netherlands – *Digitale Universiteit*.

and decides to create a new market for a product or service, activities which previously were not considered to be “economic activities” would now be covered by this concept.

The Commission concluded that the fact that an activity is carried out within the framework of the national education system does not necessarily mean that it cannot be qualified as an economic activity.

We agree with this conclusion for the reasons we explained in section 2. What matters is not any inherent quality of the activity or who carries out the activity or the context in which it is carried out but whether there can in principle be a market for it where the product can be offered for “consideration”.

5. Research and Development

Most Commission decisions on education establishments or research institutions concern research and development activities and are assessed on the basis of the Community Framework for state aid for research and development^{12, 13}. Point 2.4 of the Framework excludes from the scope of Article 87(1) aid measures for R&D activities carried out by “*public non-profit-making higher-education or research establishments*”. Nevertheless, in cases where the such establishments make their R&D results available to the industry, this must happen on a non-discriminatory basis, and when the R&D is carried out on behalf of or in collaboration with the industry, “*state aid within the meaning of Article 87 (1) of the EC Treaty is not involved either:*

- (a) *where the public non-profit-making higher-education or research establishments contribute to research projects as a commercial firm would, e.g. in return for payment at the market rate for the services they provide;*
- (b) *or*
 - *where the industrial participants in the research bear the full costs of the project, or*
 - *where the results which do not give rise to intellectual property right may be widely disseminated and any intellectual property rights to the R&D results are fully allocated to the public non-profit-making establishments, or*
 - *where the public non-profit-making establishments receive from the industrial participants compensation equivalent to the market price for the intellectual property rights which result from the research project and which are held by those industrial participants, and where the results which do not give rise to intellectual property right may be widely disseminated to interested third parties.”¹⁴*

¹² OJ C 045, 17.02.1996, pp.5-16.

¹³ See for example: Commission Decision of 9 December 2004, N 200/2004, Netherlands – *Ultimate Chiral Technology Project*; Commission Decision of 2 October 2001, N 364/2001, Germany – *Bauforschung und –technik für eine nachhaltige Stadt- und Raumentwicklung*; Commission Decision of 5 July 2001, N 140/2001, United Kingdom, *R&D for renewables and sustainable energy*.

¹⁴ Point 2.4. (a) and (b) of the Community Framework for state aid for research and development.

Because of the existence of point 2.4 the Commission can simply refer to this point in all R&D cases involving the above-mentioned establishments, and the question whether they are undertakings is not directly answered. Of course, one might argue that the reasoning behind point 2.4 is the same as the one applied to the concept of an undertaking – the economic nature of the activity being the decisive factor – and, from this one might conclude that the Commission does not qualify the public non-profit making establishments in question as undertakings.

But this approach immediately raises the question why the R&D Framework only refers to “public non-profit making” establishments and not other research organisations that may not be undertakings even if they are private. Unfortunately, the Commission is not very clear in its decisions either whether private higher education or research establishments can also be covered by point 2.4 of the R&D Framework.

In a decision concerning a Danish aid scheme¹⁵ under which subsidies were granted to private contract research and technology organisations, the Commission argued that they were comparable to public non-profit research establishments. The crucial factors were the special status of the organisations, their duty to work for the benefit of the society as a whole and the fact that they were not governed by private special interests. But, in cases where the private entity does not have these characteristics, the Commission is not ready to assimilate private higher-education or research establishments with public non-profit making establishments for the purpose of the R&D Framework.¹⁶

This ambiguous state of affairs may change in the future. On 20 April 2006 the European Commission published the preliminary draft of the new Community Framework for state aid for research and development and innovation¹⁷ which now brings both public and private non-profit research institutes and universities under the same heading. It furthermore provides that in cases where an entity carries out economic as well as non-economic activities, public funding will not be considered to be state aid if:

- the non-economic activities can be clearly separated from the economic activities;
- the funding of the non-economic activities can be clearly separated from the funding of the economic activities; and
- the entity is able to allocate costs to either one of the activities and no cross-subsidization of the economic activity will take place.

6. Public Health Systems

¹⁵ Commission Decision of 19 February 2003, NN 76/02, Denmark – *Contract Research and Technology Organisations*; see also, Commission Decision of 13 March 2004, N 605/03, Spain – *Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2004 – 2007)*.

¹⁶ Commission Decision of 24 March 2002, N 856/2001, United Kingdom – *LINK Collaborative Research Scheme*; Commission Decision of 19 March 2003, Netherlands – *Nationaal programma gebruikersondersteuning*; Commission Decision of 12 January 2002, N 694/2001, Germany – *Rahmenprogramm der Bundesrepublik Deutschland für Forschung und Entwicklung im Bereich der optischen Technologien*”.

¹⁷ http://europa.eu.int/comm/competition/state_aid/others/action_plan/rdi_frame_en.pdf

As outlined by the European Commission in its green paper on services of general interest¹⁸, economic and non-economic services can co-exist within the same sector and sometimes even be provided by the same organisation.

The case law of the Court of Justice and Commission decisions seem to suggest that this is certainly the case in the public health sector.

In the landmark cases *Poucet and Pistre*¹⁹ the ECJ did not consider a compulsory old-age insurance scheme and a compulsory sickness and maternity insurance scheme for self-employed persons to be undertakings since they were “*fulfilling an exclusively social function, (...) their activity was based on the principle of national solidarity and, (...) they were non-profit-making, the benefits paid out being statutory benefits that bore no relation to the level of contributions*”.

This “test” was subsequently applied by the Court of First Instance in *Fenin*²⁰. The case concerned three Spanish ministries running the Spanish national health system which purchased medical goods from FENIN (an association of undertakings which markets these goods), and which were accused by FENIN of having abused their dominant position. The Commission dismissed the complaint because it did not consider these ministries to be undertakings. The Court of First Instance agreed with the Commission on the grounds that the same characteristics applied to the Spanish national health system as the ones mentioned in *Poucet and Pistre*, and it, therefore, held that the ministries in question did not act as undertakings “*in managing the SNS*”.

FENIN filed an appeal arguing that the Court of First Instance’s view that purchasing activities could not be seen separately from the activity for which they are purchased did not hold. According to them the purchasing activity is an “economic activity” and “dissociable” from its subsequent use.²¹ The Court of Justice recently²² dismissed this appeal by confirming the Court of First Instance’s ruling.

On the basis of these cases we conclude that a public hospital that fulfils a social function (the implementation of a public health system belongs to an obligation which the state has towards its citizen) can not be considered to be an undertaking because its operation is based on the principle of solidarity (everybody has access to the hospital services) and operates on a non-profit basis. However, we must be very careful not to over-generalise here because the case law is still evolving.

Unlike the public education system where the Court has held that activities within this system cannot be classified as economic activities, the public health system has not, *prima facie*, been excluded from the scope of this concept. In *Smits/Stichting Ziekenfonds* the Court rejected the argument that hospital services could not constitute economic

¹⁸ Green Paper on Services of General Interest, 21.05.2003.

¹⁹ Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, [1993] ECR, I-00637.

²⁰ Case T-319/99, *FENIN*, Judgement of 4 March 2003, Paras. 38-39.

²¹ See also, *Bettercare II* case 1006/2/1/01, Judgement of the CCAT of 1 August 2002.

²² Case C-205/03 P, *FENIN*, Judgement of 11 July 2006, Paras. 25-28.

activities. It pointed out that medical services are covered by Article 60 EC and that there was no difference “*between care provided in a hospital environment and care provided outside such an environment*”.²³

Furthermore, in *Ambulanz Glöckner*²⁴ a German provider of emergency transport services was regarded as an undertaking because in Germany this activity – the transport of patients – is a remunerated activity which is offered by various operators. Although the provider in question operated on a non-profit basis it was held that that did not affect the Court’s conclusion. While in *Henning Veedfald*²⁵ it was held that “*the fact that products are manufactured for a specific medical service for which the patient does not pay directly but which if financed from public funds maintained out of taxpayers’ contributions cannot detract from the economic and business character of that manufacture*”.

It follows, that for determining whether an activity is an economic activity, it is not enough to simply classify it as a public health activity. Nevertheless, applying the *Poucet and Pistre* case might be very helpful.

In any case, the fact that an entity operates within the public health system does not automatically imply that it can never be considered to be an undertaking.

This is also confirmed by a Commission decision on capital allowances for hospitals in Ireland.²⁶ It concerned an Irish system under which capital allowances were granted to investors in certain hospitals. Although the measure was aimed at investors, the Commission argued that the measure was also likely to benefit the hospitals concerned. And, even though it did not assess the nature of the hospitals in detail, it stated that hospitals can be considered as undertakings, especially when they are offering private health care as well as public.

7. Conclusion

Although, the definition of an undertaking in the case law is very straightforward, Commission decisions dealing with public assistance to universities and hospitals reveal that there is a large grey area.

The case law as well as the Commission decisions demonstrates that entities which operate within the public education and public health system are normally not considered to be undertakings. Nevertheless, a member state can create a market for activities which traditionally fall within the boundaries of these systems thereby transforming them into “economic” activities.

²³ Case C-157/99, *Smits and Others*, [2001] ECR, I-5473, Paras.52 -53. See also, Case C-368/98, *Abdon Vanbraekel*, [2001] ECR, I-5363, and Case C-475/99, *Ambulanz Glöckner*, [2001] ECR, I-09089, Paras.19-22.

²⁴ C-475/99, *Ambulanz Glöckner*, [2001] ECR, I-09089, Paras.19-22.

²⁵ Case C-203/99, *Veedfald*, [2001] ECR, I-3569.

²⁶ Commission Decision of 27 February 2002, N 543/2001, Ireland – *Capital Allowances for Hospitals*.

Moreover, the fact that an entity is not considered to be an undertaking because it is engaged in public health or public education activities does not imply that it cannot be classified as undertaking with respect to activities falling outside the boundaries of public education and public health. Likewise, private entities having all the characteristics of public universities or public health providers are not always regarded as undertakings.

Where a public university or hospital or private research organisation is not certain whether an activity is economic or not, it is advisable that they separate in financial and accounting terms the activities which are clearly non-economic so as to protect them from the application of Article 87(1). Naturally, where there is doubt, it is always advisable to notify the relevant measures to the European Commission. Only an explicit decision of the Commission can provide certainty.