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The Concept of Undertaking in EU Competition Law

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Contents

Abstract

The concept of “undertaking” is a vital component of European Union Competition Law. Understanding when an entity is or isn't considered an undertaking is crucial to correctly applying the rules under this domain. The purpose of this paper is to clarify the concept of undertakings to delimit the area of competition law from others.

The paper will explore the different definitions of “undertaking” given by the Court of Justice of the European Union, as well as by doctrine and national courts of member states. The concept of the undertaking is fundamental to the enforcement and application of antitrust rules within the European Union. This study aims to provide a comprehensive understanding of the concept of undertaking and its significance in ensuring competitive markets and safeguarding consumer welfare.

The research begins by examining the legal framework surrounding the concept of the undertaking, tracing its evolution from foundational treaties such as the Treaty on the Functioning of the European Union (TFEU) to subsequent legislation and case law. It analyzes key principles and criteria used to determine the existence of an undertaking, including the notion of economic activity, control, and functional unity.

Keywords: EU Competition law, Undertaking, Economic Activity, Non-Economic, Articles 101 and 102 of TFEU.

Abbreviations

CJEU	Court of Justice of the European Union
EU	European Union
CCAT	Competition Commission Appeal Tribunal
CMA	Competition and Markets Authority
EU	European Union
ECJ	European Court of Justice
EFTA	European Free Trade Association
EMR	Merger Regulation
OFT	Office of Fair Trading
EEA	European Economic Area
FIFA	Federation of International Football Association
GC	General Court of Justice
MOTOE	Motosykletistiki Omospondia Ellados (Case)
TFEU	Treaty of the Functioning of European Union
TEU	Treaty on European Union

1 Introduction

1.1 Background

The concept of "undertaking" in EU competition law is foundational to the enforcement of antitrust regulations within the European Union. Evolving alongside the development of competition law, its definition and criteria are crucial for identifying entities subject to competition rules, determining market dominance, and assessing anti-competitive behaviours.

The CJEU defined "undertaking" in C-41/90 Höfner and Elsner v Macrotron GmbH as "any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed."[1] The court emphasized that the concept of economic activity involves offering goods or services on a market, regardless of the entity's public or private nature. The court concluded that the public employment agency's job placement services constituted economic activity, and thus, it qualified as an undertaking under EU competition law.

According to Article 2(4) Regulation (EC) No 1071/2009

"Undertaking shall mean any natural person, any legal person, whether profit-making or not, any association or group of persons without legal personality, whether profit-making or not or any official body, whether it has legal personality itself or is dependent upon an authority that has such personality, that transports, loads or unloads dangerous good's".[2] Looking at the Treaty See Opinion of AG Jääskinen in Case C-271/09 Poland v. Commission [2011] ECR I-13613, para.[3]71 of Functioning of European Union (TFEU) broad definition, undertakings encompass profit-making and non-profit entities, including government-owned enterprises. Let's look at the most cited case below in which the court defined undertaking. Höfner and Elsner v Macrotron GmbH, the CJEU held that an undertaking is an economic unit even if it does not have legal personality and is not necessarily visible as such in business *dealings*.[4] This decision confirmed that the concept of an undertaking is not limited to entities with legal personality but may also include groups of individuals or companies that operate as a single economic unit.

Therefore, it is important to understand the concept of an undertaking, as it has significant implications for the application of EU competition law, particularly in assessing market dominance and anti-competitive behaviour.

[1] Case C-41/90 EU:C:1991, Höfner and Elsner v Macrotron GmbH

[2] Chapter 1 Article 2 Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (Text with EEA relevance)

[3] See Opinion of AG Jääskinen in Case C-271/09 Poland v. Commission [2011] ECR I-13613, para

[4] Case C-41/90 EU:C:1991, Höfner and Elsner v Macrotron GmbH

One recent case involving the definition of undertakings and economic activity in competition law is the European Court of Justice's ruling in Case C-372/19 Facebook Ireland and Others v. the Belgian Data Protection Authority. In this case, the court found that Facebook's collection of data through cookies on third-party websites was an economic activity subject to competition law.[5] The court also clarified that the notion of an undertaking includes a natural or legal person engaged in economic activity, even if it does not have a legal personality under national law.

The legal foundation of an undertaking is embedded within the legal framework of Articles 101 and 102 TFEU, landmark cases shape the concept and the interpretations of EU institutions like the European Commission and the European Court of Justice. Understanding market power and dominance is integral, as undertakings often wield significant influence over markets. Enforcement, however, faces challenges such as jurisdictional complexities and the need for robust evidence gathering. Moreover, recent developments, including the rise of digital markets, globalization, and evolving economic landscapes, pose new challenges for the application of the concept of undertaking in EU competition law. Thus, a comprehensive examination of its background provides insights into its evolution, legal intricacies, practical implications, and emerging issues..

1.2 Purpose and Research Questions

In the dynamic landscape of EU competition law, the concept of *undertaking* serves as a cornerstone, shaping the enforcement framework and presenting the boundaries of permissible behaviour in the Single Market. This thesis begins by analysing the concept undertaking, delving into its legal foundations, judicial interpretation, and practical ramifications for businesses operating within the EU. By synthesizing legal analysis with pragmatic insights, this study endeavours to deepen understanding of the undertaking concept and its pivotal role in fostering competitive markets, safeguarding consumer welfare, and ensuring legal coherence in the application of competition rules. Legal Foundations and Criteria for undertaking concept lie within the Treaty on the Functioning of the European Union TFEU, notably in Articles 101 and 102. These provisions establish the framework for prohibiting anti-competitive agreements and abuses of dominant positions, applying to undertakings engaged in economic activities. Through an exploration of case law, including judgments such as Höfner and Elser v Macrotron GmbH, where the court defined undertaking as any entity engaged in economic activity regardless of legal form or the manner in which it is financed.[6] From the definition of the concept of undertaking, I will further explain the criteria used to define undertakings, which encompasses control relationships, economic activities, and functional unity. Courts and competition authorities play a pivotal role in interpreting and applying the undertaking concept in practice. Landmark cases, such as DaimlerChrysler v Commission and Intel v

[5] Case C-372/19 Facebook Ireland and Others v. the Belgian Data Protection Authority, [2021] ECLI:EU:C:2021:594

[6] Case C-41/90 EU:C:1991: Höfner and Elser v Macrotron GmbH

Commission,[7] provide insights into the judicial scrutiny of undertakings' conduct and determining liability for anti-competitive behaviour. By analyzing these cases, alongside decisions by the European Commission, this thesis explains the nuanced approach taken in assessing the existence of undertakings, including considerations of economic integration, control structures, and the attribution of liability. It Implications to businesses operating within the EU Single Market, understanding the concept of undertaking is paramount to navigating the complexities of competition law compliance and businesses and individuals will never go wrong if they understand the concept of undertaking when engaging in economic activity. Through a synthesis of legal analysis and practical insights, my thesis examines the implications of the undertaking concept to businesses, such as corporate structuring, joint ventures, and liability exposure. This study aims to empower businesses to proactively manage their competition law risks and leverage opportunities within the Single Market by providing practical guidance and case studies.
In summary, this thesis offers a holistic examination of the concept of undertaking in EU competition law, its legal foundations, interpretation by courts and competition authorities, and practical implications for businesses. By bridging theoretical analysis with real-world applications, this study contributes to a deeper understanding of the undertaking concept's significance in ensuring competitive markets, protecting consumer interests, and fostering legal certainty within the EU Single Market. The following three questions will be answered in part five of this thesis to fulfil this purpose.

1. What is the concept of undertaking in EU competition law, and how is it interpreted and applied in practice?
2. What are the legal foundations and criteria used to define an undertaking in EU competition law, as outlined in relevant treaty provisions and case law?
3. How have courts and competition authorities interpreted the concept of undertaking in landmark cases, and what are the key principles and factors considered in determining the existence of an undertaking?.

1.3 Delimitations

The purpose of this paper is not to provide a comprehensive overview of the conditions under which competition law is applicable. While the concept of an undertaking is a prerequisite for the application of competition law on the conduct of market participant in the internal market or single market, there may be instances where other provisions of completition law take precedence. Article 106 TFEU contains an exception that exempts entities entrusted with public service obligations from application of competition rules if it impedes their ability to perform their duties. The undertaking consists of material and procedural. The material aspect of undertakings determines which types of activities are subject to competition law

[7] Case T-219/99 DaimlerChrysler v Commission and Intel v Commission

rules. The procedural aspect of undertakings sets rules for addressing issues such as when to hold a parent company accountable for its subsidiary's conduct *known as the single economic doctrine*. This paper only discusses the material aspect of undertakings.

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1.4 Method and materials

In this thesis, I make use of a doctrinal legal method. Focuses on the letter of law rather than the law in action. This method involves a descriptive and detailed analysis and interpretation of legal rules found in both primary and secondary sources (cases, statutes, or regulations).[8] The concept of the undertaking is subject to comprehensive case law and academic literature. Related EU legislation, case-law of the CJEU and the Commission, and a limited number of cases from other jurisdictions like the UK etc to see how the concept is defined and put into practice, opinions of Advocates General, scholarly publications including both textbooks and articles, Commission's Notices and other related publications have been used.

This research is predominantly concerned with jurisprudence and legal theory developed in European Union competition law.

1.5 Outline

The concept of "undertaking" is vital for enforcing antitrust regulations in the European Union. It helps identify entities subject to competition rules, detect market dominance, and evaluate anti-competitive behaviours. The definition and criteria of the undertaking are outlined in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The interpretation of undertaking evolves through landmark cases and EU institutions like the European Commission and the European Court of Justice. Undertakings often hold considerable authority over market dynamics, so understanding the dynamics of market power and dominance is important. However, enforcing competition rules can be challenging due to complex jurisdictional issues and the need for robust evidence-gathering procedures. Recent developments like the proliferation of digital markets and globalization add to these complexities, making it necessary to apply the concept of undertaking in EU competition law in a nuanced way. Therefore, exploring the background of the undertaking provides insights into its historical development, legal intricacies, pragmatic implications, and emerging challenges within the EU's competition law landscape.

[8] Https://www.merriam-webster.com

2 Concept of Undertaking

2.1 INTRODUCTION

The term undertaking identifies the addresses of the European competition provisions.[9] It is important to analyse Article 101 TFEU, Article 102 TFEU and the European Merger Regulation **(**EMR), as only undertaking may be subjected to these regulatory instruments. The Treaty does not define what is meant by an undertaking it has been left to the Court of Justice through its case law to give meaning to this term.[10] The expression undertaking is critically important since only *agreements and concerted practices between undertakings are caught by Article 101*, similarly, A*rticle 102 applies only to abuses committed by dominant undertakings.* To ensure the full effectiveness of competition provision and to make sure that the entities did not escape the application of competition law, the Court adopted a functional approach, applying the term to entities engaged in economic activities regardless of their legal status and how they are financed, as seen in According to the Court of Justice of the European Union (CJEU) in Höfner and Elser v Macrotron GmbH9, the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and how it is financed.[11]The court made a similar judgment in Pavlov's case and has consistently maintained that any activity that involves offering goods or services in a particular market is considered an economic activity, this is to say that for an entity to be considered an undertaking it must be engaged in economic activity.[12] In the case of Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten, the Court ruled that the competition rules outlined in the Treaty are not applicable to activities that, due to their nature, purpose, and the regulations governing them, do not fall under the realm of economic activity. Similarly, these rules do not apply to activities that are linked with the exercise of public authority powers.[13] The Court's reason for the functional approach is that the same legal entity may be acting as an undertaking when it carries on one activity but not acting as an economic activity when it is carrying on another. A functional approach must be adopted when determining whether an entity, when engaged in a particular activity, is doing so as an undertaking for the purpose of the competition rules.[14] As the Court of Justice states or ruled in MOTOE v Ellinkio

[9] Consolidated version of Treaty on the Functioning of the European Union Art.101 and Art. 102 and Competition Act 1998 Chapter I prohibition and Chapter II prohibition.

[10] Okeoghene Odudu, Oxford University Press, 2006 'The Meaning of Undertaking within Article 81 EC' in The Boundaries of EC Competition Law: The Scope of Article 81, ch 3; note that Article 80 of the former ECSC Treaty and Article 80 of the Euratom Treaty do contain definitions of an undertaking for their respective purposes, as does Article 1 of Protocol 22 of the EEA Agreement.

[11] Case C-41/90 EU:C:1991, Höfner and Elser v Macrotron GmbH9 EU:C:1991:161, para 21.

[12] Cases C-180/98 Pavlov's EU:C:2000:428, para 75.

[13] Case C-309/99 Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten EU:C:2002:98, para 57.

[14] Opinion of AG Jacobs in Cases C-67/96 etc Albany International BV
v SBT EU:C:1999:28, para 207; this Opinion contains a useful discussion of the meaning of undertakings in Article 101(1).

Dimosioin judgment at the time.[15] The determination as to whether an activity falls within the exercise of public authority or as an economic activity must be carried out separately for each activity exercised by a given entity. [16]Thus an entity can be engaged in both economic activity and non-economic based on fact-specific in each circumstance, this is also the reason why it is said that the concept of undertaking is a relative concept in EU competition law regulation, As the notion of undertaking focuses on the nature of the activity carried out by the entity concerned, it is clear that it is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules.[17] The functional approach taken by the CJEU involves analyzing each activity of an entity separately. It has been emphasized by AG Poiares Maduro that some activities of an entity may fall within the sphere of competition law, while others may not.[18] For example, in AOK Bundesverband and others, the Court found that leading associations of statutory sickness funds did not come under EU competition rules as their role in managing the German social security system was purely social and not economic in nature. However, it was possible for the sickness funds and fund associations to engage in operations with an economic purpose, and in that scenario, adopt decisions that are considered to be decisions of undertakings or associations of undertakings.[19]

In Commission v Italy, the Court held that Italy's refusal to supply financial information to the Commission regarding the administrative body managing the State monopoly for tobacco violated the obligations of transparency under the Transparency Directive.[20] This was because the public body, although integrated into the State administration and lacking legal personality distinct from the State, was considered a public undertaking for the purpose of the Treaty state aid rules. Despite being a part of the State administration, the public body's financial relations with the State allowed it to grant compensation for operating losses and make new funds available to the undertaking, which could be considered state aid incompatible with the internal market.[21]

In Wolfgang Heiser v Finanzamt innsbruck ruling, the Court of Justice found that a medical practitioner specializing in dentistry should be regarded as an undertaking within the meaning of Article 92 EC (now Article 107 TFEU), with an implicit reference to the definition in Höfner.[22]

Another case which deals with whether a particular entity is an undertaking or not , is the case of SELEX Sistemi Integrati SpA v Commission**,** where the interpreted whether Eurocontrol, an entity created by the EU Member States to ensure

[15] Case C-49/07 MOTOE v Ellinkio Dimosioin EU:C:[2008]:376.

[16] Ibid, para 25.

[17] Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz EU:C:2001:577, Jacobs AG, para. 72.

[18] Opinion of AG Poiares Maduro in Case C-205/03 P FENIN [2006] ECR I-6295, para.10.

[19] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and others [2004] ECR I-2493, paras.57-65.

[20] Case 118/85 Commission v Italy [1987] ECR 2599. More precisely, Italy was claimed to have infringed Article 5 (2) of the Transparency Directive. The essential purpose of this Directive was to promote the effective application to public undertakings of the provisions contained in Articles 92 and 93 of the Treaty concerning State aid

[21] Case 118/85 Commission v Italy [1987] ECR 2599, para.13.

[22] case C-172/03 Wolfgang Heiser v Finanzamt innsbruck [2005] ECR I-1627, para.26.

navigational safety in European airspace, was acting as a business or undertaking in the meaning of EU competition law.[23] The Court of Justice ruled that Eurocontrol's activities, which included setting technical standards, procuring prototypes, and managing intellectual property rights, did not have an economic nature. The Court disagreed with the General Court's (GC) opinion that other activities, such as the provision of technical assistance to national administrations, could be separated from the exercise of its public powers and therefore considered as economic. We will go across more of these cases as we proceed with the thesis.[24]

2.2 What is Economic Activity?

Richard Whish & David Bailey[25] define economic activity as any activity that involves offering goods or services on a market is referred to as *economic activity*. The decisive factor is not just the possibility of private operators carrying out the activity, but the fact that it is carried out under market conditions.[26] In the Spanish Courier Services case, the Commission determined that the Spanish Post Office was acting as an undertaking, as it was offering services on the market and by implication competing with private operators for profit making.[27] Similarly, in the Höfner and Elser case, the Court of Justice concluded that the employment procurement activities of the German Federal Employment Office constituted economic activity.[28] In Glöckner v Landkreis Südwestpfalz, the Court of Justice held that non-profit-making medical aid organizations, such as the German Red Cross, providing ambulance services for remuneration were also acting as undertakings in the context of competition rules.[29] To engage in economic activity or regarded as an undertaking was not only about offering goods and services in the market but also certain acts or decisions as can amount to an undertaking as was held in the case of Treuhand v Commission that, Even if a legal entity does not produce the goods or services that are cartelized, it can be considered an undertaking if it acts as a (facilitator) to a cartel. whenever your action influences the decision of an entity it will consider an undertaking.[30] The mere ownership of shares in an undertaking does not mean that the shareholder is engaged in economic activity unless the shareholder exercises control by involving himself in the management of the undertaking, the fact is that the shareholder must act in a way which influences the decision or management of the company. If Fatima Trading Company registered as a company offering goods and services in the internal market but unfortunately since after the incorporation the company never offered any goods or services, then it can be said that the company was not acting as an undertaking. This was manifested In Pegler v Commission, the

[23] Case C-113/07 P SELEX Sistemi Integrati SpA v Commission EU:C:[2009]:191, paras 77–79.

[24] Case T-155/04 SELEX Sistemi Integrati SpA v Commission EU:T:[2006]:387.

[25] Richard Whish & David Bailey Competition Law, 7th edition

[26] See AG Opinion in Case C-205/03 P FENIN v Commission EU:C:2005:666, para 13

[27] OJ [1990] L 233/19

[28] Case C-41/90 EU Höfner and Elser:C:1991:161, para 22.

[29] Case C-475/99 Glöckner v Landkreis Südwestpfalz EU:C:[2001]:577.

[30] Case C-194/14 P AC-Treuhand v Commission EU:C:2015:717, paras 33–36 (Heat stabilisers); see further ch 13, 'Facilitators', pp 543–544.

General Court held that a *dormant* company with no assets, employees, or turnover did not offer goods or services on a market and, therefore, was not acting as an undertaking.[31] Another recent case of economic activity is the case involving the European Commission's investigation into Apple's App Store (Case AT.40643 - Apple (App Store). The Commission found that Apple's rules for the distribution of apps and the use of in-app purchase mechanisms through the App Store constituted an economic activity subject to competition law.[32]
In the case of Pavlov[33], The criteria defining an economic activity for the purpose of competition law is outlined. This definition states that any activity consisting of offering goods and services on a given market is considered an economic activity. The comparative test is only a basic test, an activity is considered economic only if it fulfils the criterion of market participation in Pavlov. The Pavlov definition is routinely used by the Court of Justice to determine whether an entity constitutes an undertaking.
However, there has been some confusion over the relationship between the term ***servic*e** in the Pavlov definition and Article 57 TFEU. In Commission v Poland, AG Jääskinen used the expression *services in the context of competition law*, which raised the question of whether the notion of service has a different meaning in EU free movement law and EU competition law.[34] As the Polish rules on pension funds restricted the possibility for these funds to invest in non-Polish funds/shares and thus restricted the free movement of capital, the Polish State invoked service of general economic interest (**SGE**I) tasks entrusted to the Polish pension funds as a justification. To assess whether Article 106(2) TFEU could apply, the AG examined whether the companies managing the funds constituted undertakings, which was the case if they operated on the market.[35] The AG concluded that the management companies operated for-profit under Polish law, but as they were allowed to administrate only one fund and had no open circle of customers, their activities could not be regarded as services for competition law.

Therefore, it can be concluded that the term *service* in the Pavlov definition does not have a different meaning than in Article 57 TFEU. Rather**,** *services in the meaning of competition law* simply means that the services are offered on a market. The Pavlov definition remains the pivotal definition of *economic activity* for EU competition rules and is routinely used by the Court to determine whether an entity constitutes an undertaking.

According to this definition, an activity is considered a *servic*e as soon as it meets three criteria and they include the fact that it has (*undergone a comparative test, is usually provided for payment, and can be offered for profit by private entities*). However, the definition of an economic activity requires more than just the existence of goods or services. It also requires that those goods or services are provided under market conditions.

[31] Case T-386/06 Apple's App Store EU:T:[2011]:115, paras 43–49 (Copper fittings).
[32] Case AT.40643 – Apple.
[33]Case -180/98 Pavlov [2000] ECR I-06451
[34] Opinion of AG Jääskinen in Case C-271/09 Poland v. Commission [2011] ECR I-13613, para.71.
[35] See Opinion of AG Jääskinen in Case C-271/09 Poland v. Commission [2011] ECR I-13613, para.70

Furthermore, the case examines whether the remuneration criterion is decisive for an economic activity to exist in the context of EU competition law. Odudu argues that an activity may be considered economic in the context of competition law even if there is no remuneration.[36] This is based on the General Court's view in SELEX, which stated that the absence of payment is only one factor to consider when determining whether an activity is economic. It cannot, by itself, exclude the possibility that the activity is economic.[37]

However, the General Court did not mean that remuneration is irrelevant in determining whether an activity fulfils the Pavlov definition and is offered on the market. The expression "economic in nature" merely indicates that remuneration is not relevant when examining whether a service activity fulfils the comparative criterion.

2.3 Every Entity Engages in an Economic Activity

In EU competition law, the concept of "every entity engaged in an economic activity" is of utmost importance because it defines the scope of application of competition rules to all businesses, irrespective of their legal form or sector of activity, as long as they engage in economic activities that have an impact on the trade between EU member states.[38] This principle is enshrined in Articles 101 and 102 of the TFEU and applies to both public and private entities that carry out economic activities.[39] It is worth noting that the TFEU also applies to non-EU businesses that engage in economic activities within the EU market.

The term "economic activity" encompasses a wide range of activities, including the production, distribution, and sale of goods and services.[40] Moreover, it includes activities such as mergers, acquisitions, and joint ventures that can have an impact on competition in the market. The European Union has a strong commitment to promoting fair competition and creating a level playing field for all businesses operating within the EU market. This is why the EU competition law imposes strict rules on companies that engage in anti-competitive practices such as price-fixing, market-sharing, and abuse of dominant market position.

In conclusion, the concept of *every entity engaged in an economic activity* is a fundamental principle of EU competition law that ensures that all businesses operating within the EU market are subject to the same competition rules. This principle promotes fair competition, creates a level playing field, and ultimately benefits consumers by providing them with a wider range of choices at competitive prices.

[36] Okeoghene Odudu., 2009, p. 231.

[37] 2 Case T-155/04 SELEX [2006] ECR II-4797, para.77,

[38] Case C-41/90 Höfner and Elser EU:C:[1991]:161.

[39] Cases T-68, 77, and 78/89, Società Italiana Vetro SpA v Commission EU:T:1992:38, para. 358. Many of the cases discussed in this chapter concern Art. 102, not Art. 101.

[40] Case C-41/90 Höfner and Elser EU:C:1991:161para. 21

2.4 The Legal form or status of the Entity is not Relevant or Immaterial

The concept of an undertaking is based on the nature of the activity that a particular entity is engaged in, rather than its legal personality which implies that the legal form of the entity is not relevant to some extent and this is seen in the text of Johns & Sufrin.[41] This means that natural persons, legal persons, state and public bodies even if they do not have an independent legal personality but form part of a State's general administration,[42] they supply public services or they are subject to a public service obligation, can all be considered as undertakings, as long as they carry out an economic activity.[43] This includes companies, partnerships, individuals,[44] trade associations,[45] agricultural cooperatives,[46] medical aid organizations,[47] collecting societies,[48] and professional bodies.[49] In some cases, even bodies engaged in sporting activities can be considered undertakings if they carry out an economic activity.

Another point to note is the fact that even if a certain body is considered a liberal profession doesn't necessarily mean that it cannot be an undertaking or part of an association of undertakings engaged in an economic activity.[50] In the case of Wouters v Algemene Raad van de Nederlandse Orde van Advocaten, mentioned above for example, the members of the Bar who offered legal assistance for a fee were considered as undertakings for the purpose of the rules, despite the complex[51] and technical nature of their services.[52]

Similarly, in a case involving the 1990 World Cup, the International Football Federation (FIFA), the Italian FA (FIGC), and the local organizing committee were all considered as undertakings within the meaning of Article 101(1) because they carried out economic activities.[53] Even non-profit-making entities that organize events and enter into sponsorship, advertising, and insurance contracts designed to exploit those events commercially can be considered undertakings. This was

[41] Johns & Sufrin (2010)

[42] COMP/26.870, Aluminium Products [1985] OJ L92/1. See also Case 42/83, Commission v Italy EU:C:1984:254, paras. 16–20.

[43] Okeoghene O. Odudu, (2005) 7 Cambridge Yearbook 'The Meaning of Undertaking within Article 101' (2005) 7 Cambridge Yearbook of European Legal Studies 209 Find it in your Library citing A. Deringer, The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (Articles 85 to 90) Including the Implementing Regulations and Directives (Commerce Clearing House, 1968), 5. Find it in your Library.

[44] COMP/29.559, RAI/UNITEL [1978] OJ L157/39, COMP/38.279, French Beef [2003] OJ L209/12, aff'd (but fines reduced) in Cases T-217 and 245/03, FNSEA v Commission EU:T: 2006:391, Cases C-101 and 110/07, Coop de France bétail et viande v Commission, C19, but not, it seems, employees, see nn. 89–91 and text.

[45] Case 96/82, NV IAZ International Belgium v Commission EU:C:1983:310

[46] See Case C-250/92, Gøttrup-Klim e.a. Grovvareforeninger and Others v Dansk Landbrugs Grovvareselskab AmbA EU:C:1994:413

[47] Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz EU:C:[2001]:577.

[48] Case 127/73, Belgische Radio en Televisie v SV SABAM EU:C:1974:25.

[49] See generally M. Monti, 'Competition in Professional Services: New Light and New Challenges', Speech to the German Federal Bar Association (Bundesanwaltskammer), 21 March 2003.

[50] COMP/33.407, AICIA v CNSD [1993] OJ L203/27, para. 40.

[51] Case C-309/99, Wouters EU:C:2002:98, paras. 46–49, 64. See also Case C-1/12, Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência EU:C:2013:127 (chartered accountants, who offer accounting services for remuneration and assume the financial risks related to the exercise of those activities, are undertakings) and Cases C-180–184/98, Pavlov EU:C:2000:428 (specialist medical doctors in private practice are undertakings)

[52] Case C-309/99, Wouters EU:C:2002:98.

[53] COMP/33.384 and COMP/33.378, The Distribution of Package Tours During the 1990 World Cup [1992] OJ L326/31, especially paras. 44–60. See also COMP/36.888, 1998 World Cup Finals [2000] OJ L5/55

confirmed in the case of Motosykletistiki Omospondia Ellados NPID (MOTOE) v Ellinkio Dimosio, where the ECJ held that a legal entity which organized motorcycling events, even though it was vested with public powers, was an undertaking because it carried out economic activities.[54]

To conclude, the term "undertaking" refers to any entity that engages in economic activities, regardless of its legal status or nature. This includes a wide range of entities such as individuals, legal persons, state and public bodies, and non-profit organizations. Even entities that are considered part of a liberal profession can be considered as undertakings if they engage in economic activities. The main criteria for determining whether an entity is an undertaking is whether it carries out an economic activity, such as organizing events or providing services for a fee, overall the legal form of an entity is irrelevant for it to be considered an undertaking in the context of competition rules within the EU.

2.5 Characteristics of Economic Activity

2.5.1 Offering of Goods and Services on the Market

Going by the position of Jones and Sufrin, they maintain that one of the elements or characteristics of economic activity is the offering of goods and services in a given market and where that activity could in principle be carried out by a private undertaking to make a profit.[55] what matters the most is the activity and not the form or legal status. Odudu on the other hand have a similar stand in which he states that two conditions constitute an economic activity (1) The entity must be able to supply goods or Services, (2) A potential to make a profit in the absence of legislative intervention. The third condition (3) The entity must bear a financial risk or losses.[56] The CJEU case law provides that Any activity consisting of offering goods and services on a given market is an economic activity from this definition two requirements are seen, which are offering goods and services and it as to be in a given market[57].

According to EU competition law, engaging in economic activity requires offering goods and services. This means that simply having the intention to engage in economic activity is not enough. The law requires an actual offering of goods and services to be made. This requirement is in place to ensure a fair and competitive market for all businesses operating within the EU. Any economic activity that does not involve an offer of goods or services is not subject to EU competition law.

[54] Case C-49/07, MOTOE EU:C:2008:376. See also Case C-519/04 P, Meca-Medina v Commission EU:C:2006:492 and Case COMP/40.208, ISU 8 December 2017 (international sport associations which have as their members national sport associations 'are undertakings to the extent they themselves carry out activities of an economic nature (such as the organisation and commercial exploitation of sport events). International sport associations may also be associations of undertakings if their members carry out activities of an economic nature, regardless of whether the international sport associations themselves carry out such activities', para. 137), see n. 195 and text.

[55] Jones and Sufrin (2010) page 124-125.

[56] Okeoghene Odudu (2006) page 23-56

[57] Case T-513/93 CNSD [2000] ECR II-01807paragraph 36, T-155/04 SELEX Sistemi Integrati SpA v Commission of the European Communities [2006] ECR II-04797 paragraph 50, T-217/03 French Beef [2006] ECR II-04987 paragraph 52.

2.5.2 Where that Activity can be carried out by private Undertaking.

Characterizing economic activity under EU competition law involves identifying activities that involve the offering of goods or services on the market, and where such activities could, at least theoretically, be undertaken by private entities to make profits.[58] Economic activity is distinguished from the exercise of official authority or public powers.[59] The distinction can sometimes be challenging, but case law provides guidance. For instance, in the Höfner and Elser v Macrotron case, the CJEU considered the nature of the activities involved and emphasized that economic activities are those that could be performed by private entities, even if they are often undertaken by public agencies.[60] In this case, employment procurement activities were deemed economic because they were not exclusively carried out by public entities. This decision was made even though the public agency had a legal monopoly over employment procurement for higher staff and provided such services free of charge. The CJEU's interpretation underscores that economic activities can be carried out by both public and private entities, provided they involve offerings of goods and services on the market that could potentially generate profits for private undertakings.

2.6 Requirement for defining Undertaking.

2.6.1 Is Bearing Financial Risks a Requirement for Undertaking

It is occasionally necessary to consider specific factors when defining undertakings for economic activities. These factors may be used to assess economic activity, but are not necessarily general requirements for constituting an undertaking. For instance, receiving payment (*making a profit)* is not always a decisive factor for defining undertakings held by CJEU, but it was considered relevant in French Beef, where farmers were deemed to be undertaking economic activities because they offered goods for sale in return for payment.[61] In Pavlov[62], medical specialists were considered undertakings because they were paid by patients for their services and bore the financial risks associated with their activity.[63] Similarly, in Wouters, Members of the Bar were considered undertakings because they offered legal assistance services for a fee and bore the financial risks attached to those activities.[64]

Although risk-bearing is not always a general decisive factor for defining undertakings, Pavlov and Wouters use it as a relevant criterion.[65] According to

[58] Case C-67/96, Albany EU:C:1999:430, Jacobs AG, para. 311. Cases C-180–184/98, Pavlov EU:C:2000:428, para. 201.

[59] Case C-67/96, Albany EU: C:1999:430; Case C-309/99, Wouters v Algemene Raad van de Nederlandse Orde van Advocaten EU: C:2002:98; and Art. 106(2)

[60] Case C-41/90, Höfner and Elser v Macrotron [1991] ECR I-1979

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

[62] Case C-180/98 Pavlov [2000] ECR I-06451

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

[64] Case C-309/99 Wouters (2002) ECR I-1577.

[65] Okeoghene Odudu (2006) page 221

Odudu, this explains why employees are not regarded as engaged in economic activity, even if they offer a service for remuneration.[66] This is because the ability to take on financial risks is what gives an operator sufficient significance to be regarded as an entity engaged in trade. In other words, recognition as an undertakin***g*** requires the existence of an identifiable centre to which economically significant decisions can be attributed.[67]
However, risk-bearing is rarely seen in other judgments on the definition of undertakings like it was seen in Pavlov & Wouter. Other criteria can also be used to define an economic unit as long as they show that the entity is conducting its activities independently. For example, the fact that lawyers in Wouters and medical personnel in Pavlov performed an activity in return for payment while bearing the financial risk could be used to identify them as a designated economic unit. For employees in general, they are not engaged in economic activity because they are not acting independently and form part of the business where they are employed.

To conclude, the requirement for the definition of an undertaking for economic activities is not always straightforward, and specific factors need to be considered. While receiving payment is not always the most crucial factor, it is relevant in some cases. Risk-bearing is also a relevant criterion used to identify an entity as an undertaking but not a general requirement for defining an undertaking. However, risk-bearing is not always the decisive factor, and other criteria can also be used to define an economic unit as long as the entity is conducting its activities independently. Employees, in general, are not engaged in economic activity as they do not act independently but form part of the business where they are employed.

2.6.2 Whether Purchasing is an Economic Activity as in FENIN

There is no doubt as to the fact that the concept of an undertaking encompasses any entity engaged in economic activity, regardless of its legal status or financing, as per a well-established principle in Hofner and Elser v Macrotron GmbH.[68]
It is important to note that purchasing goods alone is not sufficient to qualify as an economic activity. Instead, it is necessary to determine whether the subsequent use of the purchased goods amounts to an economic activity when assessing the nature of the purchasing activity.

From the early days of competition law, it was assumed that purchases made for personal consumption were not considered an economic activity.[69] However, in a narrower sense, the act of purchasing has been recognized as an economic activity. The General Court has previously ruled in the FENIN case.
In the context of EU competition law, the judgment of FENIN clarified that purchasing activities can constitute an economic activity if they are conducted to offer goods and services on the market. FENIN involved a situation where a Spanish organization was purchasing goods, not for the purpose of offering goods and

[66] Okeoghene Odudu (2006) page 222.
[67] Case C-22/98 Becu and Others [1999] ECR I-05665, Advocate General´s opinion at paragraph 53
[68] Case C-41/90 Hofner and Elser v Macrotron GmbH
[69] Valentine Korah (2007) page 47.

services on the market, but rather for a different activity, such as one of a purely social nature. The Court emphasized that merely purchasing goods, even in large quantities, does not in itself constitute an economic activity if the goods are not subsequently offered on the market as part of an economic activity. Therefore, the FENIN judgment established that purchasing becomes an economic activity only when it is connected to the subsequent offer of goods and services on the market as indicated by the court below.[70]

‘‘Subsequently, an organisation which purchases goods even in great quantity not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for Union competition law and is therefore not subject to the prohibitions laid down in Articles 101(1) TFEU and 102 TFEU.”[71]
There is a difference between purchasing goods for personal consumption and purchasing goods for resale. The CJEU considers a significant effect on the market alone is not enough to consider consumption as an economic activity.

2.6.3 Reason for Excluding Consumption from Notion of Economic Activity

The notion of economic activity under EU competition law does not apply to consumption. This is because consumption refers to the act of using goods and services for personal use rather than for resale or production. Under EU competition law, economic activities are transactions of goods and services exchanged for remuneration that affect competition within the market. By contrast, consumption does not involve the offer of goods or services on the market for remuneration. As a result, it is considered a non-economic activity, and it does not impact market dynamics or competition among market participants.

Excluding consumption from the notion of economic activity allows competition law to focus on regulating activities that have a more direct impact on market competition, such as production, distribution, and sale of goods and services. This approach enables competition authorities to target behaviours and practices that may harm competition within markets, promoting consumer welfare and market efficiency.

One example that highlights the exclusion of consumption from the notion of economic activity is the FENIN case.[72] In this case, FENIN, a French federation representing companies in the boating industry, contested French regulations that

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

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

[72] Ibid

restricted the purchase of boats by public bodies to French shipyards. FENIN argued that these regulations violated EU competition rules by restricting competition and discriminating against non-French shipyards. The Court of Justice of the European Union (CJEU) addressed the question of whether an organization engaged in purchasing goods for its own use could be considered an economic operator subject to EU competition law.

The CJEU ruled that purchasing goods for consumption by a public body did not constitute an economic activity under EU competition law. The Court emphasized that economic activity involves offering goods or services on the market for remuneration. Since the purchases made by public bodies were for their own use and not for resale or further production, they did not fall under the scope of competition law scrutiny.

The FENIN case illustrates the distinction between economic and non-economic activities under EU competition law and clarifies that consumption, including purchasing for internal use, is not subject to competition law enforcement.

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

3 No-Economic Activity

3.1 Exercise of Public Power

The exercise of public power typically refers to actions taken by government authorities or public bodies in the performance of their regulatory, administrative, or sovereign functions. These activities are generally considered non-economic in nature because they are carried out for the public interest rather than for profit or commercial gain. As such, they fall outside the scope of competition law.
The exercise of public authority powers in activities is not considered economic. The Wouters judgment states that state-owned entities or public authorities are not considered undertakings when their behaviour is linked to the exercise of public authority powers. In the Corinne Bodson and Pompes Funèbres des Régions Libérées SA case,[73] French law required local communes to provide funeral services, and many communes then awarded concessions to private undertakings, which the court held did not fall under Article 101. When an entity performs a task in the public interest as part of the essential functions of the State, it exercises public powers, and

[73] Case 30/87 Corinne Bodson v Pompes Funèbres des Régions Libérées SA EU:C:1988:225.

its activity is linked to the exercise of powers typically held by a public authority.[74] For the same reason, In SAT Fluggesellschaft and Eurocontrol, Eurocontrol was not considered by CJEU as an undertaking when it collected route charges from users of air navigation services on behalf of the states.[75] In Calì e Figli, a private company engaged in the public task of anti-pollution surveillance in Genoa harbour was not considered as an undertaking when discharging that particular responsibility.[76] In Compass-Datenbank and Republik Österreich**,** the Austrian state was not considered as an undertaking when administering a register of information about companies registered in Austria.[77]

In conclusion, whether an entity is considered an undertaking largely depends on the specific circumstances of its activities. When the exercise of public authority powers is involved in an activity, it is not considered economic, and therefore not subject to the same regulations as regular businesses. As seen in the examples cited above, the courts have been consistent in their approach to this issue, taking into account the public interest involved in the activities of public entities.

3.2 Procurement that is ancillary to Non-Economic Activity is not Economic.

Procurement activities that are incidental to a non-commercial activity are generally not considered economic activities themselves.

For instance, if a government agency or a non-profit organization buys goods or services as part of its core mission or public service obligations, rather than for commercial purposes, those procurement activities would be considered as incidental to the non-commercial activity of fulfilling its public mandate. In such cases, procurement is not the primary economic goal of the organization, but rather incidental to the primary non-commercial goal of the organization. Therefore, it is not treated as an economic activity for the purpose of competition law.

This principle was established in the FENIN verdict by the CJEU. In the FENIN case, the CJEU ruled that procuring goods or services, even in significant quantities, does not constitute an economic activity if it is not done for the purpose of offering goods or services in the market. Instead, the focus is on whether the subsequent use of the purchased goods or services amounts to an economic activity. If procurement is incidental to a non-commercial activity, it falls outside the scope of competition law.

[74] Case C-343/95 Diego Cali v Figli EU:C:1997:160, para 23.

[75] Case C-364/92 EU:C:1994:7, para 30; different activities of Eurocontrol were held not to be economic in the SELEX case, ch 3 n 16 earlier.

[76] Case C-343/95 Dieg Calì v Figli EU:C:1997:160.

[77] Case C-138/11 Compass-Datenbank and Republik Österreich**,** EU:C:2012:449, paras 40–51.

3.3 When is an Activity Public Nature

An activity is considered to be of a public nature when it is performed by an entity or authority to fulfill a public function or serve the public interest. Typically, activities of a public nature involve providing essential services or enforcing public policies and regulations. Here are some criteria that may indicate whether an activity is public:

-Activities carried out by government agencies, regulatory bodies, or other state-established entities to perform public functions are usually considered to be of a public nature.[78] The competition rules do not apply to activities essentially connected to the powers of a public authority.

- Activities that directly benefit the general public or aim to promote the common good are likely to be categorized as public undertaken. This could include services like healthcare, education, transportation, public safety, and environmental protection.[79]

- Public activities are often characterised by their non-profit motive.[80] Unlike private enterprises, which aim to generate profit for their owners or shareholders, public entities usually operate to serve the public interest rather than maximizing financial gain.

- Activities that involve the regulation and enforcement of laws, standards, and regulations for the benefit of society are considered to be of a public function. This could include activities related to consumer protection, environmental regulation, and public health.[81]

- Activities that receive significant funding from public sources or are subject to government oversight and control are likely to be classified as public in nature.[82] In this case, CJEU examined whether the provision of hyperlinks to freely accessible content on the internet constitutes a communication to the public within the meaning of Article 3(1) of the EU Copyright Directive Directive 2001/29/EC.

The CJEU case of Diego Cali established that in order to differentiate between activities carried out in the exercise of official authority and economic activities, it is necessary to consider the nature of the activities carried on by the public undertaking or a private body appointed by the State.[83] The Court concluded that the surveillance was linked by its nature, aim, and rules to the exercise of powers relating to the protection of the environment, typically those of a public authority.

The rules governing an activity have been used in several cases as an argument. It is relevant whether the activity has any public law basis.[84] In the *Stichting*

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

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

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

[81] Case C-343/95 Calì e Figli EU:C:1997:160. A private company performing state functions which benefits the general public is said to be an activity of the public in nature.

[82] Case Svensson and Others case (Case C-466/12).

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

[84] Ibid Paragraph 18

Kraanverhuur case, the Commission held that **SCK** does not have any public-law basis in defining the economic nature of its activities.[85] However, the fact that an activity is governed by public law is not sufficient for the activity to be considered non-economic. The Wouters case held that the public law regulation of the constitution of the Bar Association did not affect the application of Article 101 this means that even if the entity is backed by public power it will not exclude its activity from considered economic activity or undertaking.[86]

It is unclear whether an activity that is not subject to public law could still be considered within the public sphere. In the *Institute of Independent Insurance Brokers v Director General of Fair Trading case*,[87] the CAT stated that it was doubtful whether, as a matter of EU law, the notion of an exercise of official authority or public powers can extend to cases where the legal basis of the activity in question is contracts between private parties.[88] It does not seem reasonable to require that all activities of public powers be governed by public law. Such a requirement could become an obstacle for Member States to handle within their sovereign powers effectively. In this regard, It's important to consider the purpose of an activity when determining if it falls under the exercise of public powers. While pursuing a public service objective may suggest that the activity is non-economic, it doesn't necessarily mean that it is. As stated in SELEX, providing services on a specific market can still be considered an economic activity, even if it serves a public service objective**.**[89]

3.4 Introduction to the Principle of Solidarity

Sometimes it is unclear whether entities that provide social protection, such as social security, pensions, health insurance, or health care, are operating as businesses or not. The courts differentiate between situations where social protection is provided in a market context or based on the principle of ***solidarit***y. Solidarity refers to an act of involuntary subsidization of one social group by another and is considered a non-economic activity. The courts examine the degree of solidarity involved to determine if the entity is operating as a business or not. The classification of these schemes is a question of degree, as schemes range from state social security schemes to private individual schemes operated by commercial insurers. In identifying whether an activity is commercial or not the court in particular cases below identifies when an activity is commercial.

In the legal case of Fédération Française des Sociétés d'Assurance and Ministère de l'Agriculture et de la Peche,[90] the concept of solidarity was used as a way to differentiate between commercial and non-commercial activities.[91] The impact of solidarity was apparent at various levels, including solidarity in time, where active workers' contributions were used to finance benefits for pensioners. Additionally,

[85] Stichtung Kraanverhurr OJ (1994) L117/30 paragraph 19

[86] Case C-309/99 Wouters (2002) ECR I-1577.

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

[88] Ibid paragraph 256.

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

[90] Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Peche

[91] (See analysis by AG Tesauro in Case C-244/94 F é d é ration Fran ç aise des Soci é t é s d ' Assurance v Minist è re de l ' Agriculture et de la Peche [1995] ECR I-4013)

financial solidarity helped to balance compulsory schemes in surplus and those in deficit. Lastly, solidarity in relation to the least well-off ensured that they received certain minimum benefits even if they had not made adequate contributions.

The courts have examined many fact-specific cases, and in Poucet and Assurances Générales de France, the Court of Justice concluded that French regional social security offices administering sickness and maternity insurance schemes to self-employed persons were not operating as businesses.[92] However, in Fédération Française des Sociétés d'Assurance, the Court concluded the opposite since the manager of the scheme was conducting an economic activity in competition with life assurance companies. The difference was that in Poucet, the scheme was based on the principle of solidarity, whereas in Fédération Française, the benefits payable depended on the amount of contributions paid by recipients and the financial results of the investments made by the managing organization.

From the case of *Poucet and Pistre's* judgement, the CJEU made several observations.[93] (*Firstly, the activity undertaken was of an exclusively social nature. Secondly, it was non-profit making. Thirdly, the benefits were statutory in nature. Fourthly, the Court used the principle of national solidarity as a benchmark for distinguishing between commercial and non-commercial activity*).[94] Finally, the benefits of the scheme were not related to the amount of contributions made by the beneficiaries. It is important to note that the social security scheme in Poucet and Pistre was compulsory.

Also, In the case of Fédération Française des Sociétés d'Assurance and Others,[95] the CJEU held that the social aim, non-profit-making nature, and the fact that the activity was governed by law did not alter the conclusion that the activity was operating according to the principle of capitalization and thus constituted an undertaking. In this case, a body was responsible for managing an old-age pension scheme, and the Court did not discuss the principle of national solidarity. Furthermore, the benefits depended solely on the amount of contributions paid by the contributors and the investments made by the managing body. The scheme was optional rather than compulsory, as in Poucet and Pistre.

We have seen that, the CJEU clarifies that having a social aim alone is not sufficient for an activity to be considered based on solidarity. In the case of Fédération Française des Sociétés d'Assurance and Others, the CJEU found that while there were elements of solidarity in the scheme, they were limited in scope due to the optional nature of the scheme. Therefore, the social aim alone could not deprive the activity of its economic character. The CJEU further clarified that an activity must serve an "exclusively social function" to be excluded based on solidarity.

Regarding profitability, simply being non-profit-making is not enough to fulfil the principle of solidarity. In the same case, the ECJ ruled that the fact that an entity was non-profit-making did not automatically exempt its activity from being considered

[92] Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, paragraphs 15 and 18). ' (para 47)
[93] Case C-159/91 Poucet and Pistre v AGF and Cancava [1993] ECR I-00637 paragraph 18
[94] Ariel Ezrachi (2010) page 6.
[95] Case C-244/94 Federation française des sociétés d'assurances and Others [1995] ECR I-4013

economic. Profit-making activities are excluded from being considered based on solidarity, but being non-profit-making alone is not sufficient.

Another point was Whether an activity is governed by law is not decisive for its economic or non-economic nature. In the case mentioned, the fact that the activity was established by law did not mean it operated according to the principle of solidarity. Therefore, being governed by law alone does not determine whether an activity falls within the principle of solidarity.

The concept of “national solidarity” has been mentioned in the CJEU's rulings, but its exact meaning is unclear. It is suggested that solidarity may be limited to activities within the state's sovereignty sphere. Advocate General Fennely defined solidarity as involving redistribution, indicating that the core aspect of activities based on solidarity involves redistributing resources and cannot be driven by profit motives.

4 Undertaking is a Relative concept

4.1 Introduction

The notion of an undertaking, as established by the CJEU, is indeed a relative concept. This means that whether an entity qualifies as an undertaking depends on the nature of the activities it carries out. In the case of SELEX Sistemi Integrati SpA (SELEX Sistemi) and Commission,[96] the CJEU clarified this concept further.

In this case, the Commission had found that Eurocontrol was not an undertaking, based on previous proceedings regarding Eurocontrol's activities. However, upon appeal, the EU Courts emphasized the need to examine each of Eurocontrol's activities individually. The CJEU ruled that Eurocontrol would only be subject to competition law for activities that were not connected with the exercise of public powers. Any activities ancillary to non-economic activity would fall outside the scope of competition law. For instance, Eurocontrol's assistance to national administrations, which was inseparable from the exercise of public powers, was not considered an economic activity subject to competition law.

Contrasting this case to MOTOE,[97] the CJEU held that a legal entity organizing motorcycling events and engaging in commercial contracts such as sponsorship, advertising, and insurance was considered an undertaking. These activities were not ancillary to its non-economic public powers, such as authorizing motorcycling events, and thus fell within the scope of competition law.

Similarly, in Aéroports de Paris and Commission,[98] the CJEU distinguished between Aéroports de Paris' administrative and supervisory activities, which were not considered economic activities subject to competition law, and its provision of

[96] SELEX Sistemi Integrati SpA (SELEX Sistemi) v Commission

[97] See the case of MOTOE

[98] Aéroports de Paris v Commission

airport services for fees fixed on a commercial basis, which did qualify as economic activities and thus made it an undertaking under competition law.

These cases illustrate that the classification of an entity as an undertaking depends on whether its activities are economic in nature and not connected with the exercise of public powers.

4.2 What is the Test for defining Undertaking?

There is no clear-cut definition of undertaking by Articles 101 and 102 of TFEU and ECJ but there is some guidance held in several case law by the CJEU. So To be considered an *undertaking* under EU competition law, an entity must meet certain criteria, which are outlined in the case law and legal principles. The requirements for an entity to be considered an undertaking include:

Engagement in Economic Activity: The entity must engage in economic activity, which involves offering goods or services on the market. Economic activity is broadly defined and encompasses any activity that involves the production, distribution, or consumption of goods and services to generate revenue or profits. See the case of Höfner and Elser v Macrotron (Case C-41/90),[99] where the Court of Justice of the European Union (CJEU) emphasized that economic activities are those that could be performed by private entities, even if they are often undertaken by public agencies. The CJEU ruled that economic activities are distinguished by their potential to be carried out in the market by private undertakings to make profits. This case illustrates the importance of the profit-making intent or potential criterion for defining an undertaking.

Potential to make a profit: The economic activity must be carried out with the intention or potential to make a profit. This criterion emphasizes the commercial nature of the activity and distinguishes it from activities performed solely for non-economic purposes.

The entity must be independent: The entity must operate independently in the market, meaning it has autonomy in its decision-making processes and is not subject to significant control or influence by other entities, particularly in terms of pricing, production, or market behaviour.

Market Presence: The entity's activities must have an impact on the market, either by competing with other operators seeking to make a profit or by affecting trade between EU member states. This was emphasised in the case of Höfner and Elser v Macrotron (Case C-41/90). This criterion ensures that EU competition rules apply to activities that have a significant effect on market competition.

Legal Form and Structure: The concept of an undertaking is not limited by legal form or ownership structure. It applies to a wide range of entities, including corporations, partnerships, sole traders, public authorities, and state-owned enterprises, as long as they meet the criteria outlined above. In the case of Europemballage and Continental Can v Commission (Case 6/72),[100] In a landmark case, the CJEU defined the concept of an undertaking as any entity engaged in economic activity, regardless of its legal form or how it is financed. This ruling established that the concept of an undertaking

[99] Case C-41/90 Höfner and Elser v Macrotron

[100] Europemballage and Continental Can v Commission (Case 6/72)

is not limited by legal form or ownership structure, but rather depends on the entity's engagement in economic activity.
Another case is Société Technique Minière v Maselli-Stramigioli (Case 56/64),[101] In this case, the CJEU held similar rulling that the concept of an undertaking encompasses any entity engaged in economic activities, including those that involve the production, distribution, or sale of goods and services. The CJEU emphasized that economic activities are characterized by their commercial nature and their potential to generate profits.
These cases, among others, provide legal precedents and guidance on the requirements for an entity to be considered an undertaking under EU competition law. They underscore the importance of factors such as engagement in economic activity, profit-making intent or potential, independence, market presence, and legal form and ownership structure in determining whether an entity qualifies as an undertaking or not.

4.3 Association of Undertaking

Article 101(1)[102] of the law applies not only to agreements and practices that are coordinated between companies, but also to the decisions of *associations of undertakings*. That (i) may affect trade between Member States, and (ii) prevent, restrict or distort competition within the internal market either by object or effect. It's important to note that an association does not necessarily have to be involved in any economic activity to be subject to Article 101(1).[103] This means that the decisions made by an association could be subject to Article 101(1),[104] even if its agreements are not, because the association may not meet the criteria of an undertaking.[105] If an association is considered an undertaking, then any agreement it makes with other undertakings may be subject to Article 101(1).[106]

In Wouters,[107] the Advocate General stated that the concept of an association of undertakings seeks to prevent companies from evading competition rules simply by coordinating their conduct in a particular form. To ensure that this principle is effective, Article 101(1) covers not only direct methods of coordinating conduct between companies (agreements and concerted practices), but also institutionalized forms of cooperation where economic operators act through a collective structure or a common body.[108] Trade associations and professional bodies can be considered as associations of undertakings. Even if they are formally approved by a public

[101] Société Technique Minière v Maselli-Stramigioli (Case 56/64

[102] https://www.lawteacher.net/example-essays/Article-101-treaty-on-the-functioning-of-the-eu.php

[103] Cases T-25/95 etc Cimenteries CBR SA v Commission EU:T:2000:77, para 1320 (Cement), and case-law cited.

[104] See eg Cematex JO [1971] L 227/26; Milchförderungsfonds OJ [1985] L 35/35

[105] See the Opinion of AG Slynn in Case 123/83 BNIC v Clair EU:C:1984:300.

[106] Cases T-25/95 etc Cimenteries CBR SA v Commission EU:T:2000:77, paras 1325 and 2622.

[107] Case C-309/99 Wouters BV EU:C:2001:390, para 61.

[108] Case C-309/99 EU:C:2002:98, paras 50–71 (General Council of the Dutch Bar); ONP Commission decision of 8 December 2010, paras 589–595 (Association of French pharmacists); Case C-1/12 OTOC [2013] EU:C:2013:127, paras 39–59 (Association of Portuguese chartered accountants); Case C-136/12 Consiglio nazionale dei geologi EU:C: 2013:489, paras 41–45 (National Council of Italian geologists).

authority or if their members are appointed by the state,[109] they do not fall outside Article 101(1). The public law status of a national body such as an association of customs agents does not preclude the application of Article 101(1).[110]

In the case of MasterCard Inc v Commission,[111] it was established that MasterCard had functioned as an association of undertakings when it was owned by multiple banks and operated the MasterCard payment card system on their behalf. Despite being floated on the New York Stock Exchange in 2006 and no longer owned by those institutions, the Commission maintained that MasterCard still acted as an association of undertakings and that the "multilateral interchange fees" it was charged for breached Article 101 as a decision of an association of undertakings.[112] MasterCard, along with several banks, appealed this decision, arguing that it had become a separate entity answerable to its shareholders rather than its previous owners, and therefore ceased to be an association of undertakings. However, both the General Court and the Court of Justice rejected this appeal.[113] The Court of Justice considered that even after the flotation, MasterCard remained an "institution*alised form of coordination of the conduct of the banks*". The banks retained some decision-making power regarding MasterCard's affairs (excluding interchange fees), and the "commonality of interests" between the banks and MasterCard was deemed relevant and sufficient for assessing whether it continued to function as an association of undertakings.[114] The Court noted that, despite different forms, MasterCard continued to pursue joint regulation of the market for years. This case was unusual, particularly due to the timing of MasterCard's flotation during the Commission's administrative procedure. It is therefore important to understand the Court's judgment in this context.

In conclusion, Article 101(1) of the law applies not only to agreements and practices that are coordinated between companies, but also to the decisions of *associations of undertakings*. An association of undertakings does not have to be involved in any economic activity to be subject to Article 101(1). Institutionalized forms of cooperation where economic operators act through a collective structure or a common body, such as trade associations and professional bodies, can be considered as associations of undertakings. The case of MasterCard Inc v Commission established that MasterCard had functioned as an association of undertakings when it was owned by multiple banks and operated the MasterCard payment card system on their behalf. Even after its flotation, MasterCard remained an *institutionalized form of coordination of the conduct of the banks*.

4.4 Collective Labour, Trade Union & Employee

Collective labour relations are an important aspect of European Union (EU) law. The EU has a competition policy, but it also has a social policy, which is outlined in Article 3(3) of the Treaty on European Union TEU and Article 9 of the (TFEU). Article 153 of the TFEU promotes social cooperation between Member States,

[109] AROW v BNIC OJ [1982] L 379/1; Coapi OJ [1995] L 122/37, para 32.

[110] Case C-35/96 Commission v Italy EU:C:1998:303, para 40; Cases C-180/98 etc Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten EU:C:2000:428, para 85.

[111] Case C-382/12 MasterCard Inc v Commission P EU:C:2014:2201.

[112] Commission decision of 19 December 2007.

[113] Case C-382/12 P MasterCard Inc v Commission EU:C:2014:2201, paras 62–77.

[114] Ibid , para 72 of the judgment

particularly in matters related to the right of association and collective bargaining between employers and workers.

In Albany, the Court of Justice of the EU ruled on a case where organizations representing employers and employees agreed to establish a single pension fund to manage a supplementary pension scheme.[115] They asked the public authorities to make joining the fund mandatory. The question was whether this agreement between organizations was considered an agreement between undertakings. The Court of Justice ruled that it was not. The court believed that subjecting such agreements to Article 101 would seriously undermine the social objectives pursued by collective agreements. Therefore, they fall outside the scope of Article 101.[116]

In Norwegian Federation of Trade Unions v Norwegian Association of Local and Regional Authorities,[117] the European Free Trade Association (EFTA) Court applied the Albany doctrine to collective labour agreements under Article 53 of the European Economic Area (EEA) Agreement.[118] However, the EFTA Court noted that provisions in such agreements that pursue objectives unrelated to improving conditions of work and employment may fall within the scope of competition law.

In Holship Norge AS v Norsk Transportarbeiderforbund,[119] the EFTA Court held that the Albany exception did not apply to an agreement that went beyond the core object and elements of collective bargaining. It's important to note that the Albany exclusion does not apply to a decision taken by members of a liberal profession. This is because it is not made in the context of collective bargaining between employers and employees.[120]

In FNV Kunsten Informatie en Media v Staat der Nederlanden, the Court of Justice stated that the exclusion would not apply to an agreement with an association of self-employed persons unless they were, in reality, employees. This determination would be made on a case-by-case basis.[121] However, this may mean that workers in the "gig" economy, who are often self-employed, cannot benefit from collective bargaining.

The European Commission launched a consultation process on June 30, 2020, to determine whether measures are necessary at the EU level to protect individuals in the gig economy. It published its inception impact assessment on January 6 2021.

In terms of trade unions, it is said that Trade unions act as agents of their members and are not considered undertakings in such a scenario.[122] However, they can be considered undertakings when they act on their behalf.[123] In the case of FNCBV **v** Commission, the General Court rejected an argument that Article 101 applied to

[115] Albany BV v Stichting Bedrijfspensioenfonds Textielindustrie 1999 C-67/96, ECR 1-5751, [2000] 4 CMLR 446.

[116] Ibid

[117] Case E-8/00 Norwegian Federation of Trade Unions v Norwegian Association of Local and Regional Authorities [2002] 5 CMLR 160, paras 33–46.

[118] Chapter 1 Article 53 EEA RULES APPLICABLE TO UNDERTAKINGS

[119] Case E-14/15, judgment of 19 April 2016, paras 37–53; when the case returned to the Norwegian Supreme Court it did not reach a conclusion on the applicaton of competition law, although it indicated in its judgment that it doubted that the Albany exception applied.

[120] Cases C-180/98 etc Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten EU:C: 2000:428, paras 67–70

[121] Case C-413/13 In FNV Kunsten Informatie en Media v Staat der Nederlanden EU:C:2014:2411.

[122] Case C-22/98 Becu EU:C:1999:419, para 28.

[123] See the Opinion of AG Jacobs in Case C-67/96 Albany EU:C:1999:28; see Bradshaw 'Is a Trade Union an Undertaking under EU Competition Law?' (2016) European Competition Journal 320.

agreements between associations of farmers to fix prices and prevent beef imports into France, which restricted the freedom of trade union activity.[124]

As for the employees in the case of Jean Claude Becu,[125] the Court of Justice declared that workers are integrated into the companies that employ them and are therefore part of the company's economic unit. As a result, they are not considered as separate entities under EU competition law. Moreover, the dock workers in that case were not considered an undertaking when viewed collectively. However, if a former employee runs an independent business, they would be treated differently.[126] In FNV Kunsten Informatie en Media v Staat der Nederlanden,[127] the Court recognized that it can be challenging to determine whether a person is an employee or a self-employed individual in the market.[128] The freedom to decide when, where, and what work to do is a significant consideration.[129] Even if a person is classified as a "self-employed individual" under national law, they can still be classified as an employee under EU law if their independence is only nominal. If the employer conceals an employment relationship, that employer will be accountable for any anti-competitive behaviour by the employee because the employer and employee are considered the same undertaking.[130]

In summary, the EU has a social policy that promotes social cooperation between member states, particularly in matters related to the right of association and collective bargaining between employers and workers. The Albany exception exempts certain types of collective agreements from competition law, but it does not apply to decisions taken by members of a liberal profession. Workers in the "gig" economy may not benefit from collective bargaining, and it can be challenging to determine whether a person is self-employed or an employee under EU law. An employer is accountable for any anti-competitive behaviour by the employee because the employer and employee are considered the same undertaking.

5 Summary and Conclusion

I will start by answering the three research questions in brief

1. What is the concept of undertaking in EU competition law, and how is it interpreted and applied in practice?

[124] Cases T-217/03 etc EU:T:2006:391, upheld on appeal Cases C-101/07 P etc FNCBV v Commission EU:C:2008:741.

[125] Case C-22/98 Becu EU:C:1999:419, para 27.

[126] See Reuter/BASF OJ [1976] L 254/40.

[127] Case C-413/13 In FNV Kunsten Informatie en Media v Staat der Nederlanden EU:C:2014:2411

[128] Ibid, para 32; see also the Irish Competition Act (Amendment) Act 2017, s 2 on identifying 'false self-employed' and 'fully dependent self-employed' workers for the purposes of the application of competition law to collective bargaining.

[129] Case C-413/13 In FNV Kunsten Informatie en Media v Staat der Nederlanden EU:C:2014:2411, paras 36–37

[130] Case C-542/14 VM Remonts EU:C:2016:578, para 24.

2. What are the legal foundations and criteria used to define an undertaking in EU competition law, as outlined in relevant treaty provisions and case law?

3. How have courts and competition authorities interpreted the concept of undertaking in landmark cases, and what are the key principles and factors considered in determining the existence of an undertaking?

The concept of undertaking in EU competition law is crucial for determining liability and enforcement actions. The notion is a relative concept because it focuses on the activity carried out by the entity concerned, it is clear that it is a relative concept in the sense that a given entity might be regarded as an undertaking for one part of its activities while the rest fall outside the competition rules. An undertaking encompasses any entity engaged in economic activities, including corporations, partnerships, sole traders, and individuals pursuing economic objectives. This concept is used to identify entities responsible for anti-competitive behaviour, such as cartels or abuse of dominance. The European Commission and national competition agencies scrutinize undertakings to ensure compliance with EU competition rules, particularly Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The legal foundations for defining an undertaking in EU competition law are derived from treaty provisions and case law. Article 101(1) TFEU prohibits anti-competitive agreements between undertakings, while Article 102 TFEU prohibits abuses of dominant positions by undertakings. Criteria for determining the existence of an undertaking include control, economic activity, market participation, and functional and economic unity. Case law, such as the European Court of Justice (ECJ) judgments, has clarified these criteria. Höfner and Elser v Macrotron GmbH (1991)[131] and Commission v Anic Partecipazioni SpA (1999), has further clarified the criteria for defining undertakings in EU competition law.

Courts and competition authorities have applied the concept of undertaking in various landmark cases, offering guidance on its interpretation and application. For example, in the DaimlerChrysler v Commission[132] case, the General Court held that a parent company and its subsidiaries may constitute a single economic unit when exercising joint control over their economic activities. The ECJ's judgment in Intel v Commission affirmed that a single company may be held liable for the anti-competitive conduct of its subsidiary if it exercises decisive influence over its subsidiary's actions, the court further refined the interpretation of undertaking concept particularly concerning abuse of dominance in intel case C-413/14 P and Google Shopping case (C-AT. 39740**).**[133]

In determining the existence of an undertaking, courts and competition authorities consider factors such as the integration of economic activities, market participation, control relationships, and the functional unity of entities etc. These principles, derived from both treaty provisions and case law, serve as the cornerstone for enforcing EU competition law and safeguarding market competition within the European Union.

In summary, the concept of *undertakin**g*** is a fundamental principle in EU competition law, defining the permissible conduct and responsibilities of market

[131] Case C- 41/90Höfner and Elser v Macrotron GmbH (1991)

[132] DaimlerChrysler v Commission

[133] Case C-413/14 P Intel v Commission, ECLI: C:2017:632 (September 6)

participants in the European Single Market. An undertaking encompasses any entity engaged in economic activities and the way it is financed, including corporations, partnerships, sole traders, and individuals. This concept is crucial for enforcing competition rules, maintaining competitive markets, and safeguarding consumer welfare. Economic activity is a prerequisite for determining undertaking and it refers to any activity that involves offering goods or services on a market. The decisive factor of economic activity is not just the possibility of private operators carrying out the activity, but the fact that it is carried out under market conditions. While economic activity is a pre-requisite for determining undertaking, there are instances where a public body in authority will be engaged in economic activity but it will be termed as non-economic activity and the competition rule will not apply. Three activities have been held to be non-economic, those provided based on solidarity, the exercise of public powers, and procurement under a non-economic activity.

The concept is rooted in the Treaty on the Functioning of the European Union (TFEU), particularly in Articles 101 and 102, which cover undertakings involved in anti-competitive agreements or abuses of dominant positions. Courts and competition authorities have refined the criteria for defining undertakings, focusing on elements such as control relationships, the entity must independence, whether the entity is making a profit or not, economic activities, and functional unity.

In practice, the interpretation of the undertaking concept has significant implications for businesses operating within the EU Single Market. From multinational corporations to small enterprises, understanding the boundaries of undertakings shapes strategic decisions, corporate structuring, and compliance efforts. Landmark cases, including DaimlerChrysler v Commission and Intel v Commission, provide insights into the application of competition rules and the attribution of liability, highlighting the need for businesses to navigate complex legal terrain with diligence and foresight.

Moreover, the concept of undertaking extends beyond legal doctrine, resonating with broader principles of economic integration, market dynamics, and consumer protection. It embodies the interconnectedness of economic actors and underscores the importance of fostering fair competition and innovation within the Single Market. By providing a comprehensive analysis of the undertaking concept, this thesis aims to enhance understanding of its significance in ensuring competitive markets, safeguarding consumer interests, and promoting legal certainty within the EU.

To conclude, It is evident that the CJEU has not clearly defined the elements for determining what constitutes an undertaking. To enhance predictability, the CJEU should establish more stringent requirements for defining an undertaking. This area of law should offer straightforward criteria for application. I agree that the market is evolving every day go by and to have a specific definition will be difficult to cater for all issues but still there is a need for more or better criteria by the court for defining undertaking in order to adjudicate effectively in complex situations.

The concept of undertaking is fundamental and complex in EU competition law. It is essential in determining whether a business falls under the scope of EU competition law and is subject to its rules and regulations.

In my thesis, I explored the evolution of the European Court of Justice's interpretation of the concept of undertaking over time. Due to the changing nature of

business activities and the growing importance of competition law in the EU, I found that the definition of an undertaking has become more nuanced and complex over time.

A clear and comprehensive definition of undertaking is necessary to ensure the effective enforcement of EU competition law. The definition must be broad enough to cover all types of business activities, yet narrow enough to prevent abuse of the law by businesses seeking to circumvent its provisions. The legislator's intention of drafting articles 101 and 102 was not to cover all irregularities or distortion of ant-competitive conduct and these need to be understood by all in other to comprehend the issue at hand. There are several challenges in trying to define undertaking and these include;

The fact that undertaking includes not only traditional businesses, but also non-profit organizations, public entities, and natural persons. The definition must also take into account the various ways in which businesses operate in today's digital and globalized economy, including joint ventures, franchising, and e-commerce.

Another challenge is to ensure that the definition of the undertaking is not overly broad, as this could lead to uncertainty and confusion among businesses and undermine the effectiveness of EU competition law. It is therefore important to strike a balance between the need for a clear and comprehensive definition and the need to avoid overly broad or vague definitions.

In conclusion, the concept of undertaking is a crucial element of EU competition law, and a clear and comprehensive definition of this concept is necessary to ensure effective enforcement of the law. The definition must be broad enough to cover all types of business activities, yet narrow enough to prevent abuse of the law by businesses seeking to circumvent its provisions. It is a complex and evolving concept that requires ongoing attention and refinement to ensure its continued relevance in a rapidly changing business environment.

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