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The Competition Act 1998 and State Entities as Undertakings: promises to be an interesting debate

This paper will consider the recent *BetterCare* judgment by the Competition Appeal Tribunal under the Competition Act 1998 on the question of determining what constitutes an undertaking for the purposes of the competition rules. This is a particularly sensitive issue where it involves activity by a State body. The paper will examine the extent to which this judgment relies on and departs from Community jurisprudence on the topic, notably taking into account the recent CFI judgment in *FENIN*. It is arguable that this is merely a first level threshold issue, on the basis that the CAT make it clear that their judgment is without prejudice to the substantive assessment of whether the authority involved could be in breach of the competition law prohibitions in the circumstances of that case. This involves consideration both of the abuse/objective justification issue and the possibility of exemption for services of general economic interest etc. On the other hand, it could expose a reluctance of the OFT to involve itself in second-guessing the market implications of decisions by a range of state organs entrusted with broad social functions which interact with the market. Overall the focus in the paper will be to examine whether the OFT is guilty of double standards between private and public sectors in its application of the Chapter II prohibition?

Introduction

As John Vickers recently noted:

> 'The relationship between competition policy and government activities is perhaps one of the most interesting and potentially fruitful current issues. It has grown in importance as government bodies have increasingly operated in market environments, and as the will and the means of competition scrutiny of aspects of government activities have strengthened- both generally positive developments.'[1]

This paper will explore the CAT *BetterCare* judgment,[2] and its implications for public bodies. There has been considerable jurisprudence in Community law concerning the application of

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[1] Vickers 'How does the prohibition of abuse of dominance fit with the rest of competition policy?', Paper for the Eighth Annual EU Competition Law and Policy Workshop at the EUI, Florence, 6 June 2003, p 6.

[2] *BetterCare Group Ltd v DGFT* [2002] CAT 7 (Case No 1006/2/1/01).

the competition rules to State legislation and public bodies in general, and we await with interest the application of the Competition Act in a domestic context. The *BetterCare* judgment focused on the issue of determining the scope of the term 'undertaking', where a public body was involved in contracting out certain services. The initial part of the paper will look at the European Court jurisprudence prior to *BetterCare* for determining what constitutes an undertaking for the purposes of the competition rules. I shall then proceed to outline the Tribunal's findings in *BetterCare*, before considering the subsequent Court judgment in *FENIN* and what impact this may have on the CAT's reasoning in *BetterCare*.[3] Of course, as the CAT noted in *BetterCare*, the approach by the DGFT to the 'undertaking' issue was a convenient 'escape route' and the paper will proceed to outline some of the substantive issues which are pertinent to this, and other similar cases involving public bodies. It should be noted that the potential application of the competition rules for public sector bodies is not confined to the competition authorities, and there has been increasing litigation in recent years concerning the extent to which public bodies are undertakings and therefore amenable to the competition rules.[4]

European Court Jurisprudence on determining what constitutes an undertaking

This section of the paper shall provide a brief review of the development of the relevant Community jurisprudence as a backdrop to the *BetterCare* judgment. Probably the key starting point is *Hofner and Elser v Macroton*,[5] where the German federal employment office was granted the exclusive right to conduct employment procurement activities in German. It provided its services free but was financed by contributions from workers and employers, and was held by the Court to be an undertaking.[6] *Poucet and Pistre*[7] was the next landmark case and concerned the requirement to make payments to social security schemes. It was noted, at para 18, that the 'sickness funds fulfil an exclusively social function … based on the principle of national solidarity and is entirely non profit-making.' In addition, the fact that the statutory benefits bore no relation to the amount of the contributions led the Court to find that management of the funds did not constitute an economic activity. Similarly, in *Eurocontrol*,[8] where the body collected charges levied on users of air navigation services, the Court, at paras 18-31, considered that this was typically the exercise of powers of a public authority and did not constitute activity of an economic nature justifying the application of the Treaty rules on competition. On the other hand, in *FFSA*,[9] the issue, as in *Poucet and Pistre*, concerned an insurance scheme managed by a non-profit making organisation, and the Court focused on the fact that benefits depended upon contributions

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[3] Per Vickers, supra: 'The UK Competition Act must be applied consistently with European Court jurisprudence. So the CAT's judgment in BetterCare must be read in the light of the CFI's judgment in FENIN, which came subsequently. This is not altogether straightforward.'

[4] See for instance, *Millar & Bryce Ltd v Keeper of the Registers of Scotland* 1997 SLT 1000, in relation to a petition for judicial review against the Keeper under Article 82, where it was held that there was a *prima facie* case that the Keeper was an undertaking engaged in competition with the petitioner. See also the more recent case in which Articles 81 and 82 were pled in defence in *Leeds City Council v Watkins* [2003] UKCLR 467.

[5] Case C-41/89 [1991] ECR I-1979. See also Case C-387/93 *Banchero* [1995] ECR I-4663; [1996] 1 CMLR 829, para 50.

[6] At paras. 21-24. See also Case 30/87 *Bodson v Pompes funebres des regions liberees SA* [1988] ECR 2479.

[7] Joined cases C-159/91 and C-160/91 [1993] ECR I-637.

[8] Case C-364/92 [1994] ECR I-43. Cf *Spanish Courier Services* [1990] OJ L233/19, [1991] 4 CMLR 560; Case C-179/90 *Merci Convenzionali Porto di Genoca v Siderurgica Gabrielle SpA* [1991] ECR I-5889, [1994] 4 CMLR 422.

[9] Case C-244/94 [1995] ECR I-4013.

and the results of investments, and the principle of solidarity was of limited impact due to the optional nature of the scheme which therefore constituted an economic activity in competition with life assurance companies. Again, in *Diego Cali*,[10] the competition rules were held to be inapplicable to anti-pollution surveillance entrusted to public authorities, as the protection of the environment was typically a function for a public authority and the levying of a charge was an integral part of its surveillance activity. Moreover, the tariffs were approved by the public authorities.[11]

The issue of what constitutes an undertaking for Community competition law purposes has again been revisited in a number of more recent cases by the Court. In *Albany*,[12] the issue was whether certain sectoral pension funds in Netherlands to which affiliation was compulsory, were undertakings, where, as in *FFSA*, they operated on a capitalisation basis. As AG Jacobs indicated at para 311:

> 'the Court has generally adopted a functional approach. The basic test is whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits.'

The Court, at paras 77-86, stressed that although there was an underlying social objective and solidarity purpose, the pension funds still constituted an undertaking for these purposes. On the same basis, in *Pavel Pavlov*,[13] concerning a Dutch medical specialists' fund to which membership was compulsory, and which operated on the principle of capitalisation, its status was held to be that of an undertaking, even though it was non-profit making and pursuing a social objective with solidarity purposes. *Ambulanz Glockner*[14] related to the decision of a local authority not to renew the necessary authorisation to AG to provide non-emergency ambulance services and whether medical aid organisations constituted undertakings. The Court held, at paras 19-22, that in relation to the provision of emergency transport services and patient transport services, the medical aid organisations constituted undertakings. Two issues are notable. The first is the Court's emphasis, at para 21, that even although public service obligations may make them less competitive, this can not prevent them from being regarded as economic activities. Second, AG Jacobs indicated, at para.81, that:

> 'In any event, even when the authorities are actual competitors of independent providers (as appears to be the case in Trier) the operation of the ambulance service (economic activity) and the grant or refusal of authorisations for the provision of independent ambulance services (decision-making activity) must be analysed separately. Only with regard to the former activity do the authority act as undertakings within the meaning of the competition rules.'

The key points from this brief summary are that a body is an undertaking, where, according to the functional approach generally adopted by the Court,[15] regardless of legal status, it is engaged in an economic activity and this is to be contrasted with activities which can be characterised as the exercise of public authority.[16] As AG Jacobs stressed in *Albany*, at para 207:

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[10] Case C-343/95 [1997] ECR I-1547.

[11] See also Case C-70/95 *Sodemare* [1997] ECR I-3395

[12] Case C-67/96 [1999] ECR I-5751.

[13] Cases C-180/98 to C-184/98 [2000] ECR I-6541.

[14] Case C-475/99 [2001] ECR I-8089.

[15] For a fuller discussion, in particular in relation to the social security cases, see Winterstein 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 20 ECLR 324.

[16] Case C-343/95 *Cali e Figli* [1997] ECR I-1547 [1997] 5 CMLR 484, paras 16-17, 23.

'the Court has held that "in competition law, the term undertaking must be understood as designating an economic unit *for the purpose of the subject-matter of the agreement in question"*. Accordingly, the notion of "undertaking" is relative and has to be established *in concreto* with regard to the specific activity under scrutiny.'

BetterCare

BetterCare are engaged in providing nursing home and residential services in Northern Ireland. North and West Belfast Health and Social Services Trust ('North and West') purchase, from BetterCare, nursing care services and accommodation at 2 centres in Belfast. North and West itself manages 8 residential homes, including 5 for the elderly. BetterCare made a complaint to the DGFT to the effect that North and West was abusing its dominant position by offering unreasonably low contract prices and unfair terms which made it difficult for BetterCare to continue in business, as North and West could attract higher paid and qualified staff to work for it. As the Tribunal noted, at para 28, the key question to be resolved,[17] was 'whether the director was correct to decide, on the basis of the evidence before him, that North and West is not acting as an undertaking when purchasing social care.' Despite the review of the Community jurisprudence, the CAT rightly indicated, at para 176, that none of the earlier case-law related to similar factual circumstances as involved in this case. The question had simply not arisen 'whether a public body empowered to provide residential and nursing car engages in an "economic activity" when it contracts out provision of such care to the private sector.'

The Tribunal briefly reviewed the statutory and legal framework involving the DHSSPS (Department of Health, Social services and Personal Safety) the Health and Social Services Boards 'HSS Boards') and the Health and Social Services Trusts ('HSS'). North and West is one of the 11 HSS Trusts within Northern Ireland, and, in terms of the relevant legislation, its functions include providing, or securing the provision, of residential and nursing accommodation for the elderly. The Tribunal noted that the Trusts were established to facilitate efficiency and adopt a market oriented approach and competition in contracting out residential care. The Tribunal proceeded to consider whether N & W's activities vis-a-vis residential care and its relationship with BetterCare constituted an economic activity. The key question the Tribunal posed, per AG Jacobs in *Cisal* at para 71,[18] is whether the undertaking in question is 'in a position to generate the effects which the competition rules seek to prevent'. My view is that this is a rather circular approach and does not take the analysis much further.

However, subsequently the CAT's approach is more thorough. At the outset, the CAT does not doubt that the contracts with BetterCare can be described as 'commercial transactions'. At para 195, the CAT state that N & W is certainly active as a player on a market or markets, for example the market for the supply of residential and nursing care services in Northern Ireland as a contracting out purchaser. This market is noted as being big business across the UK worth several billion pounds a year, and therefore transactions between independent providers and the NHS or HSS trusts as a matter of common sense seem to be an 'economic activity' or directed at economic activity.[19] N & W is also involved in the market for running residential homes, and in both capacities it does not offer its services gratuitously but seeks to recover as much as possible of the cost for the services from the resident. Crucially, the Tribunal was keen at this stage in its analysis to stress that the

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[17] See the earlier judgment on the admissibility of the appeal, 26th March 2002 [2002] CAT 6.

[18] Case C-218/00, Opinion, 13 September 2001.

[19] Para 199.

'undertaking' issue is not to be confused with the separate, substantive issues, to which no consideration is given in the judgment, of whether there is an abuse or any objective justification for N & W or whether exemption is provided by Schedule 3 para 4 to the 1998 Act, although the Tribunal point out that the existence of the latter provision indicates that an entity may still be undertaking even if charged with tasks in the public interest. We shall return to the substantive issues and their potential application to this scenario later in the paper.

However, at this stage, the CAT turned to refute the various arguments of the Director the effect that N & W did not constitute an undertaking for the purposes of the Act, and I will consider briefly the key issues. The first argument, that the money for N & W's activities was raised by taxation, was rejected on the basis that it is irrelevant how an entity is financed.[20] The second was a broader argument based on the public-interest type functions of the HSS Trusts, and again this was rejected on the basis that the circumstances here were not similar to *Eurocontrol/Diego Cali*. The next argument was based on the concept of solidarity and the performance of an exclusively social function. However, the pension/insurance scheme case-law was noted to be distant on the facts, and although the Director's argument that there was a social aim was accepted, the Tribunal highlighted that exclusive concern with this aspect overlooks 'the business dimension'.[21] In particular, the way in which N & W carries out or delivers its functions is by business methods, fulfilling its statutory responsibilities via commercial transactions. The next argument was based on AG Jacob's opinions in *Albany*, at para 214, and *Ambulanz Glockner*, at para 67, that the activity could not be carried out for profit by a normal private undertaking, but the test as to whether an activity is potentially performable by private undertakings is not the only legal test for determining if an activity is economic in character. The CAT again identified the novelty of this situation, as contracting out has not been addressed by the Court and it was difficult to transpose AG Jacob's test to the activity of the supply of accommodation pursued by a number of private sector undertakings where in principle they are competing for business of the residents. The CAT suggested that the administration had been 'hoist by its own petard' as once the decision had been taken to rely on private sector transactions in the area of health provision, it was logical to expect the rules on private sector transactions, including the Competition Act 1998, to be applicable. The CAT rejected a number of other arguments put forward by the Director, the most pertinent being the argument that application of the competition rules would interfere with the State's social priorities, on the basis that if competition law applied, the Director would interfere with policy choices regarding public funding in a sensitive area of social policy. Here we see the crux of the debate and although the CAT understood the Director's caution, they stressed that it was not appropriate to find an 'escape route' in the form of the undertaking issue[22] when the real issues concerned the application of the substantive provisions of the 1998 Act.

There were two further interesting sub-issues. The first concerned the argument that N & W activities were only economic as regards self-funded patients. Here, the Director conceded that this would raise difficult issues of determining at what percentage of full payment by a resident the activities are deemed to be economic- this argument was rejected as unworkable. More importantly, the Director argued that N & W has no freedom to set the prices in question, that these are set by EHSSB and therefore N & W did not constitute an undertaking for these purposes as it had no effective choice in the relevant pricing strategy. The CAT did not deal with this argument as it was in effect a new factual element introduced by the Director at this late stage and there was insufficient material available to allow the

[20] See *Hofner and Elser,* para 21.

[21] At para. 234.

[22] See para 265.

Tribunal to make definite findings as to the extent to which N & W has autonomy to negotiate or set prices. The CAT set aside the Director's decisions and remitted the matter of BetterCare's complaint to the Director.

Subsequently, the OFT opted not to appeal against this judgment in a press release[23] on the following terms:

> 'The judgment in BetterCare does not say that all purchasing activity by public bodies is the activity of an undertaking. The OFT notes that each case needs to be considered in the context of its particular facts.
>
> The OFT believes that the large majority of public sector purchasing transactions will not raise substantial questions under the Competition Act, even where the buyer is acting as an undertaking. In broad terms the Act is concerned only with anti-competitive agreements and abuse of dominant market positions ….
>
> In deciding not to appeal, the OFT also had in mind that the European Courts are likely to rule soon on similar issues. Judgment in FENIN … is expected before the spring of 2003. This may assist in clarifying further the test as to whether a body is an undertaking for the purposes of the Act.
>
> The OFT will now reconsider the original complaint made by BetterCare Group Limited about the alleged anti-competitive conduct of North & West Belfast Health and Social Services Trust.'

The OFT is expected to make and publish its decision in *BetterCare* in the near future, and in a later part of the paper, I will outline some of the substantive issues which they may address. First, as touched on by the OFT press release, I shall outline the CFI judgment in *FENIN*, which may require reassessment of the CAT ruling in *BetterCare*.

FENIN

The applicant in this case[24] was an association of the majority of undertakings which market the medical goods and equipment used in Spanish hospitals. It complained about the payment of debts by a variety of organisations which run the Spanish national health system as an abuse of a dominant position on the basis that a 330 day delay was abusive and discriminatory. The CFI was required to consider whether the ministries and other organisations were undertakings. The relevant passages of the Court's judgment are to be found at paras 35-40 as follows:

> 35. It is appropriate to begin by observing that, according to settled case-law, in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
>
> 36. In this connection, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.
>
> 37. Consequently, an organisation which purchases goods - even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in

[23] 2 September 2002.

[24] Case T-319/99, 4 March 2003.

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 the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.

38. Next, it is appropriate to point out that, in *Poucet and Pistre* (paragraphs 18 and 19), in reaching the conclusion that the organisations managing the health funds in question in that case were not carrying on an economic activity and were not, therefore, undertakings for the purposes of Articles 81 EC and 82 EC, the Court relied on the fact that they were fulfilling an exclusively social function, that their activity was based on the principle of national solidarity and, lastly, that they were non-profit-making, the benefits paid out being statutory benefits that bore no relation to the level of contributions. As regards the judgments in *Fédération française des sociétés d'assurance and Others* and *Albany*, it should be observed that, in those judgments, the Court confirmed the approach adopted in *Poucet and Pistre*, albeit that a lesser degree of solidarity in the operation of those schemes persuaded it that the organisations concerned were in fact undertakings. Those cases thus leave the principle posited in *Poucet and Pistre* intact.

39. It is not disputed in the present case that the SNS, managed by the ministries and other organisations cited in the applicant's complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organisations do not, therefore, act as undertakings.

40. It follows that, in accordance with the rule set out in paragraphs 37 and 38 above, the organisations in question also do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which they require in order to provide free services to SNS members.

John Vickers, in the light of this judgment noted:

> 'Whether and how far those or other features differentiate *Bettercare* from *FENIN* is an interesting question of law with potentially considerable practical implications in a context of widespread contracting out by public bodies.'[25]

FENIN suggests that buying on a commercial market, even by an economically powerful buyer, is not necessarily an economic activity and that therefore one looks to the purpose of the purchase to ascertain if they will be used for en economic activity - this is clearly an extension, at least in *FENIN*, of the solidarity principle which is inherent in the Spanish domestic healthcare service in meeting a social purpose. The principle is extended outwards to relations with third parties, external to the internal solidarity scheme. It is clearly arguable that the CAT's adoption of the reasoning and approach of AG Jacobs in *Cisal*, at para 71, of whether the undertaking in question is 'in a position to generate the effects which the competition rules seek to prevent' is too wide an approach, as it can easily encompass 'state' activity which is anti-competitive, as well as being circular in approach. On the other hand, as indicated by the Tribunal, to adopt the position in FENIN is inequitable for suppliers faced with a monopsonistic buyer and no effective remedies for anti-competitive behaviour.

[25] Vickers, supra p 6.

There may be two possibilities to distinguish *BetterCare* from *FENIN*. The first is the argument that N & W were also actively engaged on the market for the provision of the services which they were also procuring from BetterCare. The CFI ignored the applicant's contention in *FENIN* that it was relevant that the Spanish national service may be in competition with other private health providers, a point noted by the CAT in *BetterCare* as potentially inequitable, where the latter but not the former were constrained by competition law limits. However, this is not the same issue as the situation where there is competition between the 'undertaking' and the complainant in the market for their services. Some support exists for this approach by the recent Opinion of AG Jacobs in *AOK Bundesverband and others*.[26] These cases raised questions concerning the compatibility with the Community competition rules of the arrangement provided by statute whereby the leading associations of sickness funds in Germany collectively determine the maximum amounts paid by sickness funds towards the cost of various types of medicinal products. Insured patients are left to pay the excess cost of any prescribed product priced above the amounts fixed collectively. AG Jacobs' opinion is instructive:

> 42. It therefore appears that the sickness funds are indeed able to compete, albeit within defined margins, with one another and with private undertakings in the provision of health insurance services. Given the existence of such competition, the EC competition rules should in my view apply.
>
> Does the setting of fixed amounts fall within the sphere of the economic activity performed by the sickness funds?
>
> 45. … However, it is clear to me that if the supply of a service is an economic activity, so also are the supplier's decisions regarding the parameters of the service to be offered. In determining fixed amounts, the sickness funds specify the maximum price at which they will purchase a key input; they also specify the level of insurance cover which they will provide to insured persons. Such decisions are thus indissociable from the core activity of health insurance.
>
> 46. In the light of that conclusion, it is not necessary to consider whether the setting of fixed amounts might constitute an economic activity even if the main activity of the sickness funds did not qualify as such. The Oberlandesgericht suggests that purchasing may amount to an economic activity whether or not the entity which purchases is itself active on another market for which the goods or services purchased constitute an input. The Commission, the appellants and the German Government all contend otherwise. The question does not arise, however, given that the sickness funds are active on another market, and contribute towards the purchase of pharmaceuticals as part of their activity on that market.

On this basis *FENIN* was distinguished, and *BetterCare* appears to be closer to the facts of this case at least in terms of the existence of activity and competition on the other market for the supply of the services.

The second possibility concerns the funding issue. It was also suggested by the applicant in *FENIN* that some of the services provided by the health service were provided to tourists for remuneration. Unfortunately, this evidence was deemed to be inadmissible and the Court did not take these services into account in determining whether the purchasing operations constituted an economic activity. Here, *BetterCare* can be distinguished and indeed the CAT, at para 275, broached the range of difficult factual issues which would be involved were one to consider the actual percentages paid by individual residents in

[26] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, Opinion, 22 May 2003.

individual cases. It is arguable that *BetterCare* is not out of line with *Poucet and Pistre* and that *FENIN* was decided upon the assumed basis of universal cover.

In any event, overall I find the CAT's reasoning in *BetterCare* to be considerably more persuasive. It is more in tune with the 'market rationality' imposed in public sector health provision and although it is slightly at odds with the CFI in *FENIN*, it can be reconciled with *Albany* and the subsequent Opinion of AG Jacobs in *Bundesverband*. The latter can, it is suggested, be understood in the light of the reticence for the Commission to become involved with sensitive issues of state social priorities in health, an argument flagged up by the Director General in *BetterCare*. Generally, I endorse the approach by the CAT in that the OFT should make the application of the substantive competition law issues more transparent, bearing in mind the guidance this may shed on potential private litigation involving state entities.

Consideration of the Substantive Issues

We shall briefly look at the issues which the OFT should address in the context of the *BetterCare* case, but it should be pointed out that one argument in relation to Article 82 or the Chapter II prohibition which will clearly not be effective, is that based on the provenance of the funds available to the public body deemed to be an undertaking.[27]

Exemption for Services of General Economic Interest

As the CAT clearly indicated at, para 214, that N & W could seek to rely on Schedule 3 para 4, on the basis that it appeared to the Tribunal to give N & W:

> 'considerable scope for demonstrating that the adoption of alternative pricing policies would substantially interfere with the performance of its statutory functions.'

Schedule 3 para 4 provides as follows:

> 'Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.'

As the OFT Guideline, OFT 421, states this provision is based on Article 86(2) of the Treaty in order to ensure the same treatment under the Act as under EC law.[28]

Article 86(2) provides as follows:

> 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the community.'

As Whish points out,[29] the typical example of undertakings exempted under this provision is a postal service entrusted with universal service obligations.

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[27] Commission Decision (2001/354/EC) *UPS/Deutsche Post AG,* 2001 OJ L125/27, COMP/35.141; DGFT Decision, *Companies House* (Case CP/1139-01), 25th October 2002; *Getmapping plc v Ordnance Survey* [2002] EWHC 1084.

[28] Para 1.5.

[29] Whish, *Competition Law*, 4th ed, p203.

The two central issues in this case, and more broadly, in determining the scope of application of the exemption, concern the delimitation of the term 'services of general economic interest' and the scope of the exemption vis-à-vis the obstruction of the tasks of the undertaking.

The OFT Draft Guideline on *Services of General Economic Interest Exclusion*,[30] addresses these issues and the following passages are instructive:

> 2.8 The greater degree of privatisation and contracting out in the United Kingdom compared with many other EU member states is likely to mean that in the United Kingdom the state is less likely to provide commercial services and that there will be fewer services of general economic interest provided either by the state or the private sector. However, it is also possible that, over time, functions that may once have been considered to be administrative will come to be regarded as economic.
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> **Services of general economic interest**
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> 2.18 The definition of 'services' under EC case law is broad and may include the distribution of goods[8] and the provision of services, such as gas and electricity. The Director General will interpret 'services' in accordance with EC case law.
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> 2.19 The European Commission has stated that services of general economic interest are services that public authorities consider should be provided in all cases, whether or not there is an incentive for the private sector to do so. It has also stated that EU member states are free to determine those services which they consider to be in the general interest. Where public authorities consider that such services will not be satisfactorily provided by the market, the European Commission has stated that public authorities are free to set specific service obligations on undertakings who are entrusted to operate the services of general economic interest. In certain circumstances, the European Court concluded that these service obligations, or the requirements to meet these service obligations, such as exclusive rights, are not compatible with the application of EC competition law. In these circumstances the undertaking entrusted with providing the service was allowed to benefit from the service of general economic interest exclusion.
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> 2.22 The term 'economic' has been interpreted as referring to the nature of the service itself, rather than the 'interest'. The European Court has held that services of an economic nature may include activities in the cultural, social and public health fields.
>
> 2.24 To be a service of general economic interest the European Commission and Court have considered that the service must be widely available and not restricted to a class, or classes, of customers. However, a service directed at a particular group of customers may be able to benefit from the exclusion if the assessment of whether to offer the service was based on furthering the general economic interest.
>
> **Extent That Restrictions on Competition Benefit From the Exclusion**
>
> 3.1 This part of the guideline explains that undertakings entrusted with the operation of a service of general economic interest will only benefit from the exclusion if the application of the prohibitions of the Act would obstruct the performance, in law or in fact, of the particular task entrusted to that undertaking. EC law has interpreted this as requiring undertakings seeking to benefit from the services of general economic interest exclusion to show that the restriction on competition caused as a result of granting the exclusion is the least restrictive means of ensuring that the undertaking can meet its

[30] OFT 421, Consultation Draft, July 2001.

objectives. The Director General of Fair Trading would expect to make a similar interpretation.

3.2 The European Court has held that it is sufficient that the performance, in law or fact, of the obligations on the undertaking would not be possible. It is not necessary that the survival of the undertaking itself is threatened before the exclusion applies.

3.7 Over the last two decades privatisation and liberalisation in the United Kingdom has significantly reduced the number of services for which exclusive rights are held. In addition, the introduction of EC Directives concerning common rules for the internal market in electricity[19] and natural gas[20] and the development of measures to promote competition in telecoms and rail services since the above Article 86(2) cases were considered will also render these precedents less relevant in the EU as more of the markets are opened up to competition and the number of exclusive rights over aspects of services is reduced.

Services of general economic interest in the United Kingdom

3.9 The Director General of Fair Trading does not consider it likely that many undertakings in the United Kingdom will meet all the criteria set out in the Act in order to benefit from the services of general economic interest exclusion. This part of the guideline provides examples of undertakings in the United Kingdom who undertake similar activities to undertakings in the EU that have benefited from the Article 86(2) exclusion, but explains the reasons that the United Kingdom exclusion is unlikely to apply in these sectors, for example the rapid deregulation and privatisation of the industries in the United Kingdom.

Services of General Economic Interest

This provision is nowhere defined in the Treaty and the impression one gets from both the OFT guideline and the Community case-law is that it is intended to cover exclusive rights afforded by national legislation in areas such as the telecommunications and utilities generally.[31] In fact if one looks at virtually all the Community jurisprudence on Article 86(2), it is about justifying the grant of exclusive rights which have been found to fall within Article 86(1) and hence are incompatible with the Treaty. *Albany* is a classic example of the context within which article 86(2) operates as we can identify from brief segments of AG Jacob's opinion:

90. It must be observed at the outset that the decision of the public authorities to make affiliation to a sectoral pension fund compulsory, as in this case, necessarily implies granting to that fund an exclusive right to collect and administer the contributions paid with a view to accruing pension rights. Such a fund must therefore be regarded as an undertaking to which exclusive rights have been granted by the public authorities, of the kind referred to in Article 90(1) of the Treaty.

98. It is therefore necessary to consider whether, as contended by the Fund, the Netherlands Government and the Commission, the exclusive right of the sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article 90(2) of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been charged.

102. It is important to bear in mind first of all that, under Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are

[31] See, for instance, Case C320/91 *Corbeau* [1993] ECR I-2533; [1995] 4 CMLR 621

subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

103. In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article 90(2) of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market

104. In view of the interest of the Member States thus defined they cannot be precluded, when determining what services of general economic interest they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings (*Commission* v *Netherlands*, paragraph 40).

There are legitimate doubts over the requirement under section 60 to interpret Schedule 3 para 4 uniformly with article 86(2). As I have earlier suggested, the Article 86(2) issue is virtually always set in the context of justifying national legislative measures which afford exclusive rights. Under the 1998 Act there is no domestic equivalent to Art 86(1) and the legal issue in *BetterCare* concerns the justification of the individual conduct. In other words, all of the Community jurisprudence to date suggests that Art 86(2) is to be applied in the context of identifying the Member State policy behind the laws which grant the exclusive rights in the first place. However, are services of general economic interest restricted to the exercise of exclusive rights? The situation in *BetterCare* does not fall within the traditional profile of 86(2) caselaw. It involves the legislative requirement for certain services to be provided, by N & W in this case, and in that context, N & W provides those services itself or by contracting-out. There is no exclusive right but an obligation on the authority to provide services, which have been defined by the CAT in the context of the undertaking issue as economic in nature. Does this fall within the scope of the exemption?

Article 16 of the Treaty, inserted by the Treaty of Amsterdam, is also important in this context. It notes the importance of Article 86 due to:

‘ … the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion.’

The subsequent Commission communication on services of general interest,[32] notes that Member States have freedom to define whether a service is to be regarded as a service of general economic interest. Paragraph 22 confirms that ‘the public service mission’ needs to be clearly defined. Accordingly, it is arguable, on a purposive interpretation, that the scope of services of general economic interest extends to general obligations imposed on Trusts within the health service to provide an effective service, and in this context to provide the residential care in accordance with the legislative requirements. However the next requirement would be to satisfy that application of the prohibition would ‘obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.’

Scope of the Exemption

AG Jacobs indicated what was required in his opinion in *Albany* as follows:

107. Next, it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it,

[32] [2001] OJ C17/4, [2001] 4 CMLR 882.

> defined by reference to the obligations and constraints to which it is subject (*Commission* v *Netherlands*, para 52) or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (Case C-320/91 *Corbeau* [1993] ECR I-2533, paras 14 to 16, and *Commission* v *Netherlands*, para 53).

It is clear that Article 86(2) and, by virtue of section 60, schedule 4, para 3 are to be interpreted narrowly and, accordingly, the Court and Commission have been critical of assertions that anti-competitive behaviour is justifiable in this context. A wide range of factors may be relevant, as in *Entreprenorforfoeningens Affalds/Miljosektion v Kobenhavns Kommune*,[33] in which environmental policy considerations were influential. Again virtually all the case-law has concerned the grant of particular rights by the Member State, for instance to make certain charges.[34] More recently this issue was raised in *Bundesverband and others*, discussed above. I have already outlined the question of whether the association constituted an association of undertaking for these purposes. AG Jacob's opinion also examined the application of article 86(2) as follows. Interestingly, this is one of the few cases in which article 86(1) was not in issue:

> The application of Article 86(2) EC
>
> 86. If the appellants have acted autonomously in setting fixed amounts in breach of Article 81(1) and therefore cannot invoke the State action defence, there remains the possibility of their defending their conduct under Article 86(2).
>
> 95. ... in applying Article 86(2) in the present context, it is in my view important also to have regard to the freedom which Community law accords to the Member States in organising their own social security systems. Given the wide margin of discretion which the national authorities therefore enjoy, I consider that the application of Article 86(2) would be precluded only if the setting of fixed amounts could be shown to be manifestly disproportionate as a method of controlling the cost of medicinal products to the sickness funds.
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> 98. As the Court held in *Albany*, a national measure in the social security field may be capable of justification under Article 86(2) even where it involves granting a power of decision to an undertaking and thereby gives rise to a potential conflict of interest. The Court had regard to the following four factors in particular. The first was the specification of criteria according to which the undertaking must act when exercising its decision-making power. In the present case also, the appellants act pursuant to criteria when setting fixed amounts. Indeed, it is by no means clear to me that a Federal Ministry, acting pursuant to the same statutory criteria as the appellants, would be under any less pressure than the appellants to set fixed amounts at as low as possible a level.
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> 99. The second factor which influenced the Court in *Albany* was the complexity of evaluating the effects of particular decisions upon the financial equilibrium of the undertaking. As regards the second factor, there is no doubt that the appellants are well placed to assess both the medical needs of those whom they insure and the impact of pharmaceutical costs on their own financial equilibrium.
>
> 100. The third was the Member States' margin of appreciation in relation to social security. That factor is clearly equally applicable to the present proceedings.
>
> 101. The fourth was the existence of an adequate level of judicial review to prevent the economic operator exercising its decision-making power in an arbitrary manner. As to

[33] Case C-209/98 [2000] ECR I-3743.

[34] See Cases C-147 & 148/97 *Deutsche Post* [2000] ECR I-825, [2000] 4 CMLR 838.

> the application of that factor to the circumstances of the present case, there is disagreement among the parties as to adequacy of subsequent judicial control over the setting of fixed amounts. What is required, in the light of *Albany*, is that national courts must exercise sufficient control to ensure that fixed amounts are not determined in an arbitrary or discriminatory manner

It is arguable that these factors may apply equally to the *BetterCare* scenario, although fuller information would be required, and that the pricing strategy adopted may be justified on the basis that it was not manifestly disproportionate as a method of controlling the costs of providing residential services to elderly patients. This would appear to give the authorities, and North and West in this instance, greater leeway than the more traditional tests - perhaps that test can be justified in the context of national insurance schemes which have been given particularly lenient treatment. This supports Ross' thesis that there has been a move to a more benign approach involving more sensitive value judgments.[35] Otherwise, it is unclear on the basis of the limited available evidence to what extent conforming to the Chapter II prohibition would obstruct in fact, the provision of its service, and more information would be required generally about the funding position of North and West.

Legal Requirement

Schedule 3, para 5(2) provides that:

> 'The Chapter II prohibition does not apply to conduct to the extent to which it is engaged in an order to comply with a legal requirement.'

Para 5(3) states that:

> 'In this paragraph "legal requirement" means a requirement - (a) imposed by or under any enactment in force in the United Kingdom.'

The CAT noted in *BetterCare*, at para 215, that North and West may be able to avail itself of this provision to take it outside the Chapter II prohibition. As noted earlier, however, insufficient facts were established at the time of the hearing as to North and West's autonomy to negotiate or set the prices for the contractual terms offered to BetterCare. Although the CAT indicated that this provision has no direct counterpart under Community law, it is suggested that it is similar to the state action defence under Community law. In *P Ladbroke*,[36] the Court confirmed the existence of the defence, in relation to both Article 81 and 82, where anti-competitive conduct is required of undertakings by national legislation or it creates a framework which eliminates any possibility of competitive activity, in which case the restriction of competition is held not to be attributable to the undertaking.

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[35] See M Ross, 'Article 16 EC and services if general interest: from derogation to obligation?' (2000) 25 ELRev 222. He emphasises the Court's dicta in Case C-393/92 *Almelo* [1994] ECR I-1477 para 49, that it is 'necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear, and the legislation, particularly concerning the environment, to which it is subject.' However, again, these are arguments about the exclusive nature of the service and public service obligations, ie whether exclusivity is justified. See Case C-203/96 *Dusseldorp* [1998] ECR I-4075, demonstrating that the argument turned on the need for protection rather than the issue of anti-competitive effects.

[36] Joined Cases C-359/95 and C-379/95 *P Ladbroke* [1997] ECR I-6265 para 33.

Objective Justification

The Tribunal also suggested at para 211, without expressing any definitive view on the matter, that North and West may seek to rely on the more general defence to a claim of alleged abuse under Article 82 that they were acting with objective justification on the basis of the financial constraints within which it operates.[37] In this case, my view is that there would be very little scope for this defence to succeed. Given the allegations of abuse and unfair and discriminatory contract terms imposed on BetterCare, this argument would be similar to the legal requirement defence.

Conclusions

Competition law is about markets and regulating the conduct of market participants. If ever a bright line existed between private market activity and the activities of state entities, it has certainly become blurred in recent years, due to a number of overlapping developments, such as liberalisation and privatisation, and the mix of public and private sector to provide services which were previously the preserve of the State, partly through contracting-out of services. Competition law and compliance can no longer be identified as a concern solely of the traditional private sector and compliance only for that sector. This is and should be the case under both Community and domestic competition law. The CAT rightly considered the DGFT's determination of the 'undertaking' issue to be an easy escape route, and the CFI's judgment in FENIN, arguably distinguishable in any event, resulting in the non-application of the competition rules to the Spanish health system,[38] partly reflects subsidiarity concerns. This is similar to the limited scope of the state aid rules as noted by AG Jacobs, at para 16, in *Viscido*:

> 'The answer is perhaps essentially a pragmatic one: to investigate all such regimes would entail an enquiry on the basis of the Treaty alone into the entire social and economic life of a member state.'[39]

My view is that the OFT should adopt a more transparent approach of identifying whether and to what extent state entities, across a wide range of contexts and activities, which engage in economic activity, should be caught by the relevant prohibitions. It may appear, for instance from *Napp* and *Genzyme*, that the 1998 Act is being used to attack anti-competitive abuses which affect the public purse. We need to understand to what extent State market activities may be subject to competition law, although the DGFT's caution is understandable and making any sweeping generalisations from this individual case is difficult. In particular it will be interesting to note to what extent the services of general economic interest exception may be applied to a case such as *BetterCare* or in the context of the health service generally. I have outlined the potentially limited use of the Community authorities which have been in relation to a completely different factual and legal background to *BetterCare*, and to other disputes which may arise under the 1998 Act where there is no equivalent to the Art 86(1) provision. On the one hand the subsidiarity issue lies behind much of the Community agenda in this area and there is reticence, particularly post Article 16 insertion into the Treaty of Amsterdam, to interfere in sensitive areas of national social policy. To an extent, the domestic debate has similarities with the potential conflict or incorporation of other Community norms into Community competition law at the domestic matter. For instance, Monti has recently indicated the increasing influence of Community public policy in the application of Article 81, for example where the collective selling of

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[37] See, for example, Case 27/76 *United Brands v Commission* [1978] ECR 207, para 184.

[38] See also Winterstein, 'Nailing the Jellyfish: social security and competition law' [1999] ECLR 324

[39] Rodger, 'State Aid - A Fully Level Playing Field?' [1999] ECLR 251, re Cases C-52-54/97 *Viscido and others v Ente Poste Italiane* [1998] ECR I-2629, at para 16

broadcasting rights is regulated taking into account the social values of sport, price-fixing of books in Germany and Austria on the basis of cultural policy etc such that we see:

> 'an emerging desire to apply, exclude, or limit the application of competition law for policy reasons beyond consumer welfare'.[40]

Unfortunately, this is made more complicated domestically when one compares the institutional make-up of the Commission, as a decision-making body, and the OFT, as an independent competition authority. In addition, Article 82 and the Chapter II prohibition, allow less scope for such wider public policy arguments and therefore the way to accommodate public interest arguments, which may be involved when state entities participate in markets, within a prohibition system are via the easy escape route (undertaking issue), interpreting the dispute as falling within a set of limited exclusions (which may be difficult) or the dangerous route of introducing ad hoc exclusions from the competition rules.

[40] Monti, 'New Directions in EC Competition Law', Hart Workshop, London, June 2003.