Art. 101 para. 1 TFEU - Undertaking

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A. The ECJ's interpretation of an undertaking

I. The ECJ's method of interpretation

The ECJ's method of statutory interpretation, although drawing on those of the national courts, is an individual one. The ECJ actually adopts “teleological” approach construing EU acts in accordance with the broad system of Treaty aims and objectives.\(^{1}\)

II. ECJ's broad interpretation of an undertaking

The term undertaking --which has the same meaning for the purposes of Art. 101 and Art. 102 is not defined in the Treaty but has been widely interpreted by the European Court. In Höfner and Elser v. Macrotron _the ECJ held that “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed”.\(^{2}\)

Additionally, in the joint cases Poucet and Pistre, the Court of Justice in deciding whether a body was an “undertaking”, stated that there was a distinction to be made based on whether the body concerned was engaged in economic activity as such, or whether, as in this case, the body pursued activities on the basis of solidarity and with no intention to make a profit.\(^{3}\)

B. Economic activity

The critical question is, therefore what constitutes an “economic activity”? There is a series of cases at the ECJ, where this matter was explored. In summary, the cases seem to establish that the characteristic features of an “economic activity” is (1) the offering of goods or services on the market, \(^{4}\) (2) where the activity could at least in principle be carried on by a private undertaking in order to make profits.\(^{5}\) If these requirements are satisfied it is irrelevant that the body is not in fact profit making or that it is not set up for an economic purpose.

Some authors consider that there exists an extra element that for an economic activity to be found there must also (3) be a bearing of the economic and financial risk of the enterprise.\(^{6}\)

C. Irrelevance of legal personality

Furthermore it is important to point out that the legal personality of the entity is irrelevant. Therefore natural persons, legal persons, State and public bodies (even if they supply public services or if the entity is subject to a public service obligation) are potentially caught under the definition of “undertaking”.\(^{7}\)

D. Some examples of what constitutes and undertaking taken from ECJ's decisions:

Some examples of bodies considered by the ECJ as to whether they were “undertakings” under Art. 101 are shown in the following table:

<table>
<thead>
<tr>
<th>Case</th>
<th>Is it an undertaking?</th>
</tr>
</thead>
</table>

\(^{1}\)\(^{2}\)\(^{3}\)\(^{4}\)\(^{5}\)\(^{6}\)\(^{7}\)
Case C-343/95 Diego Cali v SEPG
A body established by national law (in this case to collect harbour duties) was **not** an undertaking

Case C-364/92 SAT v Eurocontrol
A body set up by a Treaty was **not** an undertaking

Case C-519/04P Meca-Medina and Majcen v Commission
A sporting body (such as the International Olympic Committee) **could be** an undertaking

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Verantwortlich: Freie Universität Berlin - vertreten durch den Präsidenten
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Stand der Bearbeitung: J.K. check 1: temp. & footnotes (15.03.2012)

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