



No competition

How far do autonomous healthcare providers like NHS trusts have to worry about competition law? **Ronit Kreisberger** analyses the case law

BREACHING COMPETITION LAW can cost businesses dear. Those found to have infringed the competition rules may find themselves on the receiving end of hefty fines (up to 10 per cent of their worldwide turnover) as well as being exposed to damages claims in the courts. Additionally, agreements which restrict competition may turn out to be unenforceable.

Can conduct by public healthcare bodies be challenged under the UK or EC competition rules? These bodies spend billions on goods and services each year, so this is a question of considerable practical significance both for them and the businesses which supply them.

Competition law applies only to “undertakings”. So healthcare bodies will only be subject to competition law if they are characterised as undertakings. Case law provides the classic definition of an undertaking, which is “an entity which is engaged in economic activity regardless of its legal status or the way in which it is financed.”

The European Court of Justice (ECJ) has, over the years, applied the “economic activity” test in a number of cases which fall either side of the line. Examples of entities found to be undertakings include the German federal employment office; a pension fund for medical specialists in Holland; and a public ambulance service operator in Germany. Bodies found not to have engaged in economic activity include an Italian

compulsory insurance scheme for accidents at work; a company responsible for anti-pollution surveillance; and French social security funds.

The kinds of factors which have influenced the Court’s characterisation of these entities include whether the entity competes with private operators; whether it fulfils an exclusively social function; and whether it exercises official authority. The Court also points, in a number of these cases, to the principle of “solidarity” which describes schemes based on the notion of

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redistribution or subsidy. For instance, the French social security funds were found to operate according to the principle of solidarity, and so were not undertakings, as contributions to the funds were proportionate to the contributor’s income whereas the benefits received were identical.

In 2002, the UK Competition Appeal Tribunal (CAT) had to decide whether the North & West health trust in Belfast (which operates much like an English NHS trust) was an undertaking for the purposes of UK competition law. BetterCare, a private operator of care homes whose largest customer was North &

West, had complained to the Office of Fair Trading (OFT) that North & West was abusing a dominant position in breach of Chapter II of the Competition Act, by pricing too low. The OFT had rejected the complaint on the basis that North & West was not an undertaking.

The CAT overturned that decision, finding that North & West was an undertaking which was therefore subject to competition law. [*BetterCare Group Limited v Director General of Fair Trading*, Case 1006/2/1/01.]

The CAT took the view that, to determine whether North & West is an undertaking, one should ask whether it is in a position to generate the effects which the competition rules seek to prevent. It found that North & West was in such a position, given that it entered into commercial transactions by contracting out the provision of residential care. North & West argued that those transactions did not constitute economic activity as it only transacted for the *purchase* not the *supply* of services on a commercial basis. But the CAT rejected this distinction, noting that the supply of residential care was “big business” worth several billion pounds each year and so must be regarded as economic activity.

The *BetterCare* judgment had been out for less than a year when in March 2003 a judgment from the European Court of First Instance (CFI) cast doubt on this aspect of the CAT’s ruling. *Fenin*, an association of companies supplying medical equipment to the Spanish health service, complained to the European Commission that the bodies which managed the health service were paying them too late and, in so doing, abused a dominant position. The Commission rejected the complaint on the basis that, in purchasing medical supplies, those bodies did not act as undertakings.

On appeal, CFI agreed, holding that the characteristic feature of an economic activity is the activity that consists in *offering* goods/services on a given market, not the business of *purchasing* them [Case T-319/99, *Fenin v Commission*, 2003, ECR II-357]. It would therefore be wrong to dissociate the activity of purchasing goods from the subsequent use to which they are put.

The CFI went on to consider whether the subsequent use of the goods by the Spanish health service – i.e. the provision of free health care services to its members – constituted economic activity. The CFI held that it did not, as the health service operates according to the principle of solidarity, in that it is funded from social security contributions and provides services free of charge on the basis of universal cover.

Fenin pursued its appeal before the ECJ on two grounds: first that the CFI was wrong to exclude the activity of purchasing from its assessment of whether the health service is an undertaking; and second that the provision of medical care by the Spanish health service was, in any event, an economic activity.

The ECJ upheld the CFI ruling [Case C-205/03P *Fenin Commission*, judgment of 11 July 2006]. As to the first ground of the appeal, the ECJ concluded that the CFI was right not to

dissociate the purchasing activity from the subsequent use to which the goods are put. This appears to settle the debate on public purchasers: entities which only make commercial purchases not commercial supplies will not to be characterised as undertakings.

BetterCare has effectively been overruled on that point, as the UK courts are under an obligation to ensure consistency between their own decisions (and the principles applied in them) and those of the European courts.

The position is, however, less clear in relation to public bodies which make mixed supplies – i.e. those that supply goods or services both commercially and on a “non-economic” basis. This includes the NHS, since it provides private as well as public healthcare. While the answer is likely to be that the body acts as an undertaking only in relation to purchases destined for use in non-economic activities, the practical reality is that isolating such purchases may be neither obvious nor easy.

Disappointingly, the ECJ ducked the second issue of whether the provision of medical care is an economic activity, ruling that the argument was inadmissible having not been put to the Commission in the administrative stage.

By contrast, the Advocate General in *Fenin* did address the second ground of appeal and concluded that the CFI applied the wrong test in deciding that the provision of medical care was not an economic activity. In his view, the court should have asked itself whether the State intended to exclude all market considerations from the

provision of medical services by entrusting the activity exclusively to state bodies guided solely by the principle of solidarity. The correct question was therefore whether free health care in Spain is “predominant” or whether the private and public sectors coexist.

If the Advocate General is right, it is unclear how the test would apply in the UK context. Certainly a significant proportion of healthcare in the UK is provided privately, some by the NHS itself. Whether this is sufficient to turn the NHS into an undertaking, we cannot be sure. But it is an issue with which the courts may well have to grapple in future litigation.

As a postscript, I should add that both UK and EC law provide that undertakings entrusted with the operation of “services of general economic interest” (SGEI) are shielded from the competition rules, if the application of those rules would “obstruct the performance of the tasks assigned to that undertaking”.

So even if a public healthcare provider is regarded as an undertaking, it may still be able to play the SGEI card to escape liability under the competition rules – but only if it can demonstrate that it meets each of the requirements of the SGEI exclusion, which are likely to be construed strictly. For more details see the OFT guidelines on the SGEI exclusion at <http://tinyurl.com/2lkxjz>. ■

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The European Court of Justice in Luxembourg