MONCKTON CHAMBERS

FENIN: A PYRRHIC VICTORY FOR PUBLIC SECTOR BUYERS?

By Jennifer Skilbeck
April 2003

FACTS

1. The definition of an "undertaking" for competition law purposes has taken a further turn with two cases, one at the UK Competition Commission Appeals Tribunal and one at the European Court of First Instance. In both cases the respective tribunals considered the circumstances in which a public body might be regarded as an "undertaking" in discharging its function as a *buyer* of goods and services. The circumstances in which "buyer power" might amount to an abuse of a dominant position contrary to Article 82 or Chapter II of the Competition Act 1998 had not previously been directly considered by the European court, or in any UK forum.

2. The relevant facts of both cases are simple. In the UK case[1], *BetterCare,* a Health Trust in Northern Ireland was responsible for supplying long term care for the elderly. Some it supplied itself and the remainder was supplied by the private sector. In some cases the patients made a contribution to the cost. The private suppliers complained that the (fixed) fees offered to them were inadequate, and lower than the cost of the in-house provision. In the Spanish case, *Fenin*[2], suppliers to the health service complained that they were always paid unduly late, later than other suppliers, and that that was an abuse of the buyers' dominant position. The complainants noted that some health service users were charged by the health service, notably in respect of services supplied to foreign tourists, a point they had failed to make to the Commission.

Monckton Chambers
4 Raymond Buildings
Gray's Inn
London WC1R 5BP

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

[1] *BetterCare v Director General of Fair Trading*, The Competition Commission Appeal Tribunal, August 1, 2002, discussed in (2003) PPLR, NA71. An article on *Fenin* will also appear in a forthcoming edition of the PPLR.
[2] Case T-319/99 *Fenin v Commission,* March 4, 2003 (CFI).

THE JUDGMENT

3. Both Tribunals agreed that the relevant test is whether the body is "engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed". The CCAT in *BetterCare* took the robust view that buying was as much part of a commercial transaction as selling, at least in those cases in which the public body was a "major player".

4. In *Fenin* the CFI took a different view of what constitutes an economic activity: the body effectively had to be involved in selling on the goods or services it purchased. It held that "it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity" (paragraph 36: that is not a dictum that an economist would recognise - the concept of a market depends crucially upon both buyers and sellers). The Court added that evidence of the potential to abuse buyer power made no difference: "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" (Paragraph 37). It therefore impliedly rejected an opinion expressed by Advocate General Jacobs (and relied on by the CCAT) that a key consideration was whether the body in question was in a position to generate the effects that competition law sought to prevent[3].

5. Unfortunately the CFI declined to consider the relevance, if any, of the supply of health services to tourists, and whether that might turn the providers of health care into "undertakings", since that point had not been raised in the proceedings from which the appeal arose. One can only wonder whether, in the event, the Commission's decision and appeal to the CFI has assisted the parties in Spain to conclude their differences at all. It is interesting to note that recent independent figures suggest that up to 10% of NHS' income comes from private medicine.

ANALYSIS

6. The CFI's decision is one that UK tribunals "must have regard to", therefore the grounds of decision in *BetterCare* have effectively been reined in, though the basis of that decision was never quite transparent enough to be able to say that it has been overruled. The CCAT had also noted that the Trust supplied long term care itself, and that residents or third parties contributed to the cost in some cases. The relevance of those two factors has not been addressed by the CFI, and it is now unclear whether the "blue pencilling" of the CCAT's first consideration (the "major player" argument) leaves the substance of the decision intact if either or both of the second and third considerations are present.

7. It is probable, however, that those two factors alone are sufficient (in the UK at least) to establish that a public body substantial enough to exert buyer power is usually an "undertaking" in its buying function, indeed the older authorities such as *Hofner*[4] would be sufficient to support it. Very few public bodies are dominant buyers – the health service organisations, the Ministry of Defence and perhaps the police and DEFRA come to mind - but the markets in which they operate may affect a large number of sellers and a substantial volume of business.

8. In many ways the most interesting of these examples is the Ministry of Defence. Their supply is an extreme example of "solidarity", the principle that has been important in taking some public bodies outside the definition of an "undertaking", namely bodies that supply benefits without reference to individual contributions, and are even equally available, in the case of defence, to foreign visitors! The social benefits of defence expenditure are, in

---

[3] Case C-219/00, *Cisal di Battistello Venanzio v Instituto Nazionale per l'assicuraziona contro gli infortuni sul lavore (INAIL),* January 22, 2002.
[4] Case C-41/90 *Hofner & Elser v Macrotron* [1991] I ECR 1979

economic terms, pure "public goods". Nevertheless the Ministry of Defence quite properly sells its surplus equipment and to that extent is, on the CFI's definition, engaged in an economic activity at least when it *sells* the equipment. Could it be that it is not so engaged when it buys the equipment in the knowledge of its second hand value and its expected ultimate onward sale, even though that is not its main purpose? No one could doubt that the Ministry of Defence is engaged in trade.

9. Most suppliers have some protection from abuse through the public procurement process, although tender terms can themselves be unfair. The regime requires public bodies to put out to tender most substantial contracts, but the very tough requirements are designed to establish a level playing field for contractors from all Member States, not to ensure that the terms themselves are fair. Interestingly the main exceptions to the procurement regime may affect the most vulnerable suppliers. Small suppliers, supplying below the thresholds, may generally have the least bargaining power. Part B service suppliers (in practice service suppliers such as those in the health service not generally subject to trade between Member States) are also vulnerable as being relatively less likely to supply services which might be sold on by the public body and thus come within the remaining *BetterCare* tests (the facts of that case being a notable exception to this general proposition).

10. The increasingly commercial approach to the public purchasing function will inevitably (and properly) lead to increasing attempts to squeeze the margins of suppliers. This trend is probably not confined to the UK, so that further references to the European Court are likely (indeed a Spanish court may be requested to send the *Fenin* case back on a reference). Meanwhile the involvement of most public bodies in some commercial activity may well render the qualification of *BetterCare* by *Fenin* a Pyrrhic rather than a substantive victory for the public sector.

For more information on Jennifer Skilbeck, please contact our Senior Clerk, David Hockney on 020 74057211 or visit the 'Find a Barrister' section on our website www.monckton.com.