

# PUBLIC PROCUREMENT LAW REVIEW

2006 Number 6 pages 307-373; NA161-NA238

*Editor: Professor Sue Aronson Smith*

*Assistant Editors: Adrian Brown and Steven Teitel*

*Articles*

*Special section: The EC's New Competitive Dialogue Procedure*

The Field of Application of Competitive Dialogue

*Steen Teitner*

What Can be Done at the Preferred Bidder Stage in  
Competitive Dialogue?

*Celia Kennedy-Loeb*

Competitive Dialogue and the Scope for Discussion after Tenders  
and Before Selecting the Preferred Bidder: What is Fine-tuning, etc.?

*Steven Teitel*

Applying Alcatel in the Context of Competitive Dialogue

*Adrian Brown*

*Other Articles*

Choice in Government Software Procurement: A Winning Strategy

*M. Lynn Seward*

Competition Law and Public Procurement: Two Sides of the Same Coin?

*Caroline Munn*

Katrina's Lessons for Ongoing US Procurement Reform Efforts

*Joshua L. Schwartz*

THOMSON

—★—  
SWEET & MAXWELL

## European Court of Justice

# FENIN: Immunity From Competition Law Attack for Public Buyers?

Ronit Kreisberger

Barrister, Monckton Chambers, Gray's Inn

LT Anti competitive practices; Dominant position; EC law; Health care; Public authorities; Public contracts; Undertakings

### 1. Introduction

In her article on “Just When is a Public Body an Undertaking?”,<sup>1</sup> Jennifer Skilbeck compared the judgment of the European Court of First Instance in *FENIN v Commission*<sup>2</sup> with that of the UK Competition Appeal Tribunal in the *Bettercare* case,<sup>3</sup> each of which dealt with the question of whether a public body engaged in purchasing activities should be classified as an “undertaking” for the purposes of competition law.

The Court of First Instance held in *FENIN* that Art.82 did not apply to the purchasing activities of the organisations in charge of the Spanish health system on the basis that they did not act as undertakings for the purposes of Community competition law.

The long running FENIN litigation finally came to a close on July 11, 2006 when the European Court of Justice (“ECJ”) dismissed FENIN’s appeal against the Court of First Instance’s judgment which it ruled was partly inadmissible and partly unfounded.<sup>3a</sup>

### 2. Facts

Suppliers to the Spanish health service complained to the European Commission that they were always paid unduly late by the purchasing organisations in a way which comprised an abuse of the buyers’ dominant position pursuant to Art.82. The Commission rejected that complaint on the basis that the organisations which managed the Spanish health service did not act as undertakings and were therefore outside the scope of competition law. The Court of First Instance endorsed the

<sup>1</sup> (2003) 12 P.P.L.R. NA75. For further analysis see also Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn, 2005) at 2.51, and the works cited there; and also the article by Munro in this issue of the *Review*, “Competition Law and Public Procurement: Two Sides of the Same Coin?” (2006) 15 P.P.L.R. XXX.

<sup>2</sup> Case T-319/99, *Federación Española de Empresas de Tecnología Sanitaria (“FENIN”) v Commission* [2003] E.C.R. II-357.

<sup>3</sup> *BetterCare v Director General of Fair Trading*, judgment of CAT, August 1, 2002, also discussed by J. Skilbeck at (2003) P.P.L.R. NA71.

<sup>3a</sup> Case C-205/03P, *FENIN v Commission*, Judgment of July 11, 2006

Commission's approach. It ruled that the test for determining whether the entity is to be characterised as an undertaking is whether, irrespective of its legal status or the way in which it is financed, it is engaged in an economic activity. The Court of First Instance went on to hold that it is the activity consisting in *offering* goods and services on a given market that is the characteristic feature of an economic activity rather than the activity of *purchasing* goods.<sup>4</sup> This led the Court of First Instance to conclude that the health service did not engage in an economic activity as it is funded from social security contributions and other state funding and it provides services free of charge to its members on the basis of universal cover.

### 3. Appeal to the ECJ

FENIN sought to challenge the Court of First Instance's ruling on the alternative grounds that either:

- i) the Court of First Instance was wrong to exclude from its consideration whether a purchasing activity is in itself an economic activity which may be dissociated from the service subsequently provided; or
- ii) the subsequent activity, namely the provision of medical treatment, is itself an economic activity so that the related purchasing activity is economic in nature.

As regards the first limb of FENIN's challenge, the ECJ simply asserted that the Court of First Instance:

"rightly deduced (. . .) that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity."

As regards the second limb of FENIN's challenge, the ECJ effectively ducked the issue, finding that the plea was inadmissible, the argument having been made for the first time at the appeal stage. In this regard, the ECJ departed from the findings of its Advocate General who concluded that the plea was admissible and that the case should be referred back to the Court of First Instance to make findings of fact to determine whether the activities of those undertakings managing the Spanish health service were economic in nature.<sup>5</sup>

### 4. Comments

This eagerly awaited judgment is something of a damp squib both in its absence of reasoning for upholding the Court of First Instance's approach to the first limb of the appeal and in its failure to address the second limb.

On the other hand, the judgment does seem definitively to settle the question of whether there will in future be any scope for parties to argue that purchasing activities may, in and of themselves,

<sup>4</sup> As J. Skilbeck notes, this definition departs from an economist's understanding of the concept of a market; fn.3 above.

<sup>5</sup> Opinion of A.G. M. Poiares Maduro of November 10, 2005.

be economic in nature.<sup>6</sup> Parties seeking to challenge the conduct of public buyers under Community competition rules in future cases will first need to establish that the conduct relates to purchases which are destined for use in some form of commercial activity by the public body.

The judgment does not provide any guidance as to how this will play out in practical terms in respect of public bodies performing a hybrid of economic and non-economic activities. The Advocate General recognised the practical difficulties involved, noting, with perhaps a hint of understatement, that:

“it is sometimes difficult to separate economic activities from those which are not economic when they are carried out by the same body.”

However, this practical concern did not, in his view, alter the principle that it is only demand which is linked to economic activities which may fall within the scope of competition law. Thus, he went on, purchases intended for use in non-economic activities are not subject to competition law.

Given that public bodies are increasingly engaged in some form of commercial activity, the *FENIN* judgment may provide only limited shelter from the competition law regime for much of the public sector which thus remains vulnerable to challenge pursuant to the rules on competition.

<sup>6</sup> It thus represents a conclusive rejection of A.G. Jacobs suggestion that a key consideration is whether the entity is in a position to generate the effects that competition law sought to prevent; see Case C-41/90, *Hofner & Elser v Macrotron* [1991] E.C.R. I-1979.