

Can a Major Public Sector Purchaser Control the Prices It Pays or Is It Subject to the Competition Act?

Cases C-264/01, C-306/01, C-354/01 & C-355/01: AOK Bundesverband v Ichthyol (AOK), ECJ 16th March 2004.

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Pressure on the public sector to increase the efficiency of its purchasing has led to some public sector purchasers adopting practices which may be unfair and anti-competitive. The OFT is currently investigating the purchasing practices of public bodies, and a judgment of the European Court of Justice in *AOK* (16th March 2004) represents a further development in the attempts of suppliers to hold back the increasingly aggressive approach of parts of the public sector.

What terms in a public supply or services contract might conceivably be anti-competitive? A sole purchaser may impose an unreasonably low purchase price; central purchasing may, by selecting one supplier, eliminate efficient suppliers from the market altogether; framework (or call-off) contracts may result in "bulk" prices being tendered, with no guarantee of any or sufficient orders being forthcoming; other terms may require normally confidential commercial information, such as prices charged to other customers, being revealed. All these potentially anti-competitive practices may thrive in markets in which the supplier is dependent or substantially dependent on one buyer, and thus in a weak negotiating position.

The facts

The facts of *AOK* represent a prime example of the problem. The German health insurance sector is supplied by non-profit making funds, subject to recent changes intended to reduce the costs of healthcare. An important aspect of the arrangements concerned the statutory scheme under which the insurance funds together set the maximum prices that they will pay for categories of pharmaceutical products (according to certain principles). A number of pharmaceutical companies challenged the price setting procedure under Art 81(1) as an agreement between undertakings (or an association of undertakings).

An important issue was bound to be whether the insurance funds were "undertakings" for the purpose of Article 81. The funds incorporate a sophisticated system of "solidarity" (insurance cover operated on "social" rather than an "actuarial" basis), which simultaneously delivers an income-related basis of contributions, the subsidisation of funds accepting the higher risks by those accepting lower risks, and competition both on premiums and in respect of the provision of services that are not compulsory.

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The judgment

The pharmaceutical companies had, according to the evidence of the judgment, relied on the competition between funds in terms of premiums and non-statutory benefits as establishing that the funds are “undertakings” for the purpose of Article 81. However the Court held that the insurance companies are not “undertakings”: they are established on the principle of solidarity, and do not compete in the benefits they are required to provide. The element of competition was introduced by the German government to improve management and was said by the Court not to affect the social nature of the funds’ activities. In respect of those activities which are not subject to the principle of “solidarity” and which are outside the German social security system, the companies may, however, be “undertakings”.

The question then arose as to whether the provisions under which the maximum prices were set were linked to the funds’ social functions. They were. Setting maxima is a task for “the management of the German social security system” and not part of an economic activity.

Comment

The Court’s finding is superficially simple and attractive. Where a fund pursues a social objective based on “solidarity” (non-actuarial principles) it is not an “undertaking” and not, it seems, subject to the competition provisions of the Treaty.

However there are a number of possible implied qualifications in the judgment. Would the funds have been subject to Article 81 if they had fixed the maximum prices in the absence of any laws providing for them to be so fixed? Probably not, insofar as they related to the supply of services within the social function. Could they have used those prices in respect of any supply of services outside those compulsory functions? Probably not. What about the implications for Article 81 of the existence of any competition between private medicine and the social funds? None was mentioned - the existence of any such competition could not have affected the “social” nature of the funds themselves, yet the Court was careful to base its conclusions on the nature of the competition *between* funds which did not affect the fixed and social nature of their obligations.

What is missing altogether from the judgment is any mention of the points in issue in the earlier cases of *BetterCare* and *Fenin* (see the Case Notes on the Monckton Chambers website for further details). *BetterCare* established for the purposes of UK law (and subject to the subsequent findings of the European Court) that a public body could be an “undertaking” solely on account of its purchasing function. After all an economic activity depends equally on buyers and sellers and there is no economic reason why the concept of an “undertaking” should apply only to one side of the equation. Hence in *BetterCare* the CAT held that a hospital Trust was an “undertaking” in the purchase of long term care for the elderly (although the prices it fixed and that were challenged might fall outside the provisions of the Competition Act if fixed by an order of legal effect). This point was also raised in *Fenin* in respect of the Spanish health care system. Because its purchases were made exclusively for the fulfilment of its social functions it was not an undertaking. That decision is the subject of an appeal to the ECJ.

The Advocate General’s opinion in *AOK* is interesting and substantially different from the judgment of the Court. Adv. Gen Jacobs concluded that the funds were “undertakings” because of the competition between them; the price fixing mechanism amounted essentially to a purchasing “cartel”, expressly identified within the mischief of Article 81(1), and which ought to be subject to the same strict control as supply cartels. Nevertheless since it was sanctioned by law it was for the national court to decide whether it was exempt from the competition provisions under Article 86(2). The Advocate General’s opinion has been rejected, but nevertheless summarises in simple form the continuing problems that will be faced by suppliers to dominant public sector purchasers. This approach to public procurement, while bringing short term savings, may ultimately cause the disappearance of innovative and competitive suppliers in a number of areas of importance to public welfare.

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