THE CONCEPT OF UNDERTAKING IN THE EUROPEAN UNION COMPETITION LAW

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Abstract

One of the most important concepts that the European Union Competition Law uses is the undertaking. In order to correctly apply the rules under this domain, it is necessary to fully understand when an entity is or isn`t an undertaking under competition law. Therefore, the main purpose of the following paper is to facilitate the understanding of the concept of undertakings so as to delimit the area of competition law from others. In the following, we will identify the alternative definitions offered in time by the Court of Justice of the European Union in this matter, but also by doctrine and we will have a short glance over the national courts of the member states' practice. Our analyze will take into consideration also those cases which remain under discussion, such as, but not just that, when can a part of an undertaking that is a subject of a transaction be considered a merger under the European Commission Merger Regulation or how can a natural person represent an undertaking under the European Union competition law. In conclusion, undertakings, parts of undertakings or associations of undertakings, mainly in the light of EU competition law, are the concepts we will be dealing with in the following paper.

Keywords: *Undertaking, European Union Competition Law, merger, European Commission, economic activity.*

Introduction

The following paper covers a very important subject to the competition law in general and to the European Union competition law in particular. The matter in discussion regards the concept of an undertaking under a specific area of law. The main concept used in the rules and regulations for EU competition is "undertaking", word that can be interpreted differently according to various domains of law. The paper focuses only on the competition law.

The study comprises several aspects when defining an undertaking under EU competition law, but also takes a short glimpse on national case-law or legislation. The subject was very largely debated in the past and practice still isn't uniformly applied among Member States, even difference between EU Law and national legislation has been observed when analyzing cases under the same provisions. Also, different approaches when interpreting the definitions of an undertaking can deliver different assessments on similar cases. For this reasons, we believe that the subject of the study is one of currently relevance and importance for both, practitioners and theoreticians.

The study will reveal the existing definitions among the EU legislation and that will represent the point where we will start our analysis. Our intention is to find elements of niche in this topic, surprising those facts that can make a difference when approaching the definition of an undertaking under competition law. The research will take into account the jurisprudence of the European Union Court of Justice, the several definitions given by the relevant legislation, short glimpse into the national court-law practice and/or legislation and other sources. We are aware of the lack of uniformity when analyzing this concept, but we care to underline a part of the main differences.

Regarding the already existing specialized literature on this matter, we consider our study as an additional incursion on the subject, but with an overall approach from several sources. Representing only a short introduction on what it could represent a complete research on the existing differences when defining an undertaking, we are confident on a future development of the subject and on its contribution to the ongoing assessments.

Paper Content

The *Treaty on the Functioning of the European Union* ("*TFUE*") lays down several rules that concern competition, rules that apply only to undertakings, as they are defined by law. So, Article 101 stipulates that "The following shall be prohibited as incompatible with the internal market: all agreements between **undertakings**, decisions by **associations of undertakings** and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

a) directly or indirectly fix purchase or selling prices or any other trading conditions;
b) limit or control production, markets, technical development, or investment;
c) share markets or sources of supply;
d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
e) make the conclusion of contracts subject to acceptance by the other parties of supplementary

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obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

− any agreement or category of agreements between **undertakings**,

− any decision or category of decisions by **associations of undertakings**,

− any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the **undertakings** concerned restrictions which are not indispensable to the attainment of these objectives;
b) afford such **undertakings** the possibility of eliminating competition in respect of a substantial part of the products in question." The following Article 102 stipulates that "Any abuse by one or more **undertakings** of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Furthermore, *Council's Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* uses this concept to identify the entities that this normative act applies to. In this case, when defining a concentration, the regulation takes into consideration the following aspects: "1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

a) the merger of two or more previously independent **undertakings or parts of undertakings**, or
b) the acquisition, by one or more persons already controlling at least one **undertaking**, or by one or more **undertakings**, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other **undertakings**.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an **undertaking**, in particular by:

a) ownership or the right to use all or part of the assets of an **undertaking**;
b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an **undertaking**.

3. Control is acquired by persons or **undertakings** which:

a) are holders of the rights or entitled to rights under the contracts concerned; or
b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving there from.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

We have underlined a part of the previously text because we believe it is important to observe the carefully change of concepts. An undertaking or a part of an undertaking has to fulfill the main condition of being an autonomous economic activity. This subject can be approached also when referring to the transfer of assets in the context of an existing concentration.

The *Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* explains that a concentration only covers operations where a change of control in the **undertakings** concerned occurs on a lasting basis. In the light of this document, "the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an **undertaking**, i.e. a business with a market presence, to which a market turnover can be clearly attributed." The European Commission adds that "the transfer of the client base of a business can fulfill these criteria if this is sufficient to transfer a business with a market turnover."

The subject of defining the concept of an undertaking has been much debated among theoreticians and practitioners of competition law, the notion having a relative characteristic. "The functional approach and the focus on activity than the form of an entity may result in an entity being considered an undertaking when it engages in some activities but not when it engages in others[1]". Here are some relevant cases that show how the European Commission decided in different situations, where an entity was considered an undertaking or not.

On 28 November 1989[2], the Commission received a complaint from the travel agency Pauwels

[1] "EC competition Law – an analytical guide to the leading cases", Ariel Ezrachi, Hart Pubishing, 2008, p.3
[2] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31992D0521

Travel BVBA ("*Pauwels Travel*") which was related to the ticket distribution system applied during the International Federation of Football Associations ("*FIFA*") World Cup held in Italy in 1990. The main facts where that Pauwels Travel wanted to put together and sell in Belgium World Cup package tours comprising transport, accommodation and entrance tickets to the stadia in which the various matches were to be played, but it found that the ticket distribution system that had been decided on did not allow travel agencies to acquire stadium entrance tickets for the purpose of putting together package tours, any attempts of procuring from different channels, on that matter, resulting in a cease and desist action being brought before the Belgian national courts by the travel agency authorized by the World Cup organizers to sell package tours in Belgium. Two main contracts were signed by the local organizing committee (Federazione italiana gioco calico - FIGC), appointed by FIFA, on the one hand and, firstly, The Compagnia italiana turismo SpA ("*CIT*") and Italia Tour SpA ("*Italia Tour*") and, secondly, 90 Tour Italia, on the other hand, which mainly concluded that the organization of the event and the distribution of tickets to be managed through a jointly set up company, respectively 90 Tour Italy, who had the exclusive grant of the worldwide distribution rights of tickets as part of package tours. This exclusivity arrangement prevented other travel agencies from offering combined package tours with tickets for the 1990 World Cup.

In its decision, the European Commission considered the compatibility of the exclusive distribution agreement with the Article 81 EC[3]. A preliminary question concerned the nature of the entities involved and whether they constituted an undertaking within the meaning of Article 81 EC.

The legal assessment of the concept of undertaking in this case started with the Court of Justice's case-law. In accordance with it, "any entity carrying on activities of an economic nature, regardless of its legal form, constitutes an undertaking within the meaning of Article 85 of the EEC Treaty[4] (see in particular Cases 36/74 of 12 December 1974, Walrave v. Union Cycliste Internationale (1) and C-41/90 of 23 April 1991, Hoefner v. Elser/Macrotron). An activity of an economic nature means any activity, whether or not profit-making, that involves economic trade (see Case 41/83 of 20 March 1985, Italy v. Commission (British Telecommunications)".

Regarding the commercial nature of the World Cup, the Court underlined that *the World Cup* is indisputably a major sporting event, which also includes activities of an economic nature, such as the sale of package tours comprising hotel accommodation, transport and sightseeing, the conclusion of contracts for advertising on panels within the grounds, the conclusion of television broadcasting contracts, the commercial exploitation of the FIFA emblems, the World Cup, the FIFA fair-play trophy and the World Cup mascot and others. *FIFA*, however, is a federation of sports associations and accordingly carries out sports activities, but also engages is activities of economic nature, such as - the conclusion of advertising contracts, the commercial exploitation of the World Cup emblems, and the conclusion of contracts relating to television broadcasting rights.

The FIGC is the national Italian football association, appointed by FIFA to organize the 1990 World Cup. The FIGC was accordingly responsible for the entire organization of the event in accordance with the provisions of the 1990 World Cup regulations and had in particular the task of ensuring that grounds were in order, press facilities provided, parking spaces laid out, etc. For the purpose of financing such expenditure, the FIGC had a share in the net profits of the competition and was able to exploit commercially in Italy the 1990 World Cup emblem, which it had itself created. Thus the FIGC also carried out economic activities.

The local organizing committee was a body set up jointly by FIFA and the FIGC for the purpose of carrying on all activities relating directly or indirectly to the technical and logistical organization of the World Cup. The local organizing committee's tasks included the establishment and implementation of the ticket distribution arrangements. The local organizing committee's revenue derived partly from television rights, advertising rights, the sale of tickets and the commercial exploitation in Italy of the World Cup emblem. The exclusive rights granted to 90 Tour Italia resulted in remuneration for the local organizing committee, in accordance with the provisions of Article 5 of the contract of 26 June 1987.

CIT was an Italian company engaged in travel agency activities. It was therefore an undertaking within the meaning of Article 85.

Italia Tour SpA was a company carrying on an activity similar to that of CIT and was thus also an undertaking within the meaning of Article 85.

90 Tour Italia SpA was a company established under Italian law by CIT and Italia Tour for the purpose of putting together and marketing package tours to the 1990 World Cup.

In this context, the Court decided that, the entities mentioned above, regardless of their legal form, had conducted activities of economic nature, meaning that they represented undertakings within the meaning of Article 85 of the EEC Treaty.

[3] The two fundamental European Competition Law provisions were Articles 85 and 86 of the Treaty of Rome, the treaty that founded the European Economic Community (EEC) that evolved into the European Union. The drafters of one amending treaty to the Treaty of Rome, the Treaty of Amsterdam, decided it was necessary to renumber the two Articles 81 and 82 from 85 and 86; the revised Treaty on the Functioning of the European Union (TFEU) then renumbered the Articles 101 and 102.

[4] Currently article 101 from the Treaty on the functioning of European Union

Another case brought to the European Union`s Court of Justice referred to an action for annulment[5]. The plaintiff, respectively FENIN, which was an association of undertakings that marketed medical goods and equipment used in Spanish hospitals, submitted a complaint to the European Commission alleging an abuse of a dominant position, within the meaning of Article 82 EC, by various bodies and organizations responsible for the operation of the Spanish national health system (SNS). On 31 August 1999, the Commission definitively rejected the applicant's complaint on the dual ground that the bodies and organizations in question were not acting as undertakings when they participated in the management of the public health service. Consequently, the bodies managing the SNS were not acting as undertakings when they purchased medical goods and equipment from the members of the applicant association.

Again, the EU Court of Justice firstly approached this matter by enumerating some of the settled case-law, observing that "in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Höfner and Elser, Poucet and Pistre, Fédération française des sociétés d'assurances and Others, Case C-55/96 Job Centre [1997] ECR I-7119,

Albany, Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931 and Case T-513/93 Consiglio Nazionale degli Spdizionieri Doganali v Commission [2000] ECR II-1807)". On this matter, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, not the business of purchasing, as such. The Court underlined that in accordance with the Commission's arguments, it would be incorrect, when determining the nature of a subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. "The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. Consequently, an organization which purchases goods — even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. 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 and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC."

Regarding SNS, the Court qualified it as operating according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provided services free of charge to its members on the basis of universal cover. In the light of the aspects mentioned above, the Court considered that the organizations in question do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which they require in order to provide free services to SNS members.

The consequences of dual, public and private characteristics were not explored in this case, because FENIN brought up new facts, for the first time, in front of the Court. FENIN argued that SNS, on some occasions, provided private care in addition to State-sponsored healthcare and consequently, in those circumstances, it should be regarded as an undertaking. But, because no reference of this matter were made in the original complaint, the European Commission couldn't be accused of not examining facts which have not been brought to its notice by the complainant before rejecting a complaint on the ground that the practices complained of do not infringe Community competition rules or do not fall within the scope of the Community competition rules. Therefore, in its review of the legality of the decision contested in the present action, the Court also couldn't take the existence of those services into account and it was not necessary in this case for the Court to rule on their potential relevance to the question whether the purchasing operations of those organizations amount to an economic activity. So, in this case, the Court decided that the organizations in question do not act as undertakings under EU competition law, without taking into a consideration a possible relevant fact that could change its decision if it were brought to the European Commission in its original complaint.

A very interesting aspect, among member states' competition laws, regards the Competition Act currently into force in Slovakia. The term of "undertaking" is defined by this act and it comprises any entrepreneur according to the Commercial Code[6]. In addition, the term "undertaking", under the Competition Act, comprises any natural and/or legal person, their associations and associations of these associations, with respect to their activities and conduct that are, or may be, related to competition, regardless of whether or not these activities and conduct are aimed making profit. We can observe that these provisions are

[5] Case T-319/99: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de7b3f114105ed4cfb8780f728252721da.e34KaxiLc3eQc40LaxqMbN4Pb34Ke0?text=&docid=48089&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=415463

[6] "(i) any person registered in the Commercial register;
(ii) person which undertakes business based on the trade permission;
(iii) person which undertakes business based on other permission according to special legislation; or
(iv) a natural person, sole agricultural producer registered in the evidence based on special legislation."

almost completely in line with the EU competition rules, with one important exception: the term of "undertaking", in this situation, covers only entities with legal personality. Thus, the Slovak Competition Act, when referring to an undertaking, it involves a person (natural or legal) but it does not cover a "group" of individual persons forming a single economic group.[7] This reasoning derives also from the Council's decision in GIS Cartel Case[8], in which it reached the conclusion that AMO[9] could not apply joint and several liability for the breach of competition rules of the companies belonging to the same economic group in the same way the European Commission did in the same case (Case COMP/F/38.899[10]). The Slovak Competition Act also applies to professional services provided, for example, by lawyers, pharmacists and architects and to the activities of these persons. This category of persons is considered entrepreneurs under the Slovak Commercial Code because they undertake businesses based on permission, according to special legislation. These persons are mainly organized in professional associations or chambers, therefor the case-law of the AMO[11] in the area of competition, as well as Slovak courts, is often related to the assessment of agreements restricting competition, concluded in the form of decisions of associations and, in such cases, the autonomous professional associations had to be treated as undertakings under the Slovak Competition Act. An example of this judgement comes after the Slovak Bar Association (SBA) started an administrative proceeding in order to dismiss the imposed penalty for a breach of an obligation to submit information to the AMO. SBA reasoned that was neither an entrepreneur according to the Slovak Commercial Code, nor any entity whose activities were connected to competition. The motives invoked refer to, on one hand, the fact that all advocates were grouped and listed in a register, which meant that these persons could not be treated as competitors since conditions of the provision of legal services were determined by the state in the public interest with the aim of safeguarding their quality and, on the other hand, that their remuneration for legal services was determined by the general legal regulation or by an agreement between the advocate and client, thus the economic competition influenced by price or advertisement was not present. The Council, after the Regional Court in Bratislava[12] rulling and also in accordance with the Judgement of the European Court of Justice[13] concluded that advocates were entrepreneurs pursuant to section 2(2) letter c) of the Commercial Code and that the SBA was, pursuant to the Act on Advocacy, an autonomous professional organization grouping all advocates and so it represented an association of undertakings according to section 3(2) of the Competition Act.

We found a similar case among the case-law of the Romanian High Court of Cassation and Justice - Decision no. 3415/30 October 2015. The main facts regard an appeal introduced by the Romanian Notary's Chamber (*"RNC"*), seeking to call off an unannounced inspection required by the Romanian Competition Council (*"RCC"*), arguing that the legal provisions invoked by the competition authority aren't applicable in this case. The RNC rejected the RCC interpretation regarding the assimilation of notary offices and chambers as undertakings, recalling art. 3 from Law no. 36/1995 that states the following: "The public notary is invested to fulfill a service of public interest and it has the statute of an autonomous public position". In addition, according to art. 27 from the Deontological Code of Public Notaries, "the work of a notary is exercised through competition conditions, on exclusive professional competence and probity criteria, recognized and unanimous accepted as principles of strengthening the prestige of the public notary institution". The appellant considered that this situation in particular represents the exception that Law no. 21/1996 regarding competition refers to in art. 2 (1) letter b), respectively that the competition law applies to acts and deeds which restrict, prevent or distort competition, except for situations when such measures are taken to enforce other laws or protect a major public interest. To support its idea, some of the EU Court of Justice case-law[14] was brought up, in which the court constantly separates the economic liberties associated to the internal market (i.e. the freedom of establishment, the freedom to provide services, the freedom of movement for workers, etc.) from their exceptions, regarding competition law. Another case was mentioned, one that refers to lawyers, where the EU Court of Justice stated that while an undertaking is subject to the competition law, according to the European treaties, the lawyer exercises its prerogatives of public power inside its responsibilities or an activity of general interest and these activities don't have an economic character, fact that hinder the applicability of competition rules. Another argument brought by the applicant says that nowhere in Europe, the public notary doesn't represent an activity on a market, but an institution of public services. This position helps with respecting the legality of transactions on some markets and this doesn't mean it should be confused with the markets themselves. Mainly, the RNC argues that a public general interest justifies the non-application of

[7] "Competition Law in the Slovak Republic", by Andrea Oršulová,David Raus, published by Kluwer Law International BV, the Netherlands, 2011, p. 48

[8] Decision of the Council No. 2009/KH/R/2/035, 14 august 2009

[9] Antimonopoly Office of the Slovak Republic

[10] http://ec.europa.eu/competition/antitrust/cases/dec_docs/38899/38899_1030_10.pdf

[11] http://www.antimon.gov.sk/antimonopoly-office-slovak-republic/

[12] No. IS 431/2005-43, 2 Oct. 2008

[13] C-309/99, 19 Feb. 2002

[14] Case C-415/93, C-94/04

competition rules, public notaries and their organization fall outside the scope of Article 101 TFUE and for these reasons the RCC shouldn't have the capacity to initiate an investigation and sanction the RNC. In its judgement, the High Court of Cassation and Justice ("*HCCJ*") argues the following:

- reaffirms the definition that Law no. 21/1996 regarding competition gives to the concept of "undertaking", that is "undertakings as described by this law represent any economic operator engaged in an activity of goods or services provision on a given market, regardless of its legal status and financing, as defined in the case law of the European Union", but, also, the fact that even though the public notary provides a service of public interest that does not exclude it from the scope of the competition rules;
- a part of the public notary's activity has a commercial/private character, which is provided in order to obtain profit, so at least this part falls under competition conditions, fact that gives it the status of an undertaking;
- for their services, consisting of documents/procedures completed by capitalizing their professional knowledge, the notary offices receive a price/fee;
- the fee represents income, which can vary from case to case, and the difference between the income and the amount spent on other costs represents profit, which is characteristic to an undertaking. Thus, the income realized by public notaries, in a determined period of time, is not preset, but varies according to the volume of work done, therefor there is an influence exerted by the offer of such services;
- the invoices/receipts given by a notarial office have V.A.T. included and that represents another reason to believe that it practices an economic activity.

Following all the arguments presented above, the HCCJ decided that the RCC has correctly considered the public notary office as an undertaking.

Another subject of interest for our paper is focused on the meaning of the transfer of a part of an undertaking. The Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertaking ("the EC Merger Regulation") defines a concentration, among other situations, the change of control on a lasting basis that results from the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. When talking about the transfer of a part of an undertaking, we cannot forget that the Council's Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ("Directive no. 2001/23/EC") refers to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

When do we consider the transfer of a business as a transfer of a part of an undertaking and is there any relation between the concept of "part of an undertaking" used in the EC Merger Regulation with the one used in the Directive no. 2001/23/EC? For example, as we mentioned in the beginning of the paper, the *Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) no. 139/2004 on the control of concentrations between undertakings* says that "the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed". The EU Court of Justice, in an early judgement (Case 24/85[15]), ruled that "a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of" and that certain conditions need to be fulfilled in order to asses that the business was disposed of as an ongoing concern. The facts that the court took into consideration in order to determine whether those conditions were met, included the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. Even so, the court still underlined that "all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation." Furthermore, according to the Directive no. 2001/23/EC "there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary". Also, the EU Court of Justice again indicates in Case C−458/12[16] that "According to settled case-law, in order to determine whether there is a 'transfer' of the undertaking within the meaning of

[15] Judgment of the Court (Fifth Chamber) of 18 March 1986. - Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Safeguarding of employees rights in the event of transfers of undertakings. - Case 24/85 - https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61985CJ0024

[16] Judgement of the Court (Ninth Chamber) from 6 March 2014 (*) (Request for a preliminary ruling – Social policy – Transfer of undertakings – Safeguarding of employees' rights – Directive 2001/23/EC – Transfer of employment relationships in the event of a legal transfer of part of a business that cannot be identified as a pre-existing autonomous economic entity) - http://curia.europa.eu/juris/document/document.jsf?text=&docid=148743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=530251

Article 1(1) of Directive 2001/23, the decisive criterion is whether the entity in question keeps its identity after being taken over by the new employer" and "that transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. Any organized grouping of persons and of assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous, constitutes such an entity".

Conclusions

Summarizing the main outcomes of the present study, we can conclude the following:

- Even though an organization has no profit motive or functions without an economic purpose, that doesn't mean that it brings itself outside the concept of undertakings under EU competition law.
- Some cases can remain under discussions when possible relevant information was not taken into consideration at the relevant moment, because of a party's negligence in formulating a complaint or/and an action in front of the court.
- Even though the regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law, becoming binding in their entirety on all EU countries, there may exist some countries, such as Slovakia (the example offered in the paper content which refers to the definition of undertakings), where the national law can differ from the EU competition rules.
- We can find ourselves dealing with an undertaking, even though an entity is entrusted with public power or provides services of general public interest. As long as this entity's activity or only a part of it is realizes a sort of profit, according to the applicable law, than that entity should be considered an undertaking under EU competition rules.
- When assessing a transfer of a part of an undertaking, several facts need to be taken into consideration in an overall matter, but the most important criteria is to evaluate the scope of the transfer, i.e. to see if the assets transferred or other parts of undertakings are able to maintain an ongoing business or an individual economic entity with a market presence.

We expect that study's impact will effect practitioners it their analyze, helping them to identify more easily when the object of a transfer represents an undertaking or a part of it under competition law and we believe that the study will also influence future articles/papers/documents elaborated by interested persons/entities, because of its synthetized approach and punctual references.

We consider this study only a beginning for a much more complex research of the existing differences between the use of the same concept and we suggest that a further research work should reach more into national court practices and those practices compared in relation with the EU jurisprudence and legislation in order to lead to new findings.

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