Do workers constitute undertakings for the purpose of the competition rules?

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***E.L. Rev. 408** *In the* Becu *case the Court of Justice confirms that activities to be performed under an employment contract may be subject to certification, by a specific body, that professional requirements are satisfied. In the view of the Court, the number of certifications may be limited taking into account "labour requirements". According to the Court, such a limitation should not be deemed contrary to the E.C. competition rules as workers do not constitute undertakings for these purposes.*

Organisation of labour market

The case[1] concerned the organisation of labour in the port of Ghent, Belgium. According to the preliminary reference, the market for labour was regulated by three complementary bodies.[2] Principles were established by the national legislator--*in casu* the Belgian Parliament in co-operation with the King. Under these principles, activities connected to maritime transportation could only be performed in ports by workers "recognised" for that purpose. This limitation was implemented by a second body--the Belgian Government. Several Decrees were adopted by that authority, the main object being to identify the activities covered and the conditions which had to be satisfied for recognition. These rules were adopted with the assistance of a third body--a committee composed of representatives of workers and employers ("joint committee"). Pursuant to Belgian legislation, the joint committee was to advise the Government as to implementing measures.

Conditions for recognition

As mentioned above, several conditions had to be fulfilled under Belgian law in order to receive recognition. Most of these were related to the personal attributes the skills of the candidates. The purpose was to verify the ability of the persons to perform relevant activities in a satisfactory manner. Pursuant to these criteria, recognition would only be granted to persons (i) showing good conduct and satisfactory moral character; (ii) declared medically fit by the dock-work medical service; (iii) aged between 21 and 45 years; (iv) having a sufficient knowledge of the relevant technical language; (v) having attended ***E.L. Rev. 409** preparatory courses on safety; (vi) having the required technical competence; and (vii) not having been the subject of a measure withdrawing recognition.[3]

It was not sufficient, however, to show an aptitude to perform well and integrate easily. Under Belgian Law, recognition would only be granted if, and to the extent that, "labour requirements" so permitted. What were the exact contents and scope of these requirements? No indication on that point may be found in the Judgment or in the national legislation. In the absence of any criteria, a substantial margin of appreciation to determine whether the conditions were satisfied was apparently left to the authority responsible. In this case, that competence was entrusted to a joint committee at the local level. This committee was composed along the same lines as the one at the federal level (representatives of workers and employers).[4] It seems to have enjoyed a substantial degree of liberty in the determination of the circumstances under which the number of recognised workers should be increased or left unchanged.

The facts

This competence entrusted by legislation was apparently used as an instrument to regulate supply and demand. Basically, the local joint committee exercised its authority so as to ensure that the number of workers would not exceed the volume of activities. Scarcity was thus organised, in the framework provided by the legislation. As a result, workers enjoying recognition were placed in a situation where they could claim wages substantially higher than the tariff asked for identical tasks by non-recognised workers with similar qualifications.[5]

To avoid high costs, the undertakings active in the port of Ghent understandably sought to limit the tasks attributed to highly paid workers. Activities were entrusted to lower paid workers.[6] That behaviour was not left unpunished. One undertaking at least was caught and a procedure was initiated by the Public Prosecutor before a national court.[7] No condemnation followed: the judge decided that the national legislation was not compatible with European law and hence should be set aside. The decision was based on a similarity existing with *Merci,* where the Court of Justice found that a monopoly for the performance of activities in the port of Genoa (Italy) was contrary to Articles 82 and 86 combined (ex Articles 86 and 90) of the E.C. Treaty.[8] On appeal, the Public Prosecutor argued that the two cases should be distinguished. In his view, recognition granted to workers could not be assimilated to a monopoly attributed to undertakings. The argument caused the Court ****E.L. Rev. 410*** of Appeal to seek clarification from the Court of Justice by way of a preliminary ruling.

The judgment delivered by the Chamber

The case was attributed to the sixth Chamber. In the judgment[9] the reasoning developed by the Belgian Public Prosecutor was basically upheld. In the Chamber's view, the parties had not been able to show that the Belgian regulation was indeed contrary to Community law. In order to reach that conclusion, the Chamber first considered the rules of competition.[10] Under the jurisprudence, Articles 82 and 86 E.C. prohibit situations where, as a result of special or exclusive rights granted by national rules, one or several undertakings would almost inevitably use their power to obtain undue advantages or perform services at unsatisfactory conditions.[11] In the opinion of the Chamber, these provisions did not apply in the present case as workers lack the independence required to constitute an undertaking under E.C. competition rules.

The Chamber also took into account the rules relating to the internal market, in particular those relating to the free movement of workers.[12] According to the Chambers no discrimination could be found in the national regulation. There is indeed no indication that workers were treated differently on the basis of nationality or origin. Other barriers to free movement also appeared to be excluded. On that subject, the Chamber drew attention to earlier case-law prohibiting national rules that would impose an employment contract in order to perform certain duties.[13] In the Chamber's view, it must be possible to carry out activities in the form of services. A different situation (compulsory employment contract) could make it difficult for workers of other Member States to perform tasks. As a conclusion, the national court was invited to determine whether a restriction of that nature could be found in the case and, if so, to set aside the national legislation.

Judgment

In the present note, attention is concentrated on one issue--the attitude adopted by the Chamber to the notion of undertaking as potentially applicable to workers. The Chamber sets aside the application of E.C. competition rules on the grounds that Articles 82 and 86 E.C. only apply, in an individual or a combined fashion, to undertakings.[14] According to ****E.L. Rev. 411*** existing case-law, people qualify as workers where they perform tasks for, and under the direction of, another person or entity. In the eyes of the Chamber, they lack, given that subordinate position, the independence which is required to constitute an undertaking for the purpose of competition rules:

The "employment relationship … is characterised by the fact that they (dockers) perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as "workers' within the meaning of … Article 39 E.C. … Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute "undertakings' within the meaning of Community competition law".[15]

Economic activities

In numerous cases, entities are said to qualify as undertakings for the purpose of competition rules whenever they perform activities of an economic nature.[16] That condition is considered satisfied as soon as these entities carry out a commercial/industrial activity and receive, in return, a remuneration. In this judgment, the notion of undertaking is defined with reference to the nature of the activity. No consideration is given to the legal qualification granted to the entity by the parties or the Member States.

That approach is typical of competition law, where attention is given to economic mechanisms rather than legal constructions. On the basis of that approach, there is no reason to exclude individuals from the rules of competition. The only condition to be satisfied is that the person(s) in question carry out activities of an economic nature (as was the case in the situation under review). The absence of a given legal framework to exercise the activity (*e.g.* the circumstance that that person has not registered any company in a Member State) plays no role in the evaluation.[17]

Independence

The Chamber argues that workers lack the independence required to qualify as an undertaking under the rules of competition. The reasoning is presented as an application of an "independence" criterion which is sometimes used by the Court in competition cases. That criterion is often associated with the idea that entities do not constitute separate undertakings where they form a single economic unit. In such a situation, the rules of competition should be applied to that unit rather than to each entity individually.

****E.L. Rev. 412*** It is, however, respectfully submitted that the decision taken by the Chamber is less than wholly appropriate. In the case law, the economic-unit theory appears to be associated with specific contexts which are examined in the following sections. It is not clear that the solution adopted in these contexts provides any element useful to solve the issue at stake in the case under review.

Imputation of behaviour

In a first series of cases, the economic-unit theory addresses anti-competitive activities carried out by an entity placed under the control of a second one. In that context, the theory allows the taking into account of that second entity for the application of competition rules. The mechanism proves particularly useful where the behaviour is adopted by a subsidiary at the instigation of a parent company located outside the Community. The link with the former company is then used by European authorities as a factor giving them an opportunity to assert their jurisdiction against the latter one. More generally, the economic-unit theory allows authorities to consider the situation of a parent company in order to determine whether all conditions are satisfied for the application of competition rules. Arguments may be derived from that situation to demonstrate that a dominant position is held by the group as a whole--thereby opening the road for the application of Article 82 E.C.[18]

These situations do not provide elements for the solution of the case under review. In the economic-unit theory, behaviour is adopted by a company placed under the control of another one. That second company comes under European fire as authorities want to carry out a consolidated control. In *Becu,* the problem was not related to any strategy implemented in common by related entities. It was rather caused by a disagreement among them. An employer did not accept the conditions set forth by employees. He questioned the compatibility with the Treaty of the regulation allowing these employees to impose their conditions.

Intra-group agreements

In a second series of cases, the economic-unit theory addresses agreements among entities belonging to a single group. Pursuant to the theory, these agreements do not fall under Article 81 E.C. (prohibition of cartels).[19] There exists a disagreement about reasons that may justify the theory. For some scholars, entities belonging to one group form a single undertaking. As a result, Article 81 E.C. may not be applied individually to these entities. The contracts concluded among them thus fall outside the scope of Article 81 E.C.[20] According to other authors, the debate does not concern the notion of undertaking. It is rather related to the concept of agreement.[21] Intra-group agreements may be compared to ****E.L. Rev. 413*** internal arrangements whereby tasks are divided among divisions/departments. These arrangements are not scrutinised under Article 81 E.C. where they take place within a single company. Why would a different solution apply where legal personality has been attributed to some departments? For the authors defending that position, these arrangements should not be deemed "agreements" for the application of Article 81 E.C. A second argument is directed at the scope of the agreements which fall under Article 81 E.C. According to the relevant authors, that provision addresses agreements whereby economic strategies are unified. Clients are left with firms carrying out similar policies. Yet competition requires that clients be given a choice among several potential partners.[22]

Whatever the justification, attention has to be given to the scope of the economic-unit theory. That theory allows agreements not to be scrutinised under Article 81 E.C. where they are concluded within a group characterised by a single economic strategy. As to the effects, the lack of independence implies, in the opinion of the Chamber, that workers should not be submitted to competition rules. In the cases applying the economic-unit theory, it is conceded that Article 81 E.C. will not apply. However, groups are not immune from other competition provisions. Article 82 E.C. in particular, will apply whenever the group has acquired/developed market power to the extent that competition is affected by the arrangements. In that context, it is striking to see that arrangements excluded from Article 81 E.C. often provide decisive arguments to demonstrate that the group holds market power under Article 82 E.C.[23]

The Chamber thus appears to draw from the lack of independence a conclusion which is exaggerated. In the Chamber's opinion, the absence of independence implies that workers escape the rules of competition. By contrast, the economic-unit theory merely serves to identify what rule--Article 81 or 82 E.C.--will apply. The observation is essential as Article 81 E.C. was not at stake in the case under review. It was not submitted that an agreement had been concluded in contravention of a cartel prohibition. The challenge was rather directed at the special/exclusive right granted to recognised workers--a situation to be determined under Article 82 E.C.

Subordination

According to Advocate General Ruiz-Jarabo Colomer, the Court held in *Suiker Unie* [24] that employees do not constitute, as a rule, undertakings.[25] In that case, the Court indeed examined among other issues, various agreements concluded by one firm with intermediaries. The issue was to determine whether the latter constituted separate undertakings. If a positive answer was given, Article 81 E.C. would apply. Thus, the agreements would be scrutinised under the prohibition affecting cartels. If the intermediaries lacked ***E.L. Rev. 414** sufficient independence, Article 81 E.C. would be set aside. The only possibility, to assess the behaviour under the rules of competition, would thus be to apply Article 82 E.C.[26]

No hasty conclusion should however be drawn from that case, and the comments which have been written about it.[27] Attention should be devoted to the circumstances under which that decision was adopted by the Chamber. It appears that, in the eyes of the Chamber, employees are not undertakings where they act *in their capacity as employees.* That is, competition rules should not apply to employees wherever they act in the framework of their relation with the employer.

Suppose that an employee concludes an agreement on behalf, and for the benefit, of the firm in which he was hired. The agreement is concluded in the name of the employer. It produces legal effects, if the agreement is not found to be void, with that latter person. There is no reason to apply the rules of competition to the employee. It is the employer who will be held accountable for the possible infraction on such rules.

Another solution would apply if the employee were to act outside the employment relationship. Suppose that an employee forms an association with all other employees within a firm in order to determine the conditions (tariff, etc.) under which they agree to perform their tasks in the future. The action would not take place within the subordination which characterises the relation with the employer. The agreement would not be concluded on behalf or for the benefit of the employer. Hence, the rules of competition could not be applied to the employer who plays no role in the agreement. These rules would only affect the behaviour of the employees.

That last situation is precisely that which was at stake in the case under review. In the port of Ghent, recognised workers enjoyed a position which allowed them to determine the conditions under which they would agree to perform tasks. That position was defined independently of the employers for whom activities would be performed in the future. It was thus not the result of negotiation carried out by the workers on behalf, and for the account of the employers. That position placed the workers in a situation where they could determine the conditions which applied *vis-à-vis* the employers. There is no reason to consider that such a position should not be examined under Articles 82 and 86 E.C.

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Footnotes

1 Court of Justice of the European Communities (Sixth Chamber), Judgment of September 16, 1999, Case C-22/98, *Criminal proceedings against Jean-Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV,* not yet published.

2 For a description of the national rules, see judgment, paras 3 to 13.

3 See para. 12 of the judgment. Such conditions were established by the Royal Decree of April 21, 1977 on the conditions and detailed rules for the recognition of dockworkers in Ghent port area, Belgian Official Journal, June 10, 1977, at 7760.

4 The federal joint committee was thus composed of national representatives advising the Government on draft measures potentially affecting workers throughout the national territory. As for the local joint committee, it was composed of local representatives competent to determine whether conditions were satisfied to grant recognition in the port of Ghent.

5 According to the order of reference, the wage for non-recognised workers amounted to 667 Belgian francs per hour, whereas undertakings had to pay at least 1355 Belgian francs per hour to recognised workers for the same activity. See para. 17 of the judgment.

6 Their own workers as well as personnel made available by a local employment agency.

7 The legislation was enforced with sanctions of a criminal nature.

8 Case C-179/90, *Merci v. Gabrielli* [1991] E.C.R. I-5889, following an excellent opinion by Advocate General W. van Gerven.

9 The judgment does not deviate from the opinion delivered by the Advocate General M. Ruiz-Jarabo Colomer. As a result, that opinion will not be discussed separately.

10 Para. 20 to 31 of the judgment.

11 Among the excellent reflections written on this

subject matter, see Edward & Hoskins, Article 90: Deregulation and EC Law (1995) 32 C.M.L. Rev. 157, Gardner. "The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors" (1995) E.C.L.R. 78; Kronenberger, Les monopoles publics et le droit communautaire: entre neutralisation et justification, *Journal des tribunaux--droit européen,* 1998, no. 53, 193 and no. 54, 223.

12 Para. 32 to 37 of the judgment.

13 Case C-398/95, *SETTG v. Ypourgos Ergasias* [1997] E.C.R. I-3091.

14 Article 82 will normally apply to behaviour whereby an undertaking abuses its dominant position. Articles 82 and 86 will apply in a combined fashion to situations where an undertaking abuses--or is bound to abuse--market power as a result of a situation which was created by national regulation. On that subject see the literature quoted in note 13.

15 Para. 26 of the judgment.

16 See *inter alia* Case C-41/90, *Höfner and Elser v. Macroton,* [1991] E.C.R. I-1979, para. 21; Case C-159/91 and C-160/91, *Poucet v. Assurances générales de France* [1991] E.C.R. I-637, para. 17; Case C-35/96, *Commission v. Italy* [1998] E.C.R. I-3851, para. 36; Case C-115/97 to C-117/97, *Brentjes v. Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999], not yet published, para. 77.

17 See Hildebrand, *The Role of Economic Analysis in the E.C. Competition Rules,* Kluwer, European Monographs. The Hague-London-Boston, 1998, at 25-26; Korah, *An Introductory Guide to E.C. Competition Law and Practice,* fifth edition, London, Sweet & Maxwell, 1994, at 38; Bellamy and Child, *Common Market Law of Competition,* fourth edition, edited by Rose, London, Sweet & Maxwell, at 38; Waelbroek & Frignani, *Le droit de la CEE: Concurrence,* Bruxelles, Editions de l'Université, 1997, at 35; Whish & Sufrin, *Competition Law,* third edition, Butterworths, London,

Edinburgh, 1993, at 187, 212 and 246.

18 See Korah, cited above, at 389; Bellamy and Child at para. 2-005 and 2-0038; Waelbroek & Frignani at 47-48; Whish & Sufrin at 380. A classic example may be found in *Commercial Solvents*: Decision 72/457/CEE of the Commission, December 14, 1972, O.J. L 299, 51; Case 6 and 7/73, *Istituto Chemioterapico Italiano and Commercial Solvents Corporation v. Commission* [1974] E.C.R. I-223.

19 In the case law, see a.o. C-22/71, *Béguelin v. S.A.G.L. Import Export* [1971] E.C.R. I-949.

20 For an example, see Pappalardo, La réglementation communautaire de la concurrence, *Revue internationale de droit économique,* at 345.

21 On this position, see Goyder, *E.C. Competition Law,* Oxford University Press, European Community Law Series, 2nd ed. 1995, at 90.

22 The main argument supporting that position is that it is closer to the language used by the Court in the judgments concerning these cases. See Case C-22/71, *Béguelin,* cited above, para. 6. See also Case C-15/74, *Centrafarm et Adriaan De Peijper v. Sterling Drug* [1974] E.C.R. I-1147, para. 41.

23 See for instance Case C-27/76, *United Brands Company et al. v. Commission* [1978] E.C.R. 207.

24 Case 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Suiker Unie and others v. Commission* [1975] E.C.R. 1663, paras. 537 to 557.

25 Opinion, para. 54 and following.

26 In its Judgment, the Court ruled that, in the facts in issue, the intermediaries enjoyed enough independence to qualify as undertakings. It is generally accepted that this position illustrates the analysis which may be applied to relations between agents and principals. These relations will not be considered here as agents adopt acts which are supposed to create legal effects whereas workers were engaged in the port of Ghent in rather material activities--loading or unloading goods.

27 See also P. J. G. Kapteyn & P. Verloren van Themaat (1998), *Introduction to the Law of the European Communities,* 3rd ed. edited and further revised by L.W. Gormley, London--The Hague--Boston, Kluwer International, at 845-846; Bellamy & Child at para. 2.006; Korah at 38; Whish & Sufrin at 189.

