

FENIN: Appeals and judgments

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**SUMMARY BACKGROUND TO THE APPEAL TO THE CFI**

**Complaint to the EU Commission 12 December 1997**

1. FENIN is an association of businesses which market and sell medical goods and equipment used in Spanish hospitals. It originally complained to the European Commission about the practice of a number of public bodies which run the Spanish National Health Service (SNS) and which purchase goods from FENIN.
2. FENIN alleged that the organisations that run the SNS were abusing a dominant position contrary to Article 82 EC by paying bills very late (on average a 300 day delay).

Commission decision of 26 August 1999

3. The Commission rejected that complaint on the basis that the SNS organisations were not 'undertakings' for the purposes of EU competition law. Since Articles 81 and 82 of the EC Treaty apply only to undertakings, it followed that SNS was not subject to Article 82. FENIN appealed the Commission decision to the CFI.

The CFI decision (FENIN v Commission)<sup>1</sup> of 4 March 2003

4. The CFI upheld the Commission's decision that the SNS organisations should not be considered an undertaking.
5. The CFI recalled that an undertaking is an entity engaged in economic activity. It then held that only offering goods or services on a given market could be characterised as an economic activity. Simply making purchases on a market did not alone constitute an economic activity. It would be incorrect to disassociate the activity of purchasing products from the use to which those products were put. Therefore, purchasing products would only constitute an economic activity where the purchaser subsequently used them in offering goods or services on a given market (i.e. in a downstream economic activity).
6. The CFI considered the provision of services by SNS and noted it was not disputed that, in providing national health services in Spain, SNS functions according to the principle of solidarity (in that it is funded through social and other state contributions, provides free services to its members and provides universal cover to them). On the basis of cases such as *Poucet and Pistre* and *FFSA*, the CFI therefore concluded that SNS was not engaged in economic activity in the provision of health care services.
7. Accordingly, the CFI found that SNS does not act as an undertaking when it purchases medical goods to use in connection with the provision of health care services.
8. Two additional points were raised by FENIN in the appeal<sup>2</sup>:
  - FENIN raised the issue that private operators provide the same service as the SNS, both in Spain and in other Member States. This aspect was not addressed by the CFI, presumably on the basis that FENIN had not challenged the conclusion that SNS functioned according to the principle of solidarity in providing health care services.
  - FENIN also noted that public hospitals in Spain on occasion provide private care for remuneration, for example to tourists to Spain who are

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<sup>1</sup> T-319/99 of 4 March 2003, ECR II, 357.

<sup>2</sup> Paragraph 19, CFI Decision

not member of the SNS. The CFI declined to consider this further argument as it had not been made in the original complaint to the Commission and therefore could not serve as a reason for annulling the Commission's decision<sup>3</sup>.

9. FENIN appealed the matter to the ECJ.

### **The appeal to the ECJ**

10. The overall ground of appeal is that the CFI incorrectly interpreted the concept of an undertaking under Community law. This overall ground is split into two parts:

- that the CFI incorrectly linked the nature of the purchasing activity to that of the service subsequently provided (i.e. the free provision of health services to members of the SNS), or
- in the alternative, and assuming that that the CFI was correct to link the purchasing activity to the subsequent activity, the subsequent activity (i.e. the free provision of healthcare to members of the SNS) should have been held to be economic in nature and therefore the purchasing activity should have been held to be economic in nature.<sup>4</sup>

### **The opinion of Advocate General Maduro of 10 November 2005**

11. On the first ground of appeal, the AG agreed with the CFI that purchasing is not in itself an economic activity and that the act of purchasing cannot be dissociated from the subsequent use to which those goods are put. This part of the appeal was dismissed.<sup>5</sup>

12. On the second ground of appeal, the AG concluded that CFI failed to establish that the State intended to exclude SNS from all market considerations. The AG therefore recommends that the case should be referred back to the CFI for it to make the necessary findings in fact.<sup>6</sup> In reaching this conclusion the AG reasoned that:

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<sup>3</sup> Paragraph 43, CFI Decision

<sup>4</sup> Paragraph 8, ECJ Decision

<sup>5</sup> Paragraphs 58 -69, AG's Opinion

<sup>6</sup> Paragraphs 54, AG's Opinion

- In assessing whether the provision of healthcare is an economic activity, the degree of solidarity which exists must be assessed in the light of other factors than those which apply to the activity of a sickness insurance fund.<sup>7</sup>
- 'Market participation' / whether 'market considerations apply' are highly relevant factors to consider in assessing the degree of solidarity in healthcare cases (however, the AG does not categorically state that a finding of market participation will necessarily determine that an activity is economic). The existence or not of private undertakings in the market is essential information in determining whether there is market participation. The CFI failed to consider this aspect in its decision.<sup>8</sup>
- The CFI should have classified each activity of the SNS separately (see *AOK Bundesverband* and *Italy v the Commission*), although any failing here would have no bearing on conclusions if the specific activity of providing free healthcare services was itself found to be non-economic.<sup>9</sup>

#### **ECJ judgment (FENIN v Commission)<sup>10</sup> of 11 July 2006**

13. In a relatively short judgment, the ECJ upheld the judgment of the CFI (agreeing with the AG), finding that the activity of purchasing products could not be dissociated from the subsequent use to which they are put in determining whether an entity was engaged in economic activity (and therefore an undertaking).<sup>11</sup>
14. The ECJ declared inadmissible the arguments on which the Advocate General had recommended referring the case back to the CFI. FENIN's arguments about the economic nature of medical treatment were only put forward at the appeal stage. Among others, FENIN had acknowledged that SNS's activities were of a purely social nature before the CFI. Thus the ECJ was unable to support the AG's call for more economic assessment.<sup>12</sup>

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<sup>7</sup> Paragraphs 30,31,46 and 47, AG's Opinion

<sup>8</sup> Paragraphs 13, 29, 31 and 53, AG's Opinion

<sup>9</sup> Paragraphs 41 and 43, AG's Opinion

<sup>10</sup> C-205/03

<sup>11</sup> Paragraph 26 of the ECJ Decision.

<sup>12</sup> Paragraph 20 and 21 of the ECJ Decision