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Social Security under EU State Aid Law

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INTRODUCTION

The complex relationship between social security and State Aid Law represents one of the aspects of the more general relationship between Member States and the European Union, in shaping the Internal Market and preserve the Welfare State. Provided the sovereignty of Member States in organizing their social security systems, the EU has been attributed a limited competence on social security thanks to its codification in the Lisbon Treaty; while the funding of social security still answers to the specific configuration established by the Member States and the nature of the activity which may change in relation to the specific regulation.

Services of General Economic Interest are guaranteed as the possible solution to the distribution of competences between the EU and the Member States to balance the protection of the level playing field and the liberalization process and the social policies, pursued by the supply of essential services.

The analysis moves from the Member States' different traditions of public services to the evolution of the overarching category of Services of General Interest, shaped over time to assimilate economic and non-economic Services of General Interest under EU Law and making them subject to the Competition Law provisions in the Treaty, respecting specific conditions and thresholds.

The different definitions given at EU level try to conciliate the double function of SGIs which tend to derogate the Treaty provisions on State Aid and to pursue social objectives in the light of the European Social Market Economy.

Starting from the necessary intervention of the State in the Market to solve the *market failures* to a fundamental value to enhance social policies and objectives, the legislative evolution follows a concrete evolution in the case law which contributed the interpretation and position of these services as "shared values" of the EU.

Anyway, the possible derogation to the Treaty provisions on competition depends on the definition of economic activity and the mission of general interest. The Court of Justice plays a role in defining what constitutes an "undertaking" and what is an

"economic activity" leaving to the Member States the discretion to shape the regulatory features of the market.

Social Security represents the typical example of SSGIs and the way in which is organized, the possibility to perform both economic and social activities, may arise problems for the application of State Aid law.

In the first chapter, it is analyzed the evolution of what is closer to the concept of public services at EU level and the definition through the ECJ case law of what constitute economic activity and what qualifies an undertaking, in the particular field of social services, as implementation of social policies.

Given the functional approach outlined in the "*Hofner and Elser"* or "*Poucet et Pistre"* judgements, it is true that each case needs a specific assessment, but the Court of Justice identified some common features in social security statutory schemes, that exclude the economic nature of the activity. It can be inferred that the functional criterion has been actualized giving particular attention to the market system as a whole.

The second chapter inspects the application of State Aid law to Social Services of General Interest in the form of public service compensations. Dealing with economic social services, it is possible to examine and follow the progressive application from a strict approach to a more flexible approach, resulting from a long theoretical and practical dispute. The ECJ fixed four conditions in the important *Altmark Case* to clarify the possible exemption from State Aids and to coordinate the application of article 106(2) TFEU: the principal provision to regulate the state intervention in the Market, requiring a proportionality and necessity tests.

Moreover, the European Commission took action to enhance the clarifications and application of State Aid issuing two packages (the Monti-Kroes and the Almunia) which still today leave some questions open.

In the third chapter, the analysis continues to define the concept of solidarity as the ultimate principle to counterbalance the implementation of the Internal Market and to establish the social market economy as main goal of the EU integration process.

Solidarity that has been originally embedded in the economic integration of the Market and initially considered an exception to the application of the Treaty provisions on Competition and that later, has been taken as main goal to contribute to the creation of a European social market. The legislative evolution showed how solidarity gained relevance later over the years and that only the European Commission's action started a complicated process of coordination among the Member States' different welfare systems.

The fourth chapter is dedicated to the exam of the "Slovak Saga" (Joined Cases C-262/18 P and C-271/18 P Commission v Dôvera) that touches different aspects analyzed through the previous chapters. State Aids applied to social security schemes in the Slovak Republic that raised problems in the definition of social purposes, economic activities and undertakings and the Member States' discretion in shaping their statutory systems, which may challenge the interpretation given by the ECJ.

The General Court gave a disruptive interpretation to the economic elements introduced in the statutory system that led to the qualification of the system as an economic activity, prevailing over the solidaristic features.

After the Court of Justice reestablished the common interpretation of the different statutory schemes and the necessary presence of certain elements that exclude the economic nature of the service, but it opened the possibility to non-economic social services to compete, respecting the degree of solidarity requested, among other non-economic social services.

It will be examined whether the answer given by the Court of Justice might consolidate the approach adopted in future, given this emblematic "Slovak saga" which still demonstrates the potential Courts conflict and theoretical debates.

To conclude, the thesis also acknowledges the possible influences that the COVID-19 pandemic may create on the concept of solidarity and the measures taken in the field of state aids to protect undertakings from the economic consequences. In August 2020, the Commission opened a public consultation to evaluate the SGEI de minimis Regulation (No. 360/2012) with regard to health and social services to

support the delivery of public services to citizens. Here the Commission takes into account the economic consequences caused by the pandemic and underlines the possibility for affected undertakings to be eligible for aids. The results and the consequences on solidarity and social services will be seen in the future.

CHAPTER 1
THE EUROPEAN CONCEPT OF SERVICES OF GENERAL INTEREST

1. DEVELOPING THE NOTION OF "PUBLIC SERVICES" UNDER EU LAW

Respecting the different traditions of Member States, it is not possible to find a definition of public service in the Treaties. There is only one clear reference in article 93[1] TFEU, but a definition is still missing. The different constitutional and administrative traditions of Member States imposed a more nuanced concept of Services of General Economic Interest, implying the distinct consolidated methods of management[2]. What is important and recognized as "shared value" is the economic nature of services of general interest, the common category used to define a national public service[3]. Applying EU Law to the economic sphere of Member States to establish the Internal Market and more widely the European model of society, it was consequential to acknowledge only economic services provided by the State. To supply economic services the market is considered as the privileged tool to achieve the collective interests[4]. Competition measures allow and regulate the expression of the economic initiative to enhance the advantages for consumers and private undertakings. Since the particular nature of the service and the provider, article 106 TFEU gives the possibility to reverse the presumption that public undertakings with exclusive or special rights distort competition, by excluding the application of competition law provisions.

[1] Article 93 TFEU *"Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service".*
[2] See Iannello C., *Poteri pubblici e servizi privatizzati. L'idea di servizio pubblico nella nuova disciplina interna e comunitaria,* Giappichelli Editore, Torino, 2005, pp. 55-57;
[3] See Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* ch. 4, Giuffré Editore, 2010, pp. 234-248;
[4] See Ceraso L., *I Servizi di interesse economico generale e la concorrenza "limitata",* Jovene Editore, Napoli, 2010, pp. 23-32;

2. Member States traditions of public services

To better understand how the European Union has changed the structure and provision of public services of national States, it is important to analyze how Member States conceive public services.

The birth of States providing services for their citizens has old roots in history[5]. Basically, European Countries know two different approaches to public services: Civil Law and Common Law traditions.

At the end of the XIX century, public services were the linchpin to renovate the State as the "*architecte de la solidarité sociale*"[6] setting aside the idea of supremacy.

The French model of "*service public"* (similar for the Italian and Spanish systems) outlines the perfect identity of State and public undertakings, because the State intervention is deemed to be in the public interest, without requiring a justification. Derogations are conceived on different needs and situations giving specific goals to the public actions. The "general interest" legitimizes the State action to withdraw some activities from the competitive mechanisms of markets, where it cannot guarantee determined conditions, such as continuity, access to all and quality.[7] Public services have a constitutional relevance because they satisfy the "general interest". They are considered to be the "*pierre angulaire"* of Administrative Law deserving a specific regulation and competence for possible litigations[8]. On the other hand, the idea of public services in the German tradition is different from the aim of the *"École de service public"* in France, which questioned the legitimization of the State intervention in the market. Duguit, who shaped the

[5] For a brief history on services see Hatzopoulos V., *Regulating Services in the European Union* Oxford University Press, 2012, ch 1, pp. 1-37;
[6] For the genesis of public services see Moderne F., *Les Transcriptions doctrinales de l'idée de service public,* in Moderne F. and Marcou G (eds.), L'idée de service public dans le droit de l'Union européenne, Paris, 2001, p.12;
[7] Recalling the idea of "social interdependence" from Léon Duguit. See Sauter W. and Schepel H., *State and Market in European Union Law: the public and private spheres of the Internal Market before the EU courts*, pp. 1-22; see also Schweitzer H., *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States*, pp. 11-62, in Cremona M., *Market Integration and Public Services in the European Union,* Oxford University Press, 2011;
[8] In Ceraso L., *I Servizi di interesse economico generale e la concorrenza "limitata",* Jovene Editore, Napoli, 2010, pp. 4-9;

concept of public services in France, underlines the opposite German theory based on the State-person as the exclusive holder of public powers and therefore, the origin and purpose of the administrative action. A public service that follows the public action and conversely, not being the center of it.

German public law does not know the concept of *"service public",* but it affirms the idea of primacy of public law on private law, which governs the market sphere[9]. However, with their slight differences the French and the German systems of public services, expression of the Civil law tradition, tend to plan and create public bodies to regulate their provisions.

Instead, the United Kingdom (a Common law system) does not have a strong tradition in public services[10]. Public services have always been considered to be a matter of political regulation rather than a legal regulation. There is not a creation of public bodies to manage the provisions of utilities. The UK is one of the first examples of liberalizing public sectors, permitting the application of competition rules.

After a long negotiation between Member States, article 14 TFEU changes the value of services of general interest seen as common values that affirmatively characterize the public action. They are not considered a limit to the establishment of the common market anymore but a principle of evolution[11].

The inclusion of Services of General Economic Interest as "shared-value" of the Union in article 14 and, recalled, in article 106 TFEU[12], undermines the full

[9] The so called "*Daseinsvorsorge"* see fn*. 7;* see also Maziarz A., *Services of General Economic Interest: Towards Common Values,* European State Aid Law Quarterly 1, 2016, pp.16-30;

[10] See Prosser T., *Competition Law and Public Services: From Single Market to Citizenship Rights?* in European Public Law v. 11(4), Kluwer Law International, 2005, pp. 543-563;

[11] See Ceraso L., *I Servizi di interesse economico generale e la concorrenza "limitata",* Jovene Editore, Napoli, 2010, pp. 49-60;

[12] Article 14 TFEU *"Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."*

sovereignty of Member States in shaping their public services, provoking the EU intervention in those areas where States performed their missions as "Welfare States". Usually, ECJ rulings oppose the national structure of public services causing a limitation on the States power to intervene in the market.

For this reason, it is important to understand the evolution of public services under EU Law.

3. Public Services as an exception under EU Law

Before the analysis on how the Union legislation structures public services, it would be better to know what a *service* is under EU Law[13].

Article 57 TFEU gives a non-exhaustive list of what is considered a service[14]: commercial and industrial activities but also activities of craftsmen and professions. They are normally provided for remuneration and the ECJ clarified that "the remuneration constitutes the consideration for the service and is agreed upon

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Article 106 TFEU *"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

[13] See Chalmers D., Davies G., Monti G., *European Union Law: Texts, Cases and Materials,* New York: Cambridge University Press 2019, p. 632; Hunt J., Shaw J., Wallace C., *Economic and social law of the European Union,* New York u.a. Palgrave Macmillan 2007, part II; See Barnard C., *The Substantive Law of the EU. The Four Freedoms,* Oxford University Press 2016, part III; Weiss F. and Kaupa C., *European Union Internal Market Law,* Cambridge University Press 2014, p. 241 and ff; Craig P., De Burca G., *EU Law: Text, Cases and Materials 7th edition*, Oxford University Press, 2020, ch 23;

[14] *Article 57 TFEU "Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."*

between the provider and the recipient of the service"[15]. They are on a temporary basis (which distinguish them from the freedom of establishment[16]), the service provider must be established in a different Member State of the recipient (so called cross-border element) and must not be subject to discriminatory restrictions, as stated in article 56 TFEU[17]. The Court of Justice in different cases (*Arblade, Gebhard, Centros, Alpine Investments[18])* stated the principle of non-discrimination and the prohibition to impose restrictions "liable to hinder or make less attractive the exercise of fundamental freedoms".[19]

However, there are some derogations that allow the possible application of restrictions to services which appear necessary to guarantee the protection of national interests[20]. Among the expressed justifications codified in the Treaty, the "preservation of public order" aims to "safeguard the machinery of government that enables such protection"[21].

Public services fall within the exercise of Member States sovereignty. States decide what must be a public-service for their citizens. To maintain this prerogative, articles 45(4) and 51 TFEU allow to set aside the treaty provisions for the employment in the public service and to exercise the official authority of the State.

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[15] Case C-281/06 *Jundt v. Finanzamt Offenburg*, ECLI:EU:C:2007:816, para. 28-30; Case C-169/08 *Presidente del Consiglio dei Ministri v. Regione Sardegna – Stopover Tax*, ECLI:EU:C:2009:709, para. 23;

[16] Case C-215/01 *Bruno Schnitzer*, ECLI:EU:C:2003:662, para. 22;

[17] *Article 56 TFEU "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union."*

[18] Joined Cases C-369/96 and C-375/96 *Arblade,* ECLI:EU:C:1999:575, p. 33; Case C-55/94 *Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano,* ECLI:EU:C:1995:411; Case C-212/97 *Centros Ltd. V Erhvervs-og Selskabsstyrelsen,* ECLI:EU:C:1999:126; Case C-384/93 *Alpine Investments v Minister van Financien,* ECLI:EU:1995:126, p. 28.

[19] Case C-55/94 *Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano,* ECLI:EU:C:1995:411;

[20] These restrictions must be compatible with EU aims, pursue a legitimate public interest, applied indistinctly without discrimination and must be proportionate to the aim. Craig P., De Burca G., *EU Law: Text, Cases and Materials 7th ed*; Sauter W. and Schepel H., *State and Market in European Union Law: the public and private spheres of the Internal Market before the EU courts*; Hunt J., Shaw J., Wallace C., *Economic and social law of the European Union.*

[21] Barnard C., *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?* in Barnard C., Odudu O., *The Outer Limits of European Union Law,* Hart Publishing 2009, ch 12;

This has been specified in *Reyners*[22] by the Court of Justice.

The evaluation of what can be considered of general interest, it is a political issue which cannot be codified.

As recalled by Hervey, the organization of national welfare systems has several elements of choice for the recipient or the body paying, that could qualify public services as services under EU Law: "there is no general exclusion for welfare provision, such as public health services in the sense of article 56 TFEU".[23] The ECJ clarified the subjugation of publicly funded healthcare services to article 56, in *Kohll, Watts* and *Stamatelaki*[24]*,* observing that if a patient directly pays for his treatments a hospital this constitutes a service under article 56 TFEU. Also for the arrangement of social security systems Member States enjoy an exclusive competence to ensure social protection of their citizens, but under article 153 TFEU, these systems could not infringe the freedom of movement of workers[25]. The ECJ in *Decker* clearly states that restrictions applied to protect a legitimate public interest must be necessary and proportionate[26]: "it must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods. However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason of general interest capable of justifying a barrier of that kind*".*[27]

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[22] Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española,* ECLI:EU:C:2003:515 "[...] *direct and specific connection with official authority"* par.45.

[23] See Hervey T.M., *If Only It Were So Simple: Public Health Services and EU Law, in* Cremona M., *Market Integration and Public Services in the European Union,* Oxford University Press 2011, ch. 7;

[24] Case C-158/96 *Raymond Kohll v Union des caisses de maladie,* ECLI:EU:C:1998:171; Case C-372/04 *Watts,* ECLI:EU:C:2006:325; Case C-444/05 *Stamatelaki,* ECLI:EU:C:2007:231;

[25] *Article 153 para. 4 "The provisions adopted pursuant to this Article:*
- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties."
The most important action taken by the EU is the Council Regulation 1408/71(OJ 1971 L149/2) now replaced by Regulation 883/2004 (OJ 2004 L166/1) which allow workers and self-employed to enjoy the free movement rights when moving from one state to another.

[26] See Hunt J., Shaw J., Wallace C., *Economic and social law of the European Union..*

[27] Case C-120/95 *Decker*, ECLI:EU:C:1998:167, para. 39. Also *Kohll* para. 41;

Services provided under the market logic are excluded from the Treaty provisions, if are aimed at covering costs with earnings (economic method) and financed by public expenses. They cannot be considered economic activities.

4. From the construction of the Internal Market to the Social Market Economy: how public services have been challenged by the EU internal market law.

The creation of the Common Market in 1957, with the Treaty of Rome[28], marked the beginning of the economic integration among Member States. The main purpose was to reach economic prosperity and peace among the peoples of Europe, through the respect of the Fundamental Freedoms (free movement of goods, persons, services and capitals) and the Competition policy. All freedoms are necessary to achieve this integration. Even though article 57 TFEU[29] suggests the subordinate nature of the services provisions (denied by the European Court of Justice in *Fidium Finanz[30])*, services lead the economy.[31] The market-oriented provisions of the Treaties, Internal Market Law and Competition Law, have a full impact on "regular services" exercising an economic activity in nature. Problems arise when public actors and, generally, the State play a role in the market, not only to contribute to the general economic development but mainly for social and public purposes[32]. The European integration erodes progressively State monopolies favoring the establishment of a free and competitive market to enhance innovation and economic

[28] "*Treaty establishing the European Economic Community" EEC* (1957).
[29] *"Consolidated version of Treaty on the functioning of the European Union" TFEU* (1957) OJ C 326, 26.10.2012, p. 47–390;
[30] Case C-452/04 *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, ECLI:EU:C:2006:631, para. 32 "[…] *does not establish any order of priority between the freedom to provide services and the other fundamental freedoms".*
[31] See Barnard C., *The Substantive Law of the EU. The Four Freedoms,* Oxford University Press, 2016, p. 365; Weiss F. and Kaupa C., *European Union Internal Market Law,* Cambridge University Press, 2014, p. 245; Hatzopoulus V., *Regulating services in the European Union,* Oxford University Press, 2012, p. 103;
[32] See Damjanovic D. and de Witte B., *Welfare integration through Law: The Overall Picture in the Light of the Lisbon Treaty,* EUI Working Papers, Law, 2008/34, 5-6: "[…] *The Member States, from their side, continue to provide specific welfare services within their social policy systems and their health and education systems (the 'core' of the welfare state), and also through their public utilities (the 'outer ring' of the welfare state), and all these are regarded to be within their primary responsibility."*

progress[33]. Notwithstanding the benefits of liberalized sectors, private entities would not provide certain kinds of services and/or goods that are not revenue-making but exclusively solidarity-based (the so-called *market failures*[34]*)*. Generally, economic activities are profit-seeking activities. So, to avoid the unpleasant result of having social and economic discrepancies, State intervention in the market appears to be necessary.

After the Lisbon Treaty, though, article 3 TEU[35], the market is also based on a social dimension that, recalling the principle of the Ordoliberalism, a free market economy is the best system to protect wealth and freedom but keeping in mind that a solid competition regulation is not enough: it is crucial for the correct functioning of this market to guarantee goods and services that are not profitable[36]. In the light of a social construction of the market, provisions aiming at protecting the market are applicable also to the State: the same principle followed by private operators are

[33] See generally Craig P., *The Lisbon Treaty. Law, Politics, and Treaty Reform,* Oxford University Press 2010, ch. 8 *"The Treaty, the Economic, and the Social",* p. 286;

[34] The ECJ tolerance over State intervention in the market concerns social purposes. See Craig P., *The Lisbon Treaty. Law, Politics, and Treaty Reform,* Oxford University Press 2010, ch. 8 p. 302; Nistor L. *Public Services and the European Union. Legal Issues of Services of General Interest,* TMC Asser Press 2011, ch 2; For an in-depth analysis on market failures see Burke J.M., *A Critical Account of Article 106(2) TFEU. Government Failure in Public Service Provision,* Hart Publishing 2018;

[35] Art 3 TEU "*1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. 4. The Union shall establish an economic and monetary union whose currency is the euro. 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties."*

[36] See Malaguti M.C., *I valori della concorrenza e del mercato nell'Unione Europea: da Roma, a Maastricht, a Lisbona,* Moneta e Credito, 68(272), pp. 401-418, Banca Nazionale del Lavoro, 2015.

relevant for the State-regulator which cannot favor or force anticompetitive behaviors.

4.1 STATE INTERVENTION IN THE MARKET V. LIBERALIZATION

One of the main goals of the "modern" State is to ensure to all citizens access to essential services. Since the evolution of different social classes, the State, and in particular Welfare States, have been taking action to erase substantial inequalities.

In this sense, the State provides protection for those who are unable to provide for their needs.[37] To ensure access to fundamental services it is necessary to limit free competition and to establish State monopolies. Monopolies conceived under national economic policies to protect "national interests" with specific regulations of prices and trading conditions[38].

The evolution of the Common Market and the economic integration ended up in emphasizing the constitutional value of the Treaty provisions on the Internal Market by the evolution of the concept: the European Economic Constitution. After the ground-breaking judgements *Van Gend en Loos*[39] and *Costa*[40] stating the supremacy and direct effect principles, the rules governing the market have been read in the light of a constitutional character[41]. Under the influence of the Ordoliberalism (the Frieburg school), the private interests in the market must be protected "at all cost", most of all from political discretion.[42] State intervention and State ownership is deemed to distort competition and undermine economic progress. Therefore, State action must be limited to let the establishment of a level playing field. This underlines the passage from a State "entrepreneur" to a State

[37] Nistor L. *Public Services and the European Union. Legal Issues of Services of General Interest,* TMC Asser Press 2011, ch 3;
[38] See generally Szyszczak E., *The regulation of the State in competitive markets in the EU,* Hart Publishing, 2007, ch. 1-7;
[39] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* ECLI:EU:C:1963:1.
[40] Case 6/64 *Costa v ENEL,* ECLI:EU:C:1964:66.
[41] In Case C-49/89 *Corsica Ferries France*, ECLI:EU:C:1989:649, para. 8 "[…] *the provisions of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited".*
[42] See Sauter W. and Schepel H., *State and Market in European Union Law: the public and private spheres of the Internal Market before the EU courts,* Cambridge 2009, pp. 29-74;

"regulator". As a consequence, the scenario changes because the State refrains from taking action, leaves the way for private subjects to enter new areas and to operate with different entities such as public-private partnerships.[43]

Liberalization is the key-element to achieve market integration and efficiency. Since the 80s[44], the European Institutions have been pushing Member States to leave certain services (such as telecommunications[45], air transport, postal services, energy)[46] to an open competition, through direct and indirect harmonization, and reconcile national monopolies with the functioning of the Internal Market. The logic behind the liberalization of markets is to achieve a full efficient market without requiring the public intervention and erasing the limits and obstacles to new potential economic operators[47]. Public Administrations should guarantee a market configuration and not reserve for themselves a market position[48]. What differs for social services is the protection granted for the people well-being but in a horizontal subsidiarity perspective, the goal is to avoid the prohibition to act for private entities. The State intervention not imposed by the market failures but alternative to the private economic initiative.

After the leading cases *Dassonville, Cassis de Dijon* and *Keck and Mithouard*[49]*,* States have less discretion in defining what responds to a public policy need and

[43] See Gallo D., *I Servizi di Interesse Economico Generale. Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffrè Editore, 2010, p. 234;
[44] There was the idea to reform public services provided with high public expenses and profits losses; generally analysed in Iannello C.**,** *Poteri pubblici e servizi privatizzati. L'idea di servizio pubblico nella nuova disciplina interna e comunitaria,* Giappichelli Editore, Torino, 2005, pp. 104-106;
[45] This area is one of the best success of the European liberalization process. See Barnard C., *The Substantive Law of the EU. The Four Freedoms,* p. 394 ff;
[46] For a sectorial view see van Miert K., *Liberalization of the Economy of the European Union: The Game is not (yet) Over* in Geradin D. *"The Liberalization of State Monopolies in the European Union and Beyond"* Kluwer Law International, 2000;
[47] See Davies W., *When is a market not a market?: Exemption, Externality and Exception in the Case of European State Aid Rules* in Theory,Culture&Society 30(2), p. 32-59, The Author(s), 2013.
[48] See Casetta E., *Manuale di Diritto Amministrativo,* Ventiduesima edizione, Giuffré Francis Lefebvre, 2020, pp. 114, 683-700;
[49] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville,* ECLI:EU:C:1974:82; Case 120/*78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* ECLI:EU:C:1979:42; Joint Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard,* ECLI:EU:C:1993:905.

they must demonstrate that applying freedoms and competition rules to specific activities impedes the general interest fulfillment.[50]

5. The EU concept of Services of General Interest (SGIs)

The notion of Services of General Interest is relatively recent compared to the original one: Services of General *Economic* Interest.
It was introduced by the European Commission to make a clearer distinction among the public services falling within the scope of EU Law.

Introduced as a legal category with the Lisbon Treaty, Services of General Interest are mentioned in Protocol n.26[51], gaining relevance in EU Primary Law. Only the Communication from the Commission, *A Quality Framework for Services of General Interest in Europe*[52] defines SGIs as: "Services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations. The term covers both economic and non-economic services*"*. As qualified by Sauter, this is the "overarching concept in EU law in relation to SGEI (Services of General Economic Interest) as well as SSGI (Social Services of General Interest)" and the "closest equivalent to the general notion of public services"[53]. This category includes economic as well as non-economic services, considered of public interest and supplied by public or private entities.[54]

All SGIs respond to social policy objectives and redistribution of economic resources, firstly they guide market forces and then correct them[55]. By making a distinction between SGEI and SSGI, the key-element is the nature of the service:

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[50] See Schweitzer H., *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States,* in Cremona M., *"Market Integration and Public Services in the European Union,* Oxford University Press 2011, ch 2; Szyszczak E., *Public Service Provision in Competitive Markets,* in Yearbook of European Law, 20(1), 2001, pp. 35-77;
[51] Protocol (no. 26) on Services of General Interest, TFEU;
[52] COM (2011) 900, p. 4 available at http://www.europarl.europa.eu/meetdocs
[53] See Sauter W., *Public Services in EU Law,* Cambridge University Press, 2015, p. 17;
[54] See Sbrescia V.M., *Servizi di interesse economico generale e dimensione comunitaria,* Rivista giuridica del Mezzogiorno, 4, 2009, Il Mulino, p. 1229;
[55] See Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, p. 28;

economic or non-economic. Generally, SGI fall under EU Law if they are economic in nature. The line between economic and non-economic is difficult to draw, because at the same time a public institution can perform both activities[56]. However, it can be considered under the solidarity principle that in the context of public services, economic and non-economic interests are intertwined but in the end, the economic purpose serves as an instrument for the non-economic objective because a service needs to be performed under conditions of financial balance.

5.1 PUBLIC SERVICE OBLIGATION (PSO) AND UNIVERSAL SERVICE OBLIGATION (USO)

What differentiate a SGEI or SSGI is the mission of general interest entrusted by the State. To address the market forces where spontaneously would not go (following the commercial interests), the State intervenes in the market to guarantee the exercise of determined activities (*market failures).* Indeed, a public service obligation is defined as: "Public service obligation means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.[57]"

Member States have a discretion in determining what their social objectives are and whether an activity should be performed under market conditions: the Commission can assess only the case of manifest error.[58] The public service obligation is the core element to assess, through the proportionality and necessity test, whether the restrictions on competition are legitimate under article 106 TFEU.[59]

The State entrusts through a legislative act a PSO determining the content, duration, the special and exclusive rights conferred and the criteria to compensate the service.

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[56] See Nistor L., *Public Services and The European Union,* p. 383;
[57]Regulation (EC) 1370/2007 of the European Parliament and of the European Council of 23 October 2007 on public passenger transport services by rail and by road.
[58] Case T-17/02 *Fred Olsen SA v Commission,* ECLI:EU:T:2005:218.
[59] See Sauter W., *Public Services in EU Law"* p. 61; Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005, p. 169-212;

Essentially, the Treaty provisions are unable to achieve the aim of the service and their application would cause a detriment "in law or in fact" to the performance.[60] However, the development of trade must not excessively be affected, jeopardizing the interests of the Union.

After the *BUPA*[61] *case* in 2008, the General Court specified what a PSO regulation caused and was compared to a general regulatory framework: *"[...]* the obligations restrict the commercial freedom of the PMI insurers to an extent going considerably beyond ordinary conditions of authorization to exercise an activity in a specific sector*".*[62]

When the obligation consists in providing a service to all users in a Member State, at the same conditions and quality at an affordable price, the PSO is called a Universal Service Obligation (USO).[63] The notion of USO, according to Szyszczak, is useful to create "equal opportunities and foster notions of citizenship rights, economic and social cohesion by demanding that all consumers have access to such *essential services*".[64]

The main concept is to provide a determined service at a net cost accessible to all consumers[65].

Firstly appeared in the 90s in the field of telecommunications through non-legislative acts[66], universality was considered the linchpin of a regulated and liberalized market. Trying to reach a balance between an open market economy and social cohesion, it was stated the goal to reach equal conditions and general access to all consumers. Art 2 letter *g* of Directive 97/33/EC describes universal service

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[60] See Szyszczak E., *Public Service Provision in Competitive Markets* in Yearbook of European Law, 20(1), 2001, 35-77.
[61] Case T-289/*03 BUPA Insurance Ltd and BUPA Ireland Ltd v Commission,* ECLI:EU:T:2008:29;
[62] Case *BUPA* p. 182.
[63] COM(2011)900 and COM(2003)270: "*USO are a type of PSO which sets the requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price."*
[64] See Szyszczak E., *Public Services in Competitive Markets,* in Yearbook of European Law, 20(1), 2001, pp. 35-77;
[65] See Sbrescia V.M., fn. 54.
[66] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Developing universal service for telecommunications in a competitive environment COM(1993) 543, final.

as: "a defined minimum set of services of specified quality which is available to all users independent of their geographical location and, in the light of specific national conditions, at an affordable price".[67] The universal supply of public services is necessary to avoid negative effects on citizens and to harmonize disadvantaged situations.

6. SGEIs AND THE ECONOMIC NATURE OF THE SERVICE

Services of General Economic Interest have always been present in EU primary law in article 86 (now 106 TFEU) and 16 (now 14 TFEU) EC Treaty. Notwithstanding the presence, it is not possible to find a definition of SGEIs. Although many services were considered SGEIs by the ECJ, it is not possible to find a direct reference to SGEIs in national legislations. In the Green Paper on services of general interest the Commission stated several common elements to SGEIs: universality of the service, continuity, specified quality and affordability[68].

After the White Paper made some references to different types of services considered SGEIs, leaving upon Member States the possibility to decide what could have constituted SGEIs[69].

Moreover, the Commission added a definition of SGEIs in its Communication *A Quality Framework for Services of General Interest in Europe*[70]; SGEIs are: "economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission".

[67] Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).
[68] COM(2003) 270 final.
[69] "White Paper on services of general interest" COM(2004) 374, final.
[70] COM(2011) 900.

Article 106 TFEU represents an exception to the common provisions of competition. Undertakings with exclusive or special rights are not compatible with the Internal Market rules on competition.

The Court of Justice in *Asemfo,* underlines that article 106 TFEU must be read in combination with article 102 TFEU[71] related to the abuse of dominant position[72]. State Monopolies in a logic of liberalization are incompatible with the market[73]. However, SGEIs represents a counterbalance between the establishment of an Internal Market, governed by the rules of competition and the development of territorial and social cohesion, through public services, necessary for the whole population (public transport, air transport, postal services, energy, telecommunications).[74]

The main concept is the entrustment of a particular mission conferred by the State for the public good, that would not be provided by economic operators under normal commercial conditions.

[71] *Article 102 TFEU: " 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:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) 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."

[72] See Case C-295/05, *Asemfo v. Tragsa,* ECLI:EU:C:2007:227, p. 40.

[73] See Caggiano G., *La disciplina dei servizi di interesse economico generale. Contributo allo studio del modello sociale europeo,* Giappichelli Editore, 2008, pp. 25-35; Klamert M., *Services liberalization in the EU and the WTO: concepts, standards and regulatory approach,* Cambridge University Press, 2015, pp. 75-121;

[74] Article 14 TFEU*: "[…] given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions […]".*

6.1 UNDERTAKINGS ENTRUSTED WITH AN SGEI MISSION

Article 106(1) TFEU[75] addresses to the Member States the prohibition to confer or maintain special or exclusive rights contrary to the Competition provisions. It engages Member States to be responsible for undertakings entrusted with a general economic mission, not to guarantee a justification to infringe Competition rules.[76] The exemption is provided only upon an act of entrustment obliging the undertaking to provide an SGEI.

When the State only encourages undertakings to set aside Competition rules, in this case, undertakings are, together with the State, responsible for the breach of EU Law, because, they cannot be exempted from Competition rules only for the reason that their behavior is induced by public intervention.[77]

Which are the undertakings entrusted with exclusive or special rights? The Treaty does not give a definition of public undertakings neither of undertakings.

As a consequence of the principle of equal treatment, article 106(1) TFEU refers to both public or private undertakings, since the definition of undertaking is linked to the nature of the service provided. In *Hofner*[78], the ECJ defines an undertaking as: "*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".*

Here article 106(1) TFEU, refers to those undertakings to which the State conferred exclusive or special rights. Exclusive rights are conferred, through any statutory act, by the State to an individual economic operator, generally private, to exercise a determined activity in a position of monopoly, in a given geographic area (legal

[75] Art 106(1) TFEU: "*In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."*
[76] Recalling the State Defence doctrine and the State Action doctrine Gallo D., *I Servizi di Interesse Economic Generale. Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* p. 92 and ff;
[77] Advocate General Darmon, Case C-41/83 *Commission v. Italy,* ECLI:EU:C:1985:120, p. 873;
[78] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161, p. 21;

monopoly). Special rights are those rights conferred to a restricted number of undertakings, on the same basis of exclusive rights[79].

To make a clear distinction in what constitutes a conferral of exclusive or special rights, *Directive 2004/17/EC* (now replaced by Directive 2014/25/EU) clarified that "exclusive rights" means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.[80]

The constitutive elements are: the concession by the State; one or more beneficiaries and the restriction on other operators to exercise the same activities in the same geographic area. The same Directive gives also the definition of "public undertaking" as: *"any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it".*

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly: (a) hold the majority of the undertaking's subscribed capital; (b) control the majority of the votes attaching to shares issued by the undertaking; (c) can appoint more than half of the undertaking's administrative, management or supervisory body.

The idea to establish a legal monopoly is not prohibited *per se* but it must be justified under EU Law when it restricts competition by making a balance of interests between national, private and European interests.

The entrustment of a mission of general interest means that the undertaking must carry on an activity that, considering its own commercial interests, would not assume under the same conditions (public service obligation); when the service

[79] See Caggiano G., *La disciplina dei servizi di interesse economico generale*, Gallo D., *I Servizi di Interesse Economico Generale*, Klamert M., *Services liberalization in the EU and the WTO: concepts, standards and regulatory approach;*

[80] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *OJ L 94, 28.3.2014.*

must be provided to the whole population to respond to a need in common, this PSO is called universal service obligation (USO).[81] What the State decides to confer and eliminate or reduce the market[82], is under its discretion and the Commission can only assess the "manifest error".[83]

6.2 JUSTIFICATION UNDER ARTICLE 106(2) TFEU

The strict application of article 106(1) TFEU may have a negative effect for public interests this is why, article 106(2) TFEU appears as a derogation to the first paragraph.[84]

Undertakings entrusted with an SGEI mission may invoke the second paragraph of article 106 TFEU to justify their restrictions to competition. Member States' power to define an SGEI mission cannot be exercised arbitrarily. It is essential to identify a legitimate public interest, which the market has failed to meet or has inadequately satisfied. The idea under "market failures" can be strictly referred to the lack of goods and services at desirable levels or generally, to social injustice and inequity. In paragraph 14 of the Commission Communication on Services of general interest in Europe[85] the Commission acknowledges that in many cases the market would be the best mechanism to provide these services, but public authorities may consider some services to be in the general interest and market operators may not

[81] See Sauter W., *Public Services in EU Law,* pp. 12-20*;* Klamert M., *Services liberalization in the EU and the WTO: concepts, standards and regulatory approaches,* pp. 75-121; Caggiano G., *La disciplina dei servizi di interesse economic generale,* pp. 25-35*;* Gallo D. *I Servizi di Interesse Economico Generale,* pp. 62-77; Cremona M. "*Market integration and public services in the European Union."*

[82] See Schweitzer H., *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States,* in Cremona M., *"Market Integration and Public Services in the European Union"* p. 17;

[83] See Case T-17/02 Tribunal Olsen v Commission, Case T-289/03 *BUPA*; COM(2000)580 on Services of General Interest in Europe.

[84] Article 106(2) TFEU: *"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union".*

[85] OJ 2001, C 17, para. 14;

satisfactorily provide them[86]. The presence of market failures is generally verified by the Commission in its decisions and in different cases it is supported by the Court in its case law: in *Colt*[87], France argued that the presence of a market failure was not a prerequisite to confer an SGEI mission, instead the General Court held that market failure, in this case the absence of a competing provider for the analogous service, was a prerequisite to impose an SGEI. Also the Court of Justice confirmed this principle in *Analir*[88], concerning maritime transport, stating that an SGEI may be imposed in the presence of a real public service need and inadequate provision by market operators.

The derogation works when the undertaking meets different conditions: there must be an SGEI mission entrusted by the State, the obstacle to provide the service when competition rules may be applied, the effect on trade must not be in conflict with the Union interests. The development of trade and the interests of the Union consist in a general rule that gives an economic dimension to SGEIs aiming at prohibiting the restauration of barriers between Member States[89].

The State may confer a mission of general *economic* interest to private and public undertakings through any statutory act specifying precisely the beneficiaries and their duties in the light of the mission itself. Paragraph 2 contains also a proportionality test verifying whether the service entrusted is appropriate to the achievement of the goal, necessary and lastly, it creates excessive benefits for the beneficiary[90].

One of the first cases where the Court of Justice interpreted article 106(2) TFEU is *Sacchi*[91]: a controversy upon a measure granting exclusive rights to the Italian TV company controlled by the State in the telecommunications sector. Here the Court

[86] See Collins A.M., Navarro M.M., *Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango,* in Journal of European Competition Law & Practice, vol. 12(5), 2021, pp. 384;
[87] See Case T-79/10 *Colt Télécommunications France v Commission,* Judgement of 16 September 2013, ECLI:EU:T:2013:463, para. 154;
[88] See Case C-205/99, *Analir,* judgement of 20 February 2001, ECLI:EU:C:2001:107, para. 34 and 68;
[89] See Maziarz A., *Services of General Economic Interest: Towards Common Values,* European State Aid Law Quarterly 1, 2016, p.16-30;
[90] Ibid., citing De Burca G., *Exclusive Rights and State Monopolies under EC Law,* Oxford University Press, 1999;
[91] Case 155/73 *Giuseppe Sacchi,* ECLI:EU:C:1974:40;

highlights that an undertaking exercising an SGEI mission is also subject to competition rules, unless it proves that the application of those provisions makes impossible, *in law and in fact,* the attainment of the mission[92]. In *Corbeau*[93]*,* the Court enlarges the application of paragraph 2 justifying a State monopoly on all postal services, in Belgium, to protect the provision of a basic postal service at a uniform rate, to avoid the so called "cream-skimming" effect[94]. A clarification came after with the case *Terminal Equipment,* the Court assessed that article 106(2) TFEU does not make compatible with the Internal Market all exclusive and special rights.[95] The obstacle to the application of competition rules must be evaluated on a case-by-case analysis.

For instance, in *Albany*[96] the Court held that the restricting measure should be necessary, if it would not be possible for the undertaking to carry on the activity by maintaining an acceptable economic balance.

The "effect on trade" is not automatically negative. It must be contrary to the Union interests. The concept of Union interests is quite vague, but it should be considered as the objectives of the Treaties and all the acts enacted by the Union, which prevail over national interests.[97]

Article 106(2) TFEU links the general interest to competition. The two goals are instrumentally linked and mutually limited by each other's fulfilment. The Commission in the 2000 Communication on SGIs[98] stated the complementarity of

[92] In the same view Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij*, ECLI:EU:C:1994:171, p. 49: "*Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject*."
[93] Case C-320/91 *Corbeau,* ECLI:EU:C:1993:198;
[94] See in particular Prosser T. *Competition Law and Public Services: From Single Market to Citizenship Rights?*; Gallo D., *I Servizi di Interesse Economico Generale,* p. 283 and ff;
[95] Case C-202/88 *French Republic v Commission (Terminal Equipment),* ECLI:EU:C:1991:120, p.12;
[96] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie,* ECLI:EU:C:1999:430.
[97] See Gallo D., Mariotti C., *Social services of General Interest,* in Hancher L., Ottervanger T., Slot P.J., *"EU State Aids",* Sweet&Maxwell, 2021, p. 329-338;
[98] COM(2000)580 *Services of General Interest in Europe,* para. 3;

SGEIs, Internal Market and competition which benefits individual citizens and society as a whole.

7. SSGIS AND THE SOCIAL NATURE OF THE SERVICE

Social services of general interest correspond to the social dimension of public services (or SGIs). If SGEIs have the characteristic to be economic in nature and suitable to be marketed, SSGIs are out of the market[99].

The term was advanced by the Commission during the European Council in 2001 in relation to State Aid rules.[100] SSGIs comprehend, for instance, Education, Healthcare, Long-term Care, Social Security and Social Housing, Social Assistance, Welfare Services. What differentiate SGEIs from SSGIs is the *economic* nature of the service provided.

The Commission in its Communication on Services of General Interest[101] states that activities performed by non-profit seeking entities with social purposes are normally exempted from the application of EU Law. Social public services represent the exercise of the Member States sovereignty and the organization of welfare policies: they fall outside the scope of the Treaties. Moreover, the Treaty acknowledges the common value of Member States to develop the social and territorial cohesion[102] enhancing social services to the fundamental instrument to establish a social market economy[103].

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[99] See Gallo D., Mariotti C., *Social services of General Interest,* in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* p. 338; Gallo D., *I Servizi di Interesse Economico Generale,* p. 283*;* Szyszczak E., *Services of General Economic Interest and State Measures Affecting Competition,* in Journal of European Competition Law and Practice, 4(6), Oxford University Press, 2013, pp. 514-524;

[100] COM(2001)598 Report to the Laeken European Council. Noted by Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013, p.4;

[101] COM(2000)580 *Services of General Interest in Europe.*

[102] Protocol n. 28 TFEU;

[103] Article 3(3) TEU: "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.*
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

What is not excluded from EU Law is the economic nature of social services, the so-called Economic Social Services of General Interest (ESSGIs)[104]. The economic character is the key-element to establish the scope of the Treaty provisions on the Internal Market[105] and it must be evaluated case by case[106]. Around the economic character, the Commission goes further in its Communication of 2007 stating that despite the social purpose SSGIs are economic activities under the Internal Market provisions of the Treaty, having the consequence to apply general principles such as non-discrimination.[107]

The application of the Treaty provisions depends on the assessment of the main purpose pursue by the entity: undertakings exercising both economic and social activities will be justified only on the basis that the activity is non-economic in nature; the economic character is negligible; the performance of non-economic activities cannot be separated from that of economic activities[108].

When EU law applies to ESSGIs, there is a legal identity with SGEIs.

Problems arise for the financing of SSGIs and what differentiate them from the economic nature of SGEIs. Authorities may invoke article 106(2) TFEU to justify a possible derogation from competition rules, always respecting the Altmark criteria. The following chapter is dedicated to the analysis of the relevant State Aid provisions, the interplay between articles 106(2) and 107(2)(a) TFEU, and the development of the relative legislation and case law to determine whether the compensation granted by the State could be considered an incompatible aid due to the economic nature of the service, notwithstanding the social aim of the activity.

It shall promote economic, social and territorial cohesion, and solidarity among Member States."

[104] Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* p. 36 and ff*;* Sauter W. and Schepel H., *State and Market in European Union Law: the public and private spheres of the Internal Market before the EU courts;*

[105] It appears clear with the exclusion of SGEIs classification from the soft law of the Commission, see Green Paper.

[106] Non-Economic Social Services of General Interest (NESSGIs) represent the ultimate category of social services that do not fall within the scope of the Treaty.

[107] COM(2007)725 *Services of general interest, including social services of general interest: a new European commitment.*

[108] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol,* ECLI:EU:C:1994:7, p. 27: "*[…] Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services".*

8. General overview of the legislative framework on Services of General Interest

8.1 Primary law: Article 106 TFEU

The analysis of the legal framework on public services under EU Law must start from article 106 TFEU.[109] The relevance of this article increased when it was necessary to assess the restricting effects of State measures granting exclusive or special rights to companies or financial compensation for the performance of these services.

The expression of "SGIs" is a relatively modern expression. The starting point is article 106 TFEU concerning Services of General Economic Interest. Recalling article 86 of the EC Treaty, it was introduced as a derogation to the Competition regime of Title V, when an undertaking (public or private) is entrusted with a mission of general interest. The first paragraph addresses the Member States imposing the prohibition to maintain or enact measures that could infringe competition rules. The second paragraph has a wider scope because it refers also to undertakings entrusted with a service of general economic interest. Undertakings entrusted with SGEIs are not excluded from the Treaty provisions on competition. They are free to demonstrate that the application of these provisions would hamper the efficient performance of the service[110].

The provision has its focus on the economic nature of the service: if the activity performed is economic, EU law shall apply. This reference underlines the aim of article 106 TFEU. Member States can decide when a specific service has the purpose to enhance the territorial and social cohesion or whether the economic

[109] Art 106 TFEU: " *1.In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, "in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

[110] See Gyselen L., *Public Service and EU Competition Law,* in Journal of European Competition Law & Practice 2(6), Oxford University Press, 2011, pp. 572-577;

effect should prevail, with the consequence to apply the rules on competition. Beyond the idea of derogation, Member States have the possibility to balance their social interests with the competition provisions, justifying the intervention in the market to solve the so-called *market failures.* In this sense, Baquero-Cruz[111] defines article 106(2) TFEU as an enforceable Treaty-norm granting the equality of SGIs values and objectives to the economic objectives. To ensure a fairer balance between the economic and social spheres, it is necessary to enhance the role of Member States (as a positive integration), which together with the EU Institutions, not only will eliminate all obstacles to the performance of SGIs, but also guarantee access to all in accordance with an appropriate standard of quality[112].

8.2 PRIMARY LAW: ARTICLE 14 TFEU

Article 14 TFEU (repealing art 16 EC) has the crucial role to legitimate the actions of Member States in regulating Services of General Economic Interest.[113] It starts stating that it would not affect competencies regarding art. 93 TFEU (public services in transport) and State Aid provisions (art. 106 and 107 TFEU). The structure of this provision has a specific reference to article 106 TFEU concerning SGEIs. Placed in the first part of the Treaty, it elevates SGEIs as "shared-values" of the Member States, making their status equal to general principles of the Union. It does not give a hierarchy among these values, whose aim is to ensure the economic integration and prosperity among Member States[114]. It

[111] See Baquero-Cruz J., *Beyond Competition: Services of General Interest and EU Law,* in De Burca G., *EU Law and the Welfare State,* pp. 169-212;
[112] Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, p. 73;
[113] Art 14 TFEU: "*Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."*
[114] See Maziarz A., *Services of General Economic Interest: Towards Common Values,* European State Aid Law Quarterly 1, 2016, pp.16-30;

engages a "shared responsibility" between the Union and Member States[115]. (Varju, 2017). The Author expresses the idea of exercising the respective prerogatives to ensure that SGIs fulfill their mission, with a necessary complementary action of both States and Union. The principle of subsidiarity obliges the Union to respect Member States prerogatives and to adopt a "pragmatic"[116] approach to develop a common framework for SGIs. This choice allows Member States to maintain their diversities at national level and respect how their societies are structured.

Article 14 TFEU is not only an exception to the protection of competition and the Internal Market, but it represents a crucial instrument of social and territorial cohesion. SGEIs are necessary to defend and access primarily social rights[117].

Article 14 TFEU is also the legal basis for the European Parliament and the Council to enact secondary legislation according to the ordinary procedure.

Scholars debate on the value and nature of article 14 TFEU, some of them deny the nature of a positive tool to enhance the European social integration and consider it a symbolic provision which must be read as a derogation like article 106(2) TFEU. Instead, other scholars and the further development in the ECJ case law consider article 14 TFEU as a new type of integration able to balance article 106(2) TFEU. Therefore, public authorities and EU Institutions need to give the same value to public services and the protection of competition which represent a positive obligation to form integration[118].

[115] See Varju M., *Conflict and Complementarity: EU Obligations, Member State Interests and Services of General Interest,* in European Public Law 23(2), p. 347-364, Kluwer Law International, 2017;
[116] See Varju M, p.357;
[117] Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, p. 60;
[118] *Ibid.* pp. 63-64;

8.3 PRIMARY LAW: PROTOCOL NO. 26 ON SERVICES OF GENERAL INTEREST

Protocol No. 26 is the major accomplishment in promoting a SGEIs reorganization in the Lisbon Treaty[119].

This Protocol is the first binding text mentioning the concept of Services of General Interest. Here, it is possible to distinguish between a non-economic service, which is immune from the Treaty provisions (article 2) and an economic service, referring to SGEIs.[120]

The first article of the Protocol recalls SGEIs, their role as shared values and the protection of national prerogatives of Member States. Due to their economic nature, SGEIs are subject to the Treaty provisions (Internal Market and Competition rules). It recalls also the subsidiarity principle, as stated by Sauter and Varju, in allocating powers to the lowest effective level (Sauter, 2015). It is also mentioned as a corollary principle for the Union, to respect local diversity: to better ensure the supply and demand of SGIs in the Member States. Relating public services to EU values represents the acknowledgement of solidarity from a pure national concept to a European concept of solidarity. This strengthen the European dimension of the welfare state[121].

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[119] "*The High Contracting Parties, Wishing to*
emphasise the importance of services of general interest,
Have Agreed Upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:
Article 1
The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.
Article 2
The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

[120] See Sauter W., *Public Services in EU Law,* pp. 12-20*,* Varju M., *Conflict and Complementarity: EU Obligations, Member State Interests and Services of General Interest,* pp. 347-364*;*

[121] See Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, p. 67;

The high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights constitute the core element of the Universal Service Obligation conferred to SGIs.

8.4 PRIMARY LAW: ARTICLE 36 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 6(1) TEU makes the EU Charter of Fundamental Rights ("The Charter") legally binding with the same force of the Treaty provisions.[122] Article 36 of the Charter,[123] placed under the Title on Solidarity, its content reclaims article 14 TFEU, with the aim of promoting the territorial and social cohesion of the Union. SGEIs appear not only as a derogation to the Treaty provisions on Competition but also as a mean to attain social purposes[124] and organizing the Member States public welfare policies[125]. They are object of several soft law acts adopted by the Commission, as they include the Member States different legal traditions, there is not a definition and consequentially, not general criteria applicable to all public services in regard of article 106(2) TFEU.

Recalling article 14 TFEU and Protocol No. 26, Article 36 establishes the right to access services of general economic interest that, without mentioning, constitutes

[122] Art. 6(1) TEU: "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."
[123] Art 36: "*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union".*
[124] See Gallo D., *I Servizi di Interesse Economico Generale*, pp. 283 and ff; Sauter W., *Public Services in EU Law,* pp. 135-145;
[125] See Gallo D., *Article 36 of the Charter and access to public services: scope, extent and limits of a sui generis provision* in e-Publica 5(2), 2018;

what a European Universal Service mission is: this represents a positive integration between market interests and fundamental rights[126].

The mixture between national public services and European values elevates the national Welfare State to a European concept of social solidarity marking the birth of a European Welfare dimension.

Access SGEIs, does not imply a European responsibility to grant access to public services but a larger role played at a European level, respecting what has been decided at a national/local field, but considering "access" as a precondition to exercise fundamental social rights[127].

The role of article 36 may be seen limited because individuals must refer to secondary legislation in judicial proceedings to claim their right to access SGEIs, but nothing affects the capacity of primary law to act as a parameter of interpretation and to be enforced with a combined application of other EU law provisions[128].

8.5 SOFT LAW: THE COMMISSION POLICY FRAMEWORK

To clarify and organize the notions of SGIs, SGEIs and SSGI, the Commission took action in issuing different policy frameworks through Communications. In the *Services Directive*[129] article 1 ensures to the Member States the possibility to determine what a SGEI should be, but there is no reference to the organization or financing of these services.[130]

[126] See Szyszczak E., *Article 36: access to services of general economic interest,* in Peers S., Hervey T., Kenner J., Ward A. (eds.) *"The EU Charter of Fundamental Rights: a commentary",* Oxford, 2016, pp. 969-982;
[127] White Paper on Services of general interest, COM(2004) 374 final.
[128] For a deeper analysis on the enforcement of art. 36 see Gallo D. footnote 102, p. 65; see also Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005, pp. 169-212;
[129] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[130] Moreover, the Services Directive does not cover SGEIs in its scope. See article 2(2)(a).

The Commission started the discussion on SGEIs in 1996 with its first Communication[131], aware that the new members entering the Union considered public services as a threat (Wehlander, 2016).

Following the first Communication, the Commission issued the Communication on Services of General Interest in Europe (2000), the Report to the Laeken Declaration (2001), The Green Paper on SGI (2003), The White Paper on SGI (2004), The Communication on Social Services of General Interest (2006) and the Communication on Services of General Interest (2007)[132]. The judicial value of these acts is non-binding; they could be used as a tool of interpretation and definition related to specific cases.[133]

In the first Communication in 1996, the Commission acknowledges the importance to have a right to access services of general interest at a certain price and quality, because they contribute to enhance the economic and social cohesion.[134] They include economic and non-economic services considered of general interest by public authorities. In this definition, the addressed services involve the entity providing them and their function.

Social services gained a specific position in the analysis of the Commission, when it became clear that welfare services could have been marketed with restricting effects on the fundamental freedoms.[135]

The Commission stated the importance of SGEIs within the scope of Competition rules and Internal Market. It is underlined the necessity to operate under the principle of subsidiarity in defining SGEIs and in the shaping of their method of fulfilment.[136]

With the Communication in 2000, the Commission specified the mission behind SGEIs through which it is achieved the objective of social cohesion and economic

[131] COM(1996)90 "Reinforcing political union and preparing for enlargement" (Opinion on the Intergovernmental Conference).
[132] COM(2000)500; COM(2001)598; COM(2003)270; COM(2004)374; COM(2006)177; COM(2007)725.
[133] See Gallo D., *I Servizi di Interesse Economico Generale,* p. 209-210..
[134] Point 1 COM(1996)90.
[135] See Wehlander C., *Services of General Economic Interest as a Constitutional Concept of EU Law,* pp. 35-65*;*
[136] P. 3 COM(2000) 580, final.

integration and the Union plays a role to guarantee the quality and the tariffs of the service.

The aim was to adapt the 1996 Communication specifying the role of public authorities in regard of these three principle: neutrality in respect of public or private ownership; Member States discretion in defining the service and proportionality not exceeding what is necessary to absolve the mission[137]. The Report to the Laeken Declaration in 2001 was the first reference made by the Commission to art 36 of the Charter, intensifying the role of the market and a free competition to provide SGEIs but stressing the essential intervention of the State, in case of market failures[138].

For the first time, it is recalled the possibility to introduce a Directive to frame particular concepts about SGEIs and to increase legal transparency for the application of State Aid Law.

Moreover, in the Green Paper, it emerges the scope of SGIs, that covers both economic and non-economic services considering then services promoting a European model of society.[139] SGEIs represents a mean to exercise in a more effective way citizenship rights in the full respect of competition measures.

Confirmed by the White Paper in 2004, which underlines the great value of SGEIs in ensuring citizenship rights. The Commission stated that public authorities should work in fulfilling the public services objectives within the market, granting co-decision and universal access.

Mario Monti in his speech to the President of the Commission[140] in 2010, remarked the importance to consider SGEIs of a constitutional dignity: "*services of general economic interest are considered to be a key sphere for broad social policy, at the national, regional and local level".*

[137] See Sbrescia V.M., "*Servizi di interesse economico generale e dimensione comunitaria",* Rivista giuridica del Mezzogiorno, 4, 2009, Il Mulino, pp. 1225-1250;
[138] COM(2001) 598, final, p. 3.
[139] COM(2007)725, p.3
[140] Monti M., Report to the President of the European Commission, J.M. Barroso, 9 May 2010, *A new strategy for the single market: At the service of Europe's economy and society.*

8.6 SECONDARY LAW: DIRECTIVES AND THE EXPRESSED POWER OF THE COMMISSION IN MONITORING STATE MEASURES.

Article 106(3)[141] TFEU grants the Commission the power to legislate in the field of SGEIs. The first ever adopted Directive was the *Transparency Directive*[142] aiming at creating more transparency in the field of financial relationships between public undertakings and Member States. France, UK and Italy[143] challenged this Directive on the ground that the wrong legal basis was used, instead of a measure of harmonization under article 114 and 115 TFEU[144]. Further, the Commission issued two Directives[145] in the field of telecommunications, using the legal basis of par. 3, also challenged by the Member States. The Commission concerns regarded the lack of competition and the fragmentation of the market[146]. Here the Court of Justice specified in *Telecommunications Equipment*, that the power granted to the Commission has not a general purpose but a specific power to deal with State monopolies[147] and identify the special obligations deriving from article 106(1) TFEU. The role played by the Commission is to supervise and monitor State measures. Indeed, the Open Network Provision Directive[148] and the Services Directive[149] were issued under article 114 TFEU as a harmonization measure.

The Service Directive was the all-comprehensive tool used to give harmonized rules on services in the Internal Market[150]. The scope of this Directive refers to all services in the meaning of article 57 TFEU and explicitly exclude the application of its provisions to certain type of services, especially non-economic SGIs. This

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[141] 106(3): "*The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."*
[142] Dir. 80/723/EEC [1980] OJ L195/35 now Dir. 2006/111/EC [2006] OJ L318/17.
[143] Cases 188-190/80, *France, Italy and UK v Commission,* ECLI:EU:C:1982:257.
[144] See Jones A., Sufrin B., Dunne N., *EU Competition Law. Text, Cases, and Materials, Seventh Edition,* Oxford, 2019, p. 644-645;
[145] Dir. 88/301/EEC [1988] OJ L131/73; Dir. 90/388 [1990] OJ L192/10.
[146] See Whish R., Bailey D., *Competition Law, Ninth Edition,* Oxford, 2018, p. 255-256;
[147] Case C-202/88, *France v Commission (Telecommunications Equipment),* ECLI:EU:C:1991:120;
[148] Council Dir. 90/387/EEC [1990] OJ L192/1.
[149] Dir. 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376/06.
[150] See Barnard C., *The Substantive Law of the EU. The Four Freedoms,* Oxford University Press, 2016; Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013, ch. 6, pp. 132-139;

leaves the opportunity for Member States to discretionally decide what can constitute an SGIs within the State Aid framework. Even though, some SSGIs are conceived as economic activities and could be considered as "services" in the sense of the text, article 2[151] enumerates the list of services excluded. J. W. van de Gronden[152] conducts an analysis on the relevant articles for SGIs, in regard of the Directive: the latter acknowledges the role of private operators in providing social services in so far as they don't act under the supervision of the State. It is important to say that the Directive applies also to a broader scope of SSGIs not mentioned in article 2. The same author deepens the analysis focusing on the complex articles 16 and 9, stating that the Directive could lead to a liberalization of SSGIs not under State control. If the Member State is not able to fulfil the mission under its control, this has to consider eliminating its authority. Consequently, what a prima facie exclusion of SGIs from the Services Directive is denied by a substantial examination of the State measures involved.

9. RETRACING THE CONCEPT OF ECONOMIC ACTIVITY UNDER EU LAW: A SUBTLE MEANING SPECIFIED OVER TIME

Having reconstructed the complex matter of public services under EU Law, to start digging into State Aid Law and their application to SSGIs, it is essential to define what have been elaborated by the Court of Justice as "economic activity" under EU Law, taking particularly into account its definition within social services.

What is "economic" represents the cornerstone around which the original European Economic Community[153] came into being and it is crucial not to leave the choice of

[151] Art 2(2)(j): *social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;*

[152] See van de Gronden J. W. *Free Movement of Services and the Right of Establishment: Does EU Internal Market Law Transform the Provision os SSGIs?* ch. 6, pp. 132-139, in Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013;

[153] See Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005, pp. 169-212;

what constitute economic activities upon Member States, to avoid a dangerous discretion in the application of competition rules[154]. However, there isn't a definition of economic activity in the Treaties, it is the Court of Justice that starts to actualize the notion of what constitutes an economic activity. The Case law suggests that there are certain activities deemed economic in nature and which delineate a policy-based exception, while other activities are non-economic in nature[155]. In particular, in the famous case *Hofner and Elser*[156], a case concerning the reference sent to the Court to explain if a monopoly reserved for a public employment agency, engaged in the business of employment procurement, could have been compatible with the Community law. Paragraph 22 of the judgement, explains how employment procurement activity is an economic activity, not affected by the nature of the provider and the way in which it is financed. The legal status of the entity, the way in which it is financed and the non-profit purpose are irrelevant[157]. The Court identified in various cases, the economic elements required to classify an activity as economic: i.e. *Pavel Pavlov*[158] the offering of goods and services on a market consists in an economic activity. This broad definition was challenged again in *Eurocontrol*[159], referring to the Court to clarify if an organization, established under an international agreement, entrusted to control the air navigation could have been considered an undertaking exercising an economic activity. The organization collected charges for the exclusive use of air navigation control facilities and services[160]. Without the possibility to separate the task

[154] See Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010, ch. 4, p. 253-270;
[155] See Dunne N., *Knowing When to See It: State Activities, Economic Activities, and the Concept of Undertaking,* Columbia Journal of European Law, 16, 2010, p. 436;
[156] Case C-41/90 *Hofner*, ECLI:EU:C:1991:161, par. 21;
[157] See Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010; Gallo D., Mariotti C., *The Public financing of Belgian Hospitals and EU Law :A Core Development in the field of State Aid*, in Mastroianni R., Arena A. (eds.), *60 Years of EU Competition Law, Naples*, 2017, 173-198; Whish R., Bailey D., *Competition Law, Ninth Edition,* ch.3, Oxford, 2018; Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 571;
[158] Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others*, ECLI:EU:C:2000:428, par. 75.
[159] Case C-364/92, *SAT Fluggesellschaft v Eurocontrol,* ECLI:EU:C:1994:7.
[160] *Ibid*., par. 28

assigned[161] by the Contracting Parties and the other activities, the organization couldn't have any influence on the imposition.

The Court here showed three conditions the nature, the rules and the exercise of powers required by the organization and concluded that, the activity held was not an economic activity, representing the mere expression of public authority. The important condition of inseparable activities performed by the organization constitutes a parameter to balance economic and social elements. In *Poucet et Pistre, FFSA and Albany*[162] the Court took into account the way the activities were shaped such as the capitalization principle, financial conditions and whether private operators would have provided the same activity under the same conditions. For the latter case, AG Jacobs in his opinion[163], started his reasoning from the assumptions of *Hofner* and *FFSA,* that no private entities would offer (the activity in object) a pension scheme without the State intervention[164]. If the entity can decide how to organize and fix the amount of due contributions, even though there are "manifestations of solidarity", the activity is economic[165]. Solidarity operates as an exclusion of the economic nature when the social protection is built upon the solidarity principle such as, social objectives, proportionate contributions to the incomes, a fixed amount, cross-subsidization and compulsory statutory conditions (*Poucet).* Precisely, when the State intervenes in the performance of the activity, the operator's autonomy suppression excludes the qualification of economic activity. In *Pavel Pavlov*[166] the Court stated the necessity for the undertaking to

[161] See Szyszczak E., *Services of General Economic Interest and State Measures Affecting Competition,* in Journal of European Competition Law and Practice, 4(6), Oxford University Press, 2013, pp. 514-524*;* i.e. Case C-113/07P, *SELEX Sistemi Integrati v Commission*, ECLI:EU:C:2009:191.
[162] Case C-159/91 *Poucet et Pistre,* ECLI:EU:C:1993:63; Case C-244/94 *Fédération Francaise des Sociétés d'Assurances,* ECLI:EU:C:1995:392; Case C-67/96, *Albany v Stichting Bedrijfspensioenfonds Textielindustrie,* ECLI:EU:C:1999:430; see next paragraph on the definition of Undertakings;
[163] Opinion of Mr. Jacobs Case C-67/96, Joined Cases C-115/97, C-116/97 and C-117/97 and Case C-219/97.
[164] See Gyselen L., Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie; Joined Cases C-115–117/97, Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmateri, in Common Market Law Review, 37(2), 2000, Wolters Kluwer, p. 425-448.
[165] See Szydlo M., *Leeway of Member States in Shaping the Notion of an "Undertaking" in Competition Law,* World Competition 33(4), p.549-568, Kluwer Law International BV, 2010.
[166] Joined Cases C-180/98 – C-184/98 *Pavlov,* par. 85-87

determine its conduct on the market. Also, in *Amministrazione autonoma dei Monopoli di Stato*[167] the Court conferred the nature of undertaking to a public authority exercising a public power (ius imperii[168]), because the State can perform both economic and non-economic activities, appearing as an undertaking for the economic sphere. The exercise of public authority, also entrusted to a private undertaking, in *Diego Calì*[169]*,* (different from *Eurocontrol*) entails that the task performed (an anti-pollution surveillance and intervention) constitutes an essential function of the State, therefore, it can't be considered economic. Deeply, when the State not only exercises or entrusts tasks of public authority, but also when It pursues social objectives (i.e. social security, healthcare and/or education) the activity is not economic. Beyond the offering of goods and services on a market, the other element verified by the Court is the potential to make profit without State intervention.

Two emblematic cases, in the healthcare sector, *Ambulanz-Glockner* and *FENIN*[170]*,* challenged the functional approach to economic activities[171]. In *Ambulanz-Glockner,* regarding the delegated task to medical aids organizations of providing the public ambulance service, the activity was considered economic, even though the public service obligation (PSO) affected the performance, because users paid a remuneration and the risks were assumed by the organization. However, the Court applied article 106(2) TFEU to the economic activity, because it corresponded to the parallel traditional service that was justified under article 106(2) TFEU. In *FENIN,* private operators purchased medical goods offered to the Spanish public organizations managing a national health system; the Court stated that the activity of purchasing and offering the goods although was economic *per se*, allocating it totally to a pure social activity, made it non-economic. The Court elaborated the

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[167] Case T-139/98 *Amministrazione autonoma dei Monopoli di Stato v Commission,* ECLI:EU:T:2001:272;
[168] See Gallo D., *I Servizi di interesse economico generale,* fn. 147*;* Nistor L., *Public Services and the European Union. Legal Issues of Services of General Interest,* TMC Asser Press, 2011, ch. 4;
[169] Case C-343/95 *Diego Calì e Figli Srl v. SEPG,* ECLI:EU:C:1997:160;
[170] Case C-475/99, *Ambulanz-Glockner v Landkreis Sudwestpfalz,* ECLI:EU:C:2001:577; Case C-205/03 P, *FENIN v Commission,* ECLI:EU:C:2006:453*;*
[171] See Gallo D., Mariotti C., *The Public financing of Belgian Hospitals and EU Law: A Core Development in the field of State Aid*, in Mastroianni R., Arena A. (eds.), *60 Years of EU Competition Law, Naples*, 2017, 173-198;

"theory of severability" which states the necessary consideration of each activity engaged by an entity, individually, because activities that are the expression of public powers cannot make other activities non-economic[172]. The activity was conducted following the solidarity principle, funded by social security contributions and provided free of charge. In social security cases, it emerges other than the social purpose, the redistributive and financial solidarity. The absolute necessary State intervention to guarantee a social protection and the State control to safeguard the right for all citizens to access a social security regime.

When deciding whether an entity can or cannot be an undertaking, because it exercises an economic or a social activity, the analysis must take into account the economic and social elements and see which of them prevail: the notion is relative (Gallo, 2010). The economic features can be detected in the varying quality offered by the operator, resources deriving from social activities, used to finance economic activities, the complementary offers, additional to the compulsory scheme, which coexist with the social elements of the main activity. The only possible conclusion is to measure which elements predominate[173].

9.1 UNDERTAKINGS AND THEIR ROLE IN SOCIAL SERVICES

The Treaty provisions on Competition refer to Undertakings. Undertakings are not defined in the Treaty. The features of an economic activity settled down by the Court identify the entity engaged in this peculiar activity. The first definition was elaborated by the Court of Justice in the leading case *Hofner and Elsner*[174], explained above, in which the Court not only specifies what is an economic activity but also, how undertakings should be defined: "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is

[172] See Case C-205/03 P *FENIN v Commission*, para. 9;
[173] Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005; Prosser T., *The Limits of Competition Law. Markets and Public Services,* Oxford University Press, 2005, pp. 169-212; Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010; Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013; Barnard C., *The Substantive Law of the EU. The Four Freedoms,* Oxford University Press, 2016;
[174] Case C-41/90 *Hofner*, par. 21;

financed"[175]. As this may appear to be a very broad definition, much more wide and comprehensive than those adopted by Member States, (i.e. in *Wouters*[176] the Court defined members of the Bar as undertakings, falling under the Treaty ruels, offering the service of legal assistance.) The focal point is the definition of "economic activity": trying to circumscribe what can or cannot be considered economic, in the settled case law of the Court, it was concluded that profit-seeking or economical purposes are not relevant for the definition, what counts is the offering of goods and services on a market[177]. Moreover, the exercise of public authority excludes the economic nature, albeit it can be used for some activities and not for others[178] (*FENIN).* Recalling the *Hofner* case, it was said that if an activity could have been provided by a private entity for profit, this must be considered economic, even though the activity "is normally entrusted to public agencies"[179]. In 2013, the Commission, deciding a case on the supplementary support scheme for libraries in Czech Republic, implementing digitalisation, stated in paragraph 29 "unless the member state concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities".[180]

Generally speaking, the Court finally decided to determine the concept of "undertaking" under a functional approach, disregarding the subjective element, on a case-by-case analysis[181].

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[175] See Case 118/85 *Commission vs Italy*, ECLI:EU:C:1987:283, point 7;
[176] Case Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten,* ECLI:EU:C:2002:98; See also Szydlo M., *Leeway of Member States in Shaping the Notion of an "Undertaking" in Competition Law,* World Competition 33(4), p.549-568, Kluwer Law International BV, 2010;
[177] See CJEU, Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others*, par. 75;
[178] See Hervey T., *If Only It Were So Simple: Public Health Services and EU Law,* ch 7, p. 189, in Cremona M., *Market integration and public services in the European Union,* Oxford University Press, 2011;

[179] See *Hofner,* par. 22. In opposition the Court explained the "essential State function" in *Eurocontrol* and *Diego Calì;*
[180] SA 35529 (2012/N) – Czech Republic Digitization of books in libraries, Brussels, C(2013) 1893, final.
[181] See Jorgensen C.H., *Private Distortion of Competition and SSGIs,* ch. 11 in Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013; Iannello C., *Poteri pubblici e servizi privatizzati. L'idea di servizio pubblico nella nuova disciplina interna e comunitaria,* Giappichelli Editore, Torino, 2005;

Dealing with social services, undertakings would fall under competition measures if their services can be defined as economic, under the case law of the Court. Without the solidarity principle and the purely social function balancing the economic interests of the market these services are economic[182]. In *Poucet et Pistre*[183], the conclusion of the judgement does not include in the concept of undertakings, organizations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity. Paragraph 18 explains how the activity is entirely non-profit making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions. The operators were not able to influence the amount of contributions which were totally under State control. As well in *AOK,*[184] the exclusive social function was fulfilled by sickness funds, which were obliged to offer benefits to their members independent from the amount of contributions and the funds mutually equalized costs and risks. Both cases *Poucet* and *AOK* express the principle of redistribution within which incomes are distributed between those who are better off and those who would be deprived of the necessary social cover[185]. Particular significance has the way in which the schemes are managed: under the capitalization principle, contributions and benefits are determined autonomously based on the administrative costs and financial results of the fund and it is more likely to be considered an undertaking; conversely, under the risk equalization principle, different operators in the same sector share a mutual risk equalizing costs and benefits among the same operators, making more likely to not be considered an undertaking[186].

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[182] See Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010; Jones A., Sufrin B., Dunne N., *EU Competition Law. Text, Cases, and Materials, Seventh Edition,* Oxford, 2019; Stanciulescu A., *The concept of undertaking in the European Union Competition Law* in Challenges in the Knowledge Society 12, pp. 668-674, Nicolae Titulescu University Publishing House, 2018; van de Gronden J., *Services of General Interest and the Concept of Undertaking: Does EU Competition Law apply?* in World Competition 41(2), pp. 197-224, Kluwer Law International, 2018; van de Gronden J., Guy M., *The role of EU competition law in health care and the undertaking concept,* in Health Economics, Policy and Law, Cambridge University Press, 2020;

[183] Case C-159/91 *Poucet et Pistre,* ECLI:EU:C:1993:63;

[184] Cases C-262, 306, 354 and 355/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co,* ECLI:EU:C:2004:150;

[185] *Poucet* para. 10 and *AOK* para. 53;

[186] See Dunne N., *Knowing When to See It: State Activities, Economic Activities, and the Concept of Undertaking,* p. 442;

A different conclusion was adopted in *Fédération Francaise des Sociétés d'Assurances*[187], a non-profit organization providing a supplementary old-age scheme which intended to supplement a basic compulsory scheme. Even though, the Court observed the display of elements of solidarity, the organization was defined as an undertaking, because it operated with capitalization principles and benefits depending on the amount of contributions.

Extremely relevant in this sense, it is the *Albany*[188] judgement in which AG Jacobs, in his opinion[189], suggested two arguments: whether the activity was carried on by a public entity and it was in a position to adopt a certain line of conduct. The fact concerned a supplementary pension fund, in the textile sector, which was non-profit-making and obliged to accept all workers, without a prior medical examination. The Court acknowledged the social objective, but the fund could decide the amount of contributions, benefits received, (connected to the financial results) and arbitrarily grant exemption from the affiliation[190].

The same reasoning was followed by the Court in *AG2R Prévoyance*[191]*:* the French bakery sector set up a compulsory affiliation scheme to complete the social security coverage offered by the basic statutory scheme, for a supplementary reimbursement of healthcare costs. Contrary to *Albany,* the French Decree didn't establish any exemption to the affiliation, which the Court evaluated as a strong solidaristic element, and all companies paid the same amount of contributions; however, *AG2* maintained a margin of negotiation to decide the details to its appointment and the influence of the latters on the functioning of the scheme[192]. Consequently, the choice to appoint *AG2R* was made among other undertakings, offering different

[187] Case C-244/94 *Fédération Francaise des Sociétés d'Assurances,* ECLI:EU:C:1995:392;
[188] Case C-67/96, *Albany v Stichting Bedrijfspensioenfonds Textielindustrie,* ECLI:EU:C:1999:430;
[189] Opinion of Mr Jacobs, Case C-67/96, Joined Cases C-115/97, C-116/97 and C-117/97 and Case C-219/97;

[190] See Gyselen L., Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie; Joined Cases C-115–117/97, Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmateri, in Common Market Law Review, 37(2), 2000, Wolters Kluwer, pp. 425-448; Jones A., Sufrin B., Dunne N., *EU Competition Law. Text, Cases, and Materials, Seventh Edition,* Oxford, 2019; Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 572;
[191] Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL,* ECLI:EU:C:2011:112;
[192] *Ibid*, par 65;

conditions, in competition with it. This definition was adopted again in *Kattner*[193] were the Court clarified that a statutory insurance scheme pursuing social objectives cannot be excluded from the ambit of economic activities, solely on this ground. Developing the level of solidarity necessary to be considered a non-economic activity, two conditions must be fulfilled: the exclusive social function of the body and the State control[194].

A particular case in 2017, *Congregacìon de Escuelas Pìas Provincia Betania*[195] challenged the Court on the application of State Aid rules to religious establishments deemed to carry out economic activities using public funding. The Court was asked whether these religious establishments could have been exempted from a municipal tax due to the purely religious nature of the activities conducted, as part of the Catholic Church. The exemption was refused on the ground that the activities performed in these buildings were not purely religious instead they were offered for remuneration[196]. Recalling the definition of undertaking under EU law, the Court analyzed what constitutes economic activity and how to evaluate each activity in the light of the overall nature of the entity. Performing certain activities for remuneration (in this case buildings used for classes and canteen) makes the consumer willing to pay for the value it obtains, even if the entity is non-profit[197]. What can be allowed is the presence of a nominal fee to cover the costs that otherwise would exclude the entity from the market. Even though the funding of education may come from those who benefit from it, non-economic activities are always loss-making and not offered for remuneration. In social services, such as health or education, beneficiaries do not pay a consideration for what they receive, they have a right and/or a need to receive it. The possibility to severe economic and non-economic activities requires a specific evaluation for each activity and eventually, the possible financial link between the two natures to finance non-

[193] Case C-350/07 *Kattner Stahlbau,* ECLI:EU:C:2009:127;
[194] Case C-218/00 *Cisal,* ECLI:EU:C:2002:36; Case C-437/09 *AG2R,* ECLI:EU:C:2011:112;
[195] Case C-74/16 *Congregacìon de escuelas Pìas Provincia Betania v Ayuntamiento de Getafe*, ECLI:EU:C:2017:496;
[196] See Nicolaides P., *Not Even the Church Is Absolved from State Aid Rules: The Essence of Economic Activity,* in European State Aid Law Quarterly 4, 2017, pp. 527-536;
[197] Ibid. 184, para. 40; Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 579;

economic activities with the profits of the economic ones does not impede to separate and classify as economic those concerned[198]. The Court left upon the Spanish Courts to verify how the educational system was organized within the Congregacìon, stating the principle that public funding of education and compulsory educational activities cannot be classified as economic.

In 2020, authors van de Gronden and Guy[199] bring a rationalisation to the analysis of the undertaking concept, with the aim to weigh economic and solidaristic elements: first of all, it is necessary to apply the abstract test, would the activity potentially be supplied on the market? Would it be required the intervention of the State? Without taking into consideration the national legal framework, if the State has to intervene in providing the service, the activity is not economic. Secondly, only for social security schemes, the analysis moves to the concrete test: if the national legal framework entrusts a body with the task of financing the social security scheme and this is mainly solidarity-based, the body is not engaged in an economic activity and is not an undertaking. Developing this reasoning, the authors recall a recent case *CEPPB*[200], dealing with tax exemptions for religious institutions in Spain, in which it was asked to the Court if a religious congregation operated as an undertaking, in providing educational services. The Court reaffirms the possibility to perform both economic and non-economic activities and what matters is the absolute State intervention in financing the activity. Through taxation, the State guarantees access for all to an essential service, such as education.

To sum up the test applicable to the provider of a social service is:

1) Does the supply of the service mainly depend on public funding?

2) Is the aim an objective of public interest?

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[198] See Collins A.M., Navarro M.M., *Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango,* in Journal of European Competition Law & Practice, vol. 12(5), 2021, pp. 381-382; also Judgement of 20 September 2019, *Port Autonome du Centre et de l'Ouest v Commission,* T-673/17, ECLI:EU:T:2019:643, para. 102-106;

[199] See van de Gronden J., Guy M., *The role of EU competition law in health care and the undertaking concept,* in Health Economics, Policy and Law, Cambridge University Press, 2020;

[200] Case C-74/16 *CEPPB v Ayuntamiento de Getafe,* ECLI:EU:C:2017:496; see van de Gronden J., *Services of General Interest and the Concept of Undertaking: Does EU Competition Law apply?* in World Competition 41(2), p. 197-224, Kluwer Law International, 2018;

3) Are the concerned activities related to this objective?

In conclusion, both the concepts of economic activity and undertaking are extremely relative and variable, even though over time, the settled case law highlighted the recurring features indispensable to define these notions: when a non-economic activity switches into an economic one, the entrustment of a SGI mission can overweight the economic interests.

10. CONCLUSIONS

The notion of public services is present in the national traditions of the Member States. Different traditions and State sovereignty could not direct to a common general definition of European public services. Since the establishment of the EEC, the idea was to create a strong common market guaranteeing fundamental freedoms regulated under Competition law provisions. The market represented the privileged tool to enhance not only economic but also general interests shared among the Member States.

Establishing a national monopoly or granting special or exclusive rights to undertakings could be allowed under strict and exceptional conditions to be justified under article 106(2) TFEU, already article 82 EC.

The liberalization process started in the 80s aimed at reducing national monopolies to pursue a level playing field, but soon the social dimension of the market confronted this trend, making the market failures the crucial point to think about a social market economy, favoring the passage from an exception to the competition rules to the common basis of the European welfare state.

More and more liberalization raised the question of universal services and the importance of protecting the welfare dimension of Member States. Starting from the idea of Services of general economic interest, already included in the Treaties as an exception to the market, a process of codification, both hard and soft law of different categories (SGEI, SSGI, SGI), represents the closer definition of public services at European level.

The Commission increased the awareness and the conceptual problem in defining SGIs and plays the crucial role in monitoring the States' measures. The most difficult definition to deal with is the difference among the economic or non-economic nature of the services. The classification is necessary to apply or not apply the rules on competition and specifically, the public funding of those entities which could entail State Aids[201].

In the lack of a definition, it is the ECJ that case after case defines the judicial tools necessary to assess the economic nature of the activity, whether an entity can be qualified as undertaking and how solidarity excludes the economic nature and the applicability of the Internal Market rules on Competition.

[201] See Chapter 2.

CHAPTER 2
FINANCING SOCIAL SERVICES OF GENERAL INTEREST

1. STATE AID PROVISIONS APPLICABLE TO SOCIAL SERVICES OF GENERAL INTEREST

In the first chapter, it was outlined the origin and the legal framework surrounding Services of General Interest. Given the difficulties in the progressive evolution of those concepts, Member States enjoy a wide margin of discretion in defining their Services of General Interest (SGIs). The crucial point is to understand what can be considered economic and non-economic. Services based on the principle of solidarity and subsidiarity, constitute Social Services of General Interest (SSGIs), which *per se* cannot be classified as economic activity, when exercising a social function; however, those activities analyzed by the Court of Justice, could be considered economic (constituting the ESSGIs) when the economic elements prevail or can be separated from the social activities. State aid measures can be considered in the light of article 106(2) TFEU applicable to those undertakings entrusted with an SGEI mission, that remain subject to the Treaty provisions on competition. No advantages can be seen conferred to those undertakings[202]. Nevertheless, under article 107 TFEU, the State intervention in the form of public compensations, representing a consideration to fulfill the mission, not having the effect to put those undertakings in a favorable market position, are not considered to be unlawful aids if they do not exceed what is necessary to cover the expenses caused by the PSOs.

State Aid provisions could apply where public funds given to certain undertakings, distort or threatens to distort competition. Anyway, not every aid is incompatible within the Internal Market, only those having distortive and unjustifiable effects. The first question on which the Court focuses on, is whether the activity performed by the party at stake may be considered economic, provided that under EU law what

[202] See Diverio D., "*L'applicazione della disciplina degli aiuti di Stato ai servizi di interesse economico generale puramente locali"* in Ammannati L. and Cafari Panico R. (eds), *I servizi pubblici: vecchi problemi e nuove regole,* 2018, pp. 56-76;

constitutes economic activity can be seen as non-economic in certain cases[203]. For this reason, considering ESSGIs as economic activity, State Aid provisions could apply to undertakings receiving from Member States, aids, which directly or indirectly and in any form, may distort competition giving support to certain undertakings and/or specific products. In this regard, articles 107-109 TFEU apply also to SSGIs in the case where the economic nature prevails or the economic activities cannot be separated, from the non-economic activities, within the scope of the Services of General Economic Interest (SGEIs) framework[204]. The general prohibition of providing State Aids is affirmed in article 107 TFEU[205]. Even without a definition of "aid"[206], the features can be explained as: imputability to the Member

[203] See Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021, pp. 321-322; Gallo D., Mariotti C., *The Public financing of Belgian Hospitals and EU Law : A Core Development in the field of State Aid*, in Mastroianni R., Arena A. (eds.), *60 Years of EU Competition Law, Naples*, 2017, p. 173-198; Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010, p. 240-248; Jones A., Sufrin B., *EU Competition Law. Text, Cases, and Materials, Sixth Edition,* Oxford, 2016, p. 6-7;

[204] *Ibid.* Gallo D., see also Schiek D., *Social Services of General Interest: The EU Competence Regime and a Constitution of Social Governance,* ch. 4, in Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013;

[205] Article 107 TFEU: *1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*
2. The following shall be compatible with the internal market:
(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

[206] See Diverio D., *L'applicazione della disciplina degli aiuti di Stato ai servizi di interesse economico generale puramente locali,* in Ammannati L., Cafari Panico R. (eds), *I Servizi Pubblici. Vecchi Problemi e Nuove Regole,* I section, ch. 3, p. 57;

State and aid granted via state resources; advantage and selectivity favoring certain undertakings or certain products and finally, the actual or potential distortion of competition, affecting trade between Member States.[207] If all these elements are met by the measure granted, this must be notified to the Commission (art. 108 TFEU[208]). For these purposes, the analysis which conducts to the identification of State Aids granted to SSGIs, starts from the definition of these elements, followed by the nature of the activity which differs from case to case, and how direct funds, cross-subsidization schemes, or public service obligations could distort competition making the aid incompatible and to be recovered.

When the service is regarded as economic, and potentially State Aid provisions could be applied, Member States may rely on article 106(2) TFEU to derogate the competition rules, as long as all conditions are met[209].

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[207] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01);

[208] Art 108 TFEU: *1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.*
2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.
If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.
On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.
If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.
3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.
4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

[209] See paragraph 2 below.

The complexity of the notion and the different cases involved adopted which penalized a systematic approach to the subject. The Monti-Kroes package and the Almunia package tried to regulate and give a framework to manage the peculiar derogations and exceptions for SGIs.

1.1 CREATING AN ADVANTAGE IMPUTABLE TO THE STATE

Generally, aids granted by the State include a policy aim to achieve and for this reason, it is important to balance their effects with possible derogations, such as in paragraphs 2 and 3 of article 107 TFEU[210]. Advantages granted to undertakings are not State Aids if they are not granted through state resources[211]. The wording of article 107 TFEU, suggests both direct and indirect aids provided to undertakings, fall within its scope: not only the transfer of State resources but also, the revenue that would have been paid to the State, contributions by market participants, a uniform tariff throughout the territory or solidarity-based financing[212].

It is necessary to include not only aids granted through public funds but also aids resulting from the State conduct via public or private bodies, established by law. In the case *Preussen Elektra*[213] the State imposed an obligation on private electricity suppliers to purchase electricity produced from renewable energy sources at a fixed minimum rate, not entailing any direct transfer of State resources. The financial burden on State resources and the imputability to the State are required to assess the measure as an aid[214]. These criteria are affirmed in *Stardust Maritime*[215]. Here the Court specified the relevance of permanent State control over the sums that are

[210] See Biondi A., *State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid,* in Common Market Law Review 50, p. 1719-1744, Kluwer Law International, 2013;
[211] Bouchagiar A., *When do funds become State resources: The notion of aid in view of the recent EEG and Achema Judgements,* in European State Aid Law Quarterly, 1, 2020 pp. 19-28;

[212] Bovis C., *Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?* In European Law Journal 11(1), Blackwell Publishing, 2005, pp. 79-109;

[213] See Case C-379/98, *PreussenElektra AG,* ECLI:EU:C:2001:160, pp. 59-60;
[214] Clayton M., Segura Catalan M.J., *The Notion of State Resources: So Near and yet so Far,* in European State Aid Law Quarterly, 2, 2015, pp. 260-270;

[215] Case C-482/99, *France v Commission (Stardust Maritime),* ECLI:EU:C:2002:294, para. 36;

not State-owned. A bank controlled by the French State granted a loan to a private undertaking, Stardust. The control and the consequent decision under objective indicators (paragraph 55) made the measure imputable to the State and an indirect transfer of State resources[216]. Additionally, in *Bouygues*[217], the Court explained that is not necessary an exact mathematical link between the measure and the financial burden on the State budget, but a direct link between the advantage and the reduction of the budget or just the concrete risk of reduction. State-owned funds, or State control over funds, plus, the possibility to dispose the allocation of those sums, need also the State intention to create an advantage for the beneficiaries: in *Sloman Neptun*[218], a German law allowed to employ seafarers from non-member States on German-flagged ships, on less favorable conditions, in respect of pay and social protection, which applied to German nationals. The law did not pursue the creation of an advantage but to change the framework within which, contractual relations were formed. No aid was found. Also, in *Doux élevage*[219], a State measure extended to all traders, in the agricultural industry, an agreement with a recognized inter-trade organization, which introduced a levy. The absence of State control over the contributions and the lack of the intention to create an advantage, excluded any aid.

In *Vent de colère*[220], it was specified that State resources must constantly remain under State control and available to public authorities, disregarding the origin of the funds and the budgetary burden placed.

As an evolution of the established case-law, the complex *EEG*[221] case, dealing with different levels for electricity suppliers, which could pay a reduced surcharge, if

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[216] See Biondi A., *State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid,* in Common Market Law Review 50, p. 1719-1744, Kluwer Law International, 2013; Jones A., Sufrin B., *EU Competition Law. Text, Cases, and Materials, Sixth Edition,* Oxford, p.10 2016; Schutze R., *European Union Law,* Cambridge University Press, 2018, p. 767; Hofmann H., Micheau C., *State Aid Law of the European Union,* part II, Oxford University Press, p. 74, 2016;

[217] Case C-399/10 P and 401/10 P, *Bouygues SA and Bouygues Télécom SA v Commission* ECLI:EU:C:2013:175, pp. 95-126;

[218] Case C-72 and 73/91, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG,* ECLI:EU:C:1993:97, point 21;

[219] Case C-677/11 *Doux élevage SNC v Ministère de l'Agriculture,* ECLI:EU:C:2013:348, pp. 37-38-39;

[220] Case C-262/12 *Association Vent de Colère, Fédération Nationale v Ministre de l'Ecologie* ECLI:EU:C:2013:851 p. 20-21;

[221] Case C-405/16 P *Germany v Commission EEG,* ECLI:EU:C:2019:268, p. 54-55;

they had purchased electricity directly from national producers, represents an evolution of *PreussenElektra.* The relevant distinction is between State aid measures and a mere price regulation. In the former case, the Court concluded that there was not State control over the funds generated by the surcharges. Conversely, in *Achema*[222]*,* Lithuania imposed a service of general economic interest consisting in the obligation to produce electricity from renewable sources, compensated by a levy imposed on end-consumers. In this case, the Court found the measure to be founded via obligatory contributions and the obligation to purchase renewable energy, without possible refusal. Bouchagiar[223] concluded his analysis on the evaluation of State resources, following a three-step test which consists: 1. A compulsory charge financing a public initiative, unilateral and binding, originated from the State; 2. Fund manager controlled by the State; 3. The burden of price regulation assumed by the State, guaranteeing to pay the costs of private operators. The intention to create an advantage does not automatically influence the effects of creating it. The aid constitutes State Aid if it confers an advantage over the beneficiaries, which would not have received under normal market conditions[224]. State intervention in the market may be compared to investments made by private actors and in private sectors, the investments expectations are economic gains. Effects imply a functional approach to the notion of advantage: in *SFEI*[225] the Court exemplified what could constitute an advantage, as receiving "an economic advantage which it would not have obtained under normal market conditions". It involves any form used, suitable to favor certain undertakings. In *Italy v Commission*[226], the Court assessed the measure in relation to their effects: the Italian Government exempted the textile industry from some contributions to a compulsory insurance fund. The "normal market conditions" may be a vague concept to identify

[222] Case C-706/17 *Achema and Others,* ECLI:EU:C:2019:407, p. 88-98;
[223] Bouchagiar A., *When do funds become State resources: The notion of aid in view of the recent EEG and Achema Judgements,* in European State Aid Law Quarterly, 1, 2020, pp. 19-28;
[224] Chalmers D., Davies G., Monti G., *European Union Law: Texts, Cases and Materials*, New York: Cambridge University Press, p. 973-5, 2010; Biondi A., *State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid,* in Common Market Law Review 50, p. 1719-1744, Kluwer Law International, 2013; Herwig C. H. Hofmann, Micheau C., *State Aid Law of the European Union,* Oxford, 2016, p. 74;

[225] Case C-39/94 *Syndicat français de l'Express international (SFEI) et al. v La Poste et al.*, ECLI:EU:C:1996:285, par. 60;
[226] Case C-173/73 *Italy v Commission*, ECLI:EU:C:1974:71, para. 13;

as well as the "normal costs" suffered by undertakings of a particular sector: *Germany v Commission*[227] showed the delicate issue in assessing the normal activities of an undertaking thus, excluding the aid, of subsidies given to Deutsch Post for an obligation towards civil servant postal workers' pensions. These were judged not to be normal costs of an undertaking. Assessing the normal conditions of a market the Market Economy Operator test is applied[228]. Due to the vagueness of the concept, it is necessary to distinguish when the State operates as an Investor, Creditor or Vendor. In the case *EDF*[229]*,* the largest electricity operator in France, entirely owned by the State, to which it was granted a waiver of a corporation tax during the restructuring of the balance sheet, was found to be an aid by the Commission. The Court urged the Commission to apply the MEIP, because the form of the measure is not in itself enough to amount to an aid; it is important to understand, what a private operator at the same market conditions would have acted.

Taking into consideration the possible application of State Aid measures to social services, when assessing a State provision to these services, it is fundamental to consider the exclusive aim, the constant control by the State, the non-profit character of the established measure and benefits accorded irrespectively of the contributions paid.

1.2 THE CONCEPT OF SELECTIVITY AND POTENTIAL DISTORTION OF COMPETITION

A specific and difficult requirement to assess is 'selectivity', especially material selectivity (territorial selectivity refers to a specific part of the entire territory of a

[227] Case T-143/12 *Germany v Commission,* ECLI:EU:T:2016:406, p. 35-36-37;
[228] Biondi A., *State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid,* in Common Market Law Review 50, p. 1719-1744, Kluwer Law International, 2013; Herwig C. H. Hofmann, Micheau C., *State Aid Law of the European Union,* Oxford, 130, 2016;

[229] Case C-124/10 *Commission v EDF,* ECLI:EU:C:2012:318, p. 85-86-97;

Member State[230]). Aids granted to *certain* undertakings or the production of *certain* goods. In the Case *Adria-Wien Pipeline[231],* the Court found selective, an energy tax rebate available only for undertakings primarily active in the manufacturing of goods and not those active in other economic sectors, such as services. The environmental purposes pursued by the State policy, could not justify a different treatment for different suppliers. In this case, the Court followed a three-step test[232] identifying the objective of the measure, the legal and factual comparison between undertakings and a justification given by the nature and logic of the system. Conversely, the Court did not find material selectivity in *British Aggregates[233],* where the UK Government imposed a levy on "virgin aggregates" instead of recycled aggregates, that were exempted. Here the Court upheld the Commission decision clarifying that the objective pursued, in absence of harmonization, was the encouragement to use recycled products as an environmental policy, excluding the presence of an aid. Moreover, the objective-oriented approach of material selectivity must comply with a reasonable implementation of the measure: in *Kimberly Clark[234],* the social policy aim granted discretion to the Fond National de l'Emploi, in determining the amount of financial contributions. For statutory schemes the Court stated the difficulty to assess selectivity, because they normally are of a general application, so the distinction between addressees must not be discretionary[235]. Taking into consideration the economic structure of that particular Member State, the Commission before identifies the reference framework, secondly the objectives pursued and lastly, their logic implementation. Even though, the

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[230] See Jones A., Sufrin B., *EU Competition Law. Text, Cases, and Materials, Sixth Edition,* Oxford, 2016, pp. 53-54;

[231] See Case C-143/99, *Adria-Wien Pipeline and others v Finanzlandesdirektion für Kärnten*, ECLI:EU:C:2001:598, para. 48;

[232] Bartosch A., *Is There A Need For A Rule Of Reason In European State Aid Law? Or How To Arrive At A Coherent Concept Of Material Selectivity?* in Common Market Law Review 47, p. 729-752, Kluwer Law International, 2010; Biondi A., *State Aid is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid,* in Common Market Law Review 50, Kluwer Law International, 2013, pp. 1719-1744;

[233] Case C-487/06 P, *British Aggregates v Commission*, ECLI:EU:C:2008:757, para. 82;

[234] Case C-241/94, *France* v. *Commission* ("*Kimberley Clark*"), ECLI:EU:C:1996:353, para 24;

[235] See Bartosch A., *Is There A Need For A Rule Of Reason In European State Aid Law? Or How To Arrive At A Coherent Concept Of Material Selectivity?* in Common Market Law Review 47, p. 729-752, Kluwer Law International, 2010;

Commission follows a three-step analysis, Biondi[236] suggests that there is not a clear distinction between objective-oriented and effects-oriented approach while assessing a measure, but selectivity represents a facet of the equality principle, imposing on Member States to refrain from adopting arbitrary conducts. In *DutchNOX*[237] the Court underlines the prerogative of a Member State in establishing its policies priorities, so that selectivity depends on the national goal to be achieved.

As for the two last intertwined elements, the distortion of competition and the effect on trade between Member States, the Commission has to prove that a contested aid is capable of distorting and having an effect on competition and trade. The Commission takes in its Notice on the notion of State Aid of 2016[238] for assumed, that an aid in a liberalized market, has the consequences of distorting competition[239]. In *CSTP Azienda della Mobilità SpA v Commission*[240], a limited liability company providing local public transport services based on a regional and municipal concessions, was granted a public service compensation which the Commission successfully motivated, how it could have affected not only the local market. Since various Member States started opening the public transport services to other undertakings, established in other Member States, after 1995, CSTP started operating in 1998, finding itself in competition with those undertakings.

2. ARTICLE 106(2) TFEU: PROMOTING SOCIAL SERVICES IN A LIBERALIZED MARKET

Article 106(2) TFEU represents a fundamental provision for Member States to balance national interests, public interventions in the economy and the application

[236] See Biondi A., fn 10;
[237] Case T-233/04, *Netherlands v Commission (NOx),* ECLI:EU:T:2008:102;
[238] Point 190;
[239] The Commission starts a formal procedure to verify the notified measure under article 108 TFEU; in the end the Commission may adopt a positive decision declaring the aid compatible, a negative decision declaring the aid incompatible and, if already conferred, it must be recovered, a conditional decision declaring the aid compatible requiring to apply some conditions.
[240] Case C-587/18 P, *CSTP Azienda della Mobilità SpA v European Commission,* 4 March 2020, ECLI:EU:C:2020:150;

of EU law, particularly antitrust law. The possibility to perform Services of General Interest and specifically, social services, entails the necessary direct or indirect[241] financial support given by the State, to pursue a general interest.[242] In this sector, it is difficult to assess the concept of advantage for those undertakings entrusted with a service of general interest and not considering it as an incompatible aid.[243] The form of aid granted to public services often, has the form of a public service compensation, bearing into consideration to exclude the strengthening of a market position[244]. Member States can compensate the costs incurred to relieve undertakings entrusted with a mission of general interest. If the compensation granted constitutes an aid under article 107 TFEU, to what extent could it be considered compatible under article 106(2) TFEU? Under the procedural point of view, it changes the obligations Member States should follow, because in lack of "aid" it is not required to notify the measure to the Commission nor to fulfill the standstill obligation of article 108 TFEU.

It is relevant to recall the application of paragraph 1 of article 106 TFEU, because it addresses the Member States to refrain from granting and creating a dominant position in a liberalized market, via public undertakings, and also, subject public undertakings or undertakings entrusted with a special or exclusive right, to the Treaty provisions on competition[245]. Paragraph 2 of article 106 TFEU[246], that seems

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[241] See Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010, p. 461;

[242] See Gallo D., Mariotti C., *L'art. 106(2) TFUE Quale Deroga Antitrust Atipica,* in Dizionario Sistematico del Diritto della Concorrenza, Lorenzo Federico Pace (ed), Wolters Kluwer Italia, 2020, pp. 159-160;

[243] See Prosser T., *The Limits of Competition Law. Markets and Public Services,* Oxford University Press, 2005, p. 142;

[244] See Brancasi A., *La tutela della concorrenza mediante il divieto di aiuti di Stato,* in Diritto pubblico 1-2, Il Mulino, 2010, pp. 195-245;

[245] Art. 106(1): *In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109;*

[246] Art 106(2): *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union*.

to constitute an exception[247] to paragraph 1, confers the possibility to offset the competition rules, as well as State Aid provisions, if the performance of the task is obstructed and made impossible by their application. In any case, what normally constitutes an abuse of dominant position is justified by a legitimate public policy, considered the specific public interest pursued, in the entrustment of an SGEI[248]. The first case dealing with the obstruction was *Sacchi*[249], (related to the Italian television monopoly) in which it was adopted a strict competition approach, without the application of any proportionality test, that characterized the Court's approach until the 90s. In *Ahmed Saeed*[250], the Court clarified the concept of "obstruction" and limited the application of paragraph 2 to indispensable and transparent obligations. The burden of prove left upon Member States was difficult to see justified under paragraph 2 and consequently, the application by the Court was restricted. The *Corbeau*[251] case constitutes a turning point for the application of the derogation: a Belgian entrepreneur infringed the Belgian postal monopoly, which had the exclusive right in collecting, carrying and distributing all correspondence, by collecting all mails and distributing them by 12 p.m., if the address was in the same district. Moving from a *prima facie* illegality of the monopoly in force, paragraph 15 of the judgement explained that, the postal service was entrusted with an SGEI mission (considering all characteristics such as available to all users, provided to the whole territory, at uniform tariffs and similar quality conditions); moreover, the analysis passed on the necessity to exclude or reduce competition to perform the task of general interest and the benefit of *economic acceptable conditions,* with the possibility to offset less profitable activities against the profitable operations. The Court evolves the concept of obstruction from the

[247] See Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005, pp. 175-176;

[248] See Davies G., *Article 86 EC, The EC's Economic Approach to Competition Law, and the General Interest,* in European Competition Journal, 5(2), 2009, pp. 549-584;

[249] Case C-155/73 *Sacchi,* ECLI:EU:C:1974:40;

[250] Case C-66/86 *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung nlauteren Wettbewerbs e.V.,* ECLI:EU:C:1989:140, point 58;

[251] Case C-320/91 *Corbeau,* ECLI:EU:C:1993:198, p. 15-16;

impossibility to perform the task, to a more flexible concept of jeopardizing the economic stability of the undertaking[252].

Issues arise when competition law should be applied to entities administering social protection regimes for workers and this was challenged in *Albany.*[253] This textile company Albany International, set up with a private insurer a pensions scheme to give its workers up to 70% their total final salary, leaving the ordinary pension fund for the textile sector. In 1990 the fund refused to grant an exemption to compulsory contributions to Albany, due to its continuous preference to its scheme. The preliminary questions, referred to the Court, regarded the possible breach of competition rules made by the grant of exclusive rights and compulsory affiliation to the fund. The Court acknowledged the compulsory affiliation to the fund entailed the grant of an exclusive right to collect and administer the contributions[254], placing the fund in a dominant position under article 102 TFEU[255]. The pension fund failed to satisfy the prevailing demand and accordingly, undertakings willing to enhance the pensions scheme, could not entrust the management of the scheme itself, to a single insurer, deriving from the exclusive right granted. However, the Court applied the proportionality and necessity test for the justification of article 106(2) TFEU: if the exclusive rights had been removed, wealthier companies would have negotiated better pensions schemes with private insurers; the sectoral fund would

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[252] See Baquero Cruz J., *Beyond Competition: Services of General Interest and European Community Law* in De Burca G., *EU Law and the Welfare State,* Oxford University Press, 2005; Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010; Hancher L., *Case C-320/91, Procureur du Roi v Paul Corbeau, Judgement of the full Court, 19 May 1993,* in Common Market Law Review 31, p. 105-122, 1994;

[253] Case C-67/96 *Albany,* ECLI:EU:C:1999:430, p. 76-87;
[254] *Ibid*. para. 90-97;
[255] Art 102 TFEU: *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:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) 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;

have been left the "bad risks" insured for a higher cost. This would have disadvantaged small companies, provided that the sectoral pension fund was shaped with a high degree of solidarity, so it was performing an essential social function. The Court also underlined the role and absolute competence of Member States in shaping their social policies and the level of social protection to ensure. In conclusion, an exclusive right to be justified under article 106(2) TFEU must pursue a legitimate aim, with the entrustment of an SGEI mission and a measure objectively tailored to achieve the goal.

Based on the principle of solidarity, universal coverage and non-commercial objective, (economic) social services may receive public compensation for the obligations performed, without application of the State Aid rules. The Court ruled on the acceptable level of compensation, which does not become an unfair advantage within the meaning of article 107 TFEU[256]. For instance, in *Chronopost*[257], it should be taken into consideration the costs for the public sector pursuing a structural policy.

2.1 THE PRE-ALTMARK SITUATION: THE LACK OF A SYSTEMATIC APPROACH

Until early 2000s, judgements of the Court were divided between the State aid approach and the Compensation approach[258]. Under the State aid approach,

[256] See Davies G., *Article 86 EC, The EC's Economic Approach to Competition Law, and the General Interest,* in European Competition Journal, 5(2), p. 549-584, 2009; Lynskey O., *The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligation,* in World Competition 30(1), p. 153-168, Kluwer Law International, 2007;

[257] Joined Cases C-88, 93 and 94/01 P *Chronopost SA and La Poste v Commission,* ECLI:EU:C:2003:388, para. 41;

[258] Lynskey O., *The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligation,* in World Competition 30(1), p. 153-168, Kluwer Law International, 2007; Szyszczak E., *Financing Services of General Economic Interest,* in The Modern Law Review Limited, p. 982-992, 2004; Gallo D., *Services of general economic interest and state aid in EU law: the challenges for the Court of Justice after the "Almunia Package"*, ch. 8, in Marquis M., Cisotta R. (eds) *Litigation and Arbitration in EU Competition Law,* Edward Elgar Publishing, 2015 p. 185-186; Cremona M., *Market integration and public services in the European Union,* Oxford University Press, p. 103-117, 2011; Sauter W., *The Criterion of advantage in State Aid: Altmark and services of general economic interest,* TILEC Discussion Paper, Tilburg University, 2014, pp. 7-8;

compensations conferred an advantage and, if the other elements of article 107 TFEU were present, they had to be classified as State aid. Conversely, the Compensation approach adopted a gross definition of aid (Lynskey): if the compensation is proportionate to the costs, the undertakings do not receive an advantage. The Commission and the Court of First Instance tended for the State Aid approach in a line of cases including *FFSA* and *La Poste,* where a tax concession to La Poste, the French postal service, for the carrying of the public service obligation was challenged to constitute State aid. The Court considered the application of article 106(2) TFEU but it was rejected, without considering the compensation approach. In the same year, the Court dismissed the assessment of the Commission in *CELF*[259]*,* an organization receiving grants, from the French Ministry of Culture, to spread worldwide the French language and literature. In this case, the Court justified the grants under article 106(2) TFEU, but the application of the justification could not have relieved Member States from the procedural obligations (prior notification and stand-still obligation required by article 108(3) TFEU[260]).

Already in the *ABDHU*[261] judgment, there was an early application of the compensation approach for provisions granting public compensation to undertakings, collecting or disposing of waste oils. The Court did not classify them as aid, but consideration for the services performed. However, the emblematic *Ferring*[262] case constituted the occasion to establish, whether public compensation could be considered State aid. In the French market of pharmaceuticals distribution, a public service obligation was imposed on wholesale distributors to maintain a stock of specified medicinal products to be available in their local area. Trying to avoid a distortion of competition, a sales tax on pharmaceutical laboratories which

[259] Case C-332/98 *French Republic v Commission, Aid for the Coopérative d'Exportation du Livre Français (CELF),* ECLI:EU:C:2000:338, para. 24-25;
[260] Art 108(3) TFEU: *The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision;* See also Szyszczak E., *Financing Services of General Economic Interest,* in The Modern Law Review Limited, p. 982-992, 2004
[261] Case C-240/83 *ADBHU,* ECLI:EU:C:1985:59, p. 5-6;
[262] Case C-53/00 *Ferring SA v Agence centrale des organisations de securité sociale (ACOSS)*, ECLI:EU:C:2001:627, para. 20-27;

could distribute their products directly to pharmacies. The Court was challenged by the laboratories and to deliver its judgement, it followed the suggestion of Advocate General Tizzano, who urged the Court to apply the compensation approach. Indeed, the Court did not find an aid, the tax was considered to be a legitimate compensation for the additional costs suffered by wholesale distributors in discharging their PSO. The Court of First Instance rejected the compensation approach stating that the measure failed to identify its causes and aims. Advocate General Tizzano, addressed this issue in his opinion[263], replying that the imposition of a PSO and the related compensation, cannot be considered "separate matters as they are two sides of the same public measure which is intended to guarantee that public interests of primary importance are satisfied". After this case, the Court was criticized to be more focused on the aims, rather than the effects of the measures; also for AG Tizzano, the effects are the determinant part of State intervention in the market, because public measures must remain economically neutral and preclude distortions of competition[264].

The Commission, but also other Advocates General were against this line of reasoning adopted by the Court, especially in the fundamental *Altmark* case, which introduced legal certainty in classifying compensations as State aids or not State aids.

3. THE *ALTMARK* CASE

The Altmark[265] judgement gave the Court the possibility to resolve the theoretical disputes amongst the application of the State aid rules for Services of General Economic Interest and give a rule of reason, resulted in four conditions to be fulfilled, to be applied in other cases, due to the lack of horizontal secondary

[263] Opinion of Advocate General Tizzano in C-53/00, *Ferring,* 22 November 2001
[264] *Ibid*. 58;
[265] Case C-280/00 *Altmark Trans GmbH and Regierungsprasidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht,* ECLI:EU:C:2003:415;

legislation[266]. In case of a SSGI, when it represents an ESSGI, it can be included in the scope of SGEIs and subject to the conditions laid down in the sentence; when dealing with SSGIs, which are not economic in nature, the Commission allows compensations to small and local services performing a social function, even excluding a prior notification.

In Germany, the Law required for passenger transport in the public transport sector, a license to be obtained to secure certain transport services. As consideration, the licensed undertaking must carry out specific obligations and have financial stability. The Altmark company saw its license renewed, while one of its competitors (whose license was denied) challenged the unlawful grant of this license, based on the claim that Altmark would have not been financially stable, if it had not received public subsidies. The German Court referred to the ECJ preliminary questions concerning the concept of advantage in article 107 (ex 87) TFEU. Advocate General Léger affirmed in his opinions[267], his preference for the state aid approach, which regarded public service compensations as an aid under article 107 TFEU, to be analyzed only to verify their compatibility with the Treaty. In His opinion, there were no reasons to treat PSO differently, on the contrary, to be considered as a "service to the public purchased by the State" (Sinnaeve[268]). Instead, the Court followed the compensation approach, like in the *Ferring* judgement, but conditioned by four cumulative criteria: 1) The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans, are clear from the national legislation and/or the licenses at issue, in the main proceedings; 2) The parameters on the basis of which the compensation is calculated, must be

[266] See Sauter W., *Public Services in EU Law,* Cambridge University Press, p. 140-141, 2014; Lynskey O., *The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligation,* in World Competition 30(1), p. 153-168, Kluwer Law International, 2007;

[267] Two opinions were aubmitted by AG Léger, Opinion of AG Léger in C-280/00, *Altmark Trans GmbH,* delivered on 19 March 2002.

[268] Sinnaeve A., *State Financing of Public Services: The Court's Dilemma in the Altmark Case,* in European State Aid Law Quarterly, 2(3), 2003, p. 355;

established in advance in an objective and transparent manner, to avoid the conferral of an economic advantage, which may favor the recipient undertaking over competing undertakings; 3) The compensation cannot exceed what is necessary to cover all or part of the costs incurred, in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such condition is essential to ensure that the recipient undertaking is not given any advantage, which distorts or threatens to distort competition by strengthening the undertaking's competitive position; 4) Where the undertaking, which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which, a typical undertaking, well run and adequately provided with means of transport, so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, considering the relevant receipts and a reasonable profit for discharging the obligations[269]. These conditions, if fulfilled, qualify State financing for discharging PSOs as a mere compensation, exempted from State aid provisions[270].

The legal consequences after the Altmark judgement, delivered on 24 july 2003, directly affected the application of article 106(2) TFEU. It seemed that the Court wanted to mitigate the flexibility of the compensation approach followed in *Ferring,* with the application of the four *Altmark* criteria. Although a clarification for public compensations had been presented in *Altmark,* in the same year, the Court did not apply the Altmark conditions in *GEMO*[271]*,* criticized by Advocate General Jacobs. The case focused on the alleged advantage granted to farmers and slaughterhouses, that were exempted from a meat tax imposed on supermarkets and not small retailers. This tax was used to finance a public service of collecting and disposing of animal carcasses and slaughterhouse wastes. Advocate General

[269] See Case C-280/00 *Altmark Trans,* para. 89; 90; 92; 93.
[270] No prior notification to the Commission is required under article 108(3). See Jaeger T., *Services of General Economic Interest,* ch. 8, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021;

[271] Case C-126/01 *GEMO*, ECLI:EU:C:2003:622, p. 21;

Jacobs[272] proposed an interesting third theory for public services compensations, the so-called "quid pro quo approach"[273]. The reasoning was based on how clearly general interest obligations were defined, where the link between the financing measures and clearly defined public obligations was direct and manifest (e.g. public contracts awarded after a public procurement procedure). In that case, the compensation approach should be applied. Whether the link is not manifest and direct, nor the general interest obligations clearly defined (e.g. a general tax exemption for public undertakings), in that case the state aid approach should be followed.

Also, the Commission practice after *Altmark* was rigorous, seldomly found applicable the four criteria. In *BBC Digital Curriculum*[274]*,* the first case decided after *Altmark,* the Commission did not find met the fourth criterion provided that, there had not been a public procurement procedure and the UK Authorities failed to supply the Commission any information able to determine, whether the costs corresponded to those of a typical undertaking. After the Commission went on considering the compatibility of the state aid measures under article 106(2) TFEU, implying the possibility to receive aid exceeding the costs of an efficient undertaking, as long as the aid met the requirements of paragraph 2. AG Léger feared the progressive deprivation of the essential role of article 106(2) TFEU and a legal basis to apply it. All four Altmark conditions wanted to help defining the concept of advantage, stated in article 107(1) TFEU and left further application of article 106(2), in case certain conditions were missing. The first criterion, aims at ensuring transparency and prevents Member States from defining ex post imposed public service obligations, clearly identified from the start. The second condition refers strictly to the state aid procedural rules and requires Member States to define

[272] Opinion of AG Jacobs in C-126/01 *GEMO,* delivered on 30 April 2002;

[273] See Renzulli A., *Services of General Economic Interest: The Post-Altmark Scenario,* in European Public Law, 14(3), Kluwer Law International, p. 401, 2008; Lynskey O., *The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligation,* in World Competition 30(1), p. 153-168, Kluwer Law International, 2007; Sinnaeve A., *State Financing of Public Services: The Court's Dilemma in the Altmark Case,* in European State Aid Law Quarterly, 2(3), p. 351-364, 2003; Prosser T., *The Limits of Competition Law. Markets and Public Services,* Oxford University Press, 2005, pp. 554-555;

[274] Case N-37/03 *BBC Digital Curriculum* [2003] OJ C271/47;

in advance the methods of the compensation calculations. The efforts made in Altmark, give concerns about the possible economic changes (e.g. financial crisis) in that particular State and possible adjustments mechanisms, preventing this condition to appear static and rigid[275]. The third criterion moves on to the substantial part of the second condition. It takes into consideration not only the incurred costs but also a reasonable profit for discharging the PSO. However, the judgement remains silent on how to determine the "reasonable" profit. The fourth criterion guarantees to avoid over-compensation with a binary choice: an open tender procedure or the costs which a well-run undertaking would have incurred in discharging the PSO. As for the public procurement procedures, the Commission's policy acknowledged[276] the usefulness of an open, non-discriminatory and transparent tender in determining compensation for PSOs. Without a public procurement procedure, it is introduced a sort of efficiency criterion, where a beneficiary must prove that the costs would have been incurred by any other efficient undertaking entrusted with the same mission. Nevertheless, it was discussed how to manage the efficiency test, when there is not any efficient undertaking providing a benchmark. Another possible situation that might occur when a Member State entrusts an SGEI mission to an operator, without a public procurement procedure, it could become necessary an in-depth analysis, if the market already offers a similar service and it is not exclusive or it could be plausibly predicted that the service will be offered in the future; in this case the Commission might ask modifications to offer the same service with a less distortive effect on competition or at a minor cost[277]. Generally, it occurs in the public sector to have no examples of other well-run undertakings, concluding that, where there was not a public procurement procedure, the last Altmark condition is not fulfilled.

The practical consequences of Altmark, marked the possibility to apply article 106(2) TFEU when the parameters are not met. The distinction between procedural

[275] See Renzulli A., *Services of General Economic Interest: The Post-Altmark Scenario,* in European Public Law, 14(3), Kluwer Law International, 2008; Szyszczak E., *Financing Services of General Economic Interest,* in The Modern Law Review Limited, 2004, pp. 982-992;

[276] XXIst Report on Competition Policy, 1991, para. 248;

[277] See Joined Cases C-431/19 P and C-432/19 P *Inpost Paczkomaty sp. z o.o v Commission and Inpost S.A v Commission,* 17 December 2020, ECLI:EU:C:2020:1051, para. 7;

and substantial criteria, leads to the possible subsequent application of article 106(2) TFEU, when the substantive ones are fulfilled. When assessing the level of compensation granted, the Commission introduced a two-fold test firstly, calculating the net costs incurred and secondly, the direct and indirect revenues the beneficiary receives from the public service.

In the absence of a Commission decision confirming the measure or finding it compatible, still no legal certainty was provided after the Altmark ruling. National jurisdictions could have alternatively judged fulfilled as non-fulfilled the four conditions, leaving the last word to the Commission, after the notification. Being aware of the risk to interpret more stringently the parameters, the Commission took initiative and launched a package on State aid and the financing of SGEIs.

4. THE MONTI-KROES PACKAGE

In 2005 the Commission issued the State Aid Action Plan[278] aiming to reform the state aid rules to encourage Member States to contribute to the Lisbon Strategy by better focusing aid, improving the competitiveness of EU industry, creating sustainable jobs, ensuring social and regional cohesion and improving public services. The economic tools used in antitrust and mergers, were supposed to support the policy objectives in state aid cases[279] and help to detect market failures and the actual effects of a measure. The first initiative resulting from the Action Plan was the Monti-Kroes Package[280]. This package had a tendency to a more

[278] COM(2005) 107 final STATE AID ACTION PLAN Less and better targeted state aid: a roadmap for state aid reform 2005–2009;

[279] See Hildebrand D., *Modernisation of State Aid Rules in the European Union Application of Economic Concepts and Principles,* ch.1, in Schoenmaekers S., Devroe W., Philipsen N., *State aid and public procurement in the European Union,* Intersentia, 2014, pp. 2-19;

[280] Lynskey O., *The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligation,* in World Competition 30(1), p. 153-168, Kluwer Law International, 2007;

flexible application of the Altmark criteria, introducing a "Frequently Asked Questions" devoting more space to SSGIs[281].

Called after the then Commissioners for Competition, the Monti-Kroes package made a distinction between public measures not to be considered state aid; measures permitted under article 106(2) TFEU and not subject to notification; and measures possibly compatible with the internal market under article 106(2) TFEU but to be notified to the Commission. Based upon the same article, the package comprises three measures: a Commission Decision[282], a Community Framework[283] and an amendment to the Transparency Directive[284].

The Commission Decision clarifies the conditions under which compensation to companies, for the provision of public services is compatible with article 106(2) TFEU and does not need prior notification to the Commission. The Decision distinguishes two categories of measures, with no need to be notified: 1) compensation of less than EUR 30 million, to undertakings which have an annual turnover falling below a specified threshold (100 million); 2) compensation to hospitals and social housing activities (small-scale public services[285]) qualified as SGEI, regardless of whether it surpasses the thresholds set out in the text. The Commission's interpretation of the Altmark judgement elaborated an idea on how qualify compensation as an aid: the State operates like a market investor, if it compensates the minimum possible amount, therefore there is no aid; if the State

[281] *Commission Staff Working Document, Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest,* SEC(2010) 1545, p.22-23;

[282] Commission Decision 2005/842 of 28 November 2005 on the application Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI, [2005] OJ L312/67.

[283] Commission Framework of 29 November 2005, Community Framework for State aid in the form of public service compensation, [2005] C 297/04.

[284] Commission Directive 2005/81/EC of 28 November 2005, amending Directive 80/723/EEC on transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [2005] L 312/47.

[285] See Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021, pp. 324-325;

confers more than the minimum but enough for a full-coverage, it would give an aid but compatible under article 106(2) TFEU[286].

The Community Framework establishes the possibility to apply article 106(2) TFEU if the Altmark criteria are not fulfilled; due to the risk of distorting competition the measures must be notified to the Commission and a possible justification can still be reached.

The amendment to the Transparency Directive requires that companies receiving public compensation but operating on both private and public markets, must have separate accounts for their different activities to verify the absence of over-compensation.

Notably, the package collected the different necessities of legal certainty and reliability in the field of public compensation with an alleviating effect, followed by the action of the ECJ in its case law, applying the Altmark criteria and giving a teleological interpretation of article 106(2) TFEU.

5. The *BUPA* case

What the post-Altmark heritage left upon the Commission practice, in controlling state aid, was a double test for public compensation measures not fulfilling the four Altmark criteria: firstly, the interpretation under article 107(1) TFEU and then, a potential justification under article 106(2) TFEU, with the threshold set out in the package.

The case was a detailed judgement (350 paragraphs[287]) by the Court of First Instance concerning the statutory scheme designed to equalize risks between parties offering private health insurances in Ireland, which did not constitute state aid. The judgement put under analysis both the Altmark criteria and article 106(2) TFEU.

[286] Coppi L., *SGEI Compensation in the Almunia Package – An Economics View,* in European State Aid Law Quarterly, 2, 2012, pp. 37-50;

[287] Case T-289/03, *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v. Commission of the European Communities,* Judgement of the Court of First Instance of 12 February 2008.

Generally, a risk equalization system means compensating insurance companies for the disadvantage of having customers older and more inclined to medical expenses, hence insurers with a better customer profile make payments to those with less healthy customers. In Ireland, the system was conceived to work based on several factors calculations, such as age, sex, medical treatments costs, resulting in an ex post compensation on the actual costs. BUPA challenged this scheme, before entering into force, because it would have involved significant payments to its competitors, therefore its activation was suspended. The Commission applied the same reasoning of the *Ferring* case, concluding the system should be regarded as a compensation to undertakings entrusted with a public service obligation, necessary to maintain stability on the market, so no state aid was implied, or it could be justified under article 106(2) TFEU. BUPA claimed to annul the Commission Decision for failing to comply with the four Altmark criteria, but the Court respectively rebutted these considerations, in particular, even if the Commission applied in a different way the *Ferring* and *Altmark* tests, due to the disparities between the systems, it did not fail to comply with the requirements. The positive result for the Commission came only because the Court reinterpreted the criteria. Most of the competence was found to fall under the Member States prerogatives and freedom to define, what an SGEI mission is. There was not an explicit act of entrustment, but it could be recognized indirectly from the statutory obligations placed upon private insurers: open enrolment, lifetime cover, community rating and minimum benefits[288]. Even though the services were not for the whole community, the Court held the compulsory nature of the service, a sufficient condition in regards of universality[289]. Moreover, products differentiation and price competition represented objectives of risk sharing and solidarity; the universality does not mean all potential users should have the resources to take advantage of all services (the "luxury cover") and services should be free of charge, without consideration of economic profitability (paragraph 203). The existence of an SGEI mission depends on the invariable conditions, applicable to all beneficiaries, without exclusions[290].

[288] The Irish Health Insurance Act, 1994.
[289] Para. 192 and ff.
[290] Caggiano G., *La disciplina dei Servizi di Interesse Economico Generale. Contributo allo studio del modello sociale europeo,* Giappichelli, 2008, p. 57;

In applying the third Altmark criterion (necessity and proportionality) the Court held that, the Commission used a different approach from Ferring and Altmark, but the purpose of the criterion was followed as the elements were specific, clearly identifiable and capable of being controlled[291], despite the lack of a direct link between the costs produced by the performance of an SGEI obligation. Concluding the analysis under Altmark, the Court also found the fourth criterion met by the Commission stating the neutrality towards inefficiencies. The overall conclusion was that a simple application of the Altmark conditions could not fit the special features of the SGEI in question and its particular functioning[292].

Alternatively, the Court examined article 106(2) TFEU to address the necessity and proportionality, under this point of view and it held that the Commission's assessment was limited to the manifest error, without failing to prove the equalization scheme was necessary to maintain stability and economically acceptable conditions. Finally, the system did not have a deterrent effect among other competitors in order to distort competition.

The Court flexibility[293] in applying the Altmark criteria, demonstrated in BUPA, made legitimately ask whether Altmark had been overruled or extended; it seems to be a different approach towards private risk equalization schemes, concerning private insurers, with a more flexible definition of the criteria than to the public insurance schemes, falling under the traditional meaning of universal service[294].

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[291] Para. 237 and see Schettino A., *La disciplina sugli aiuti di Stato nel settore sanitario: quali effetti e, soprattutto, quale applicazione?* in Il Diritto dell'Unione Euroepa 1, pp. 115-144, 2016;

[292] See Merola M., Ubaldi T., *The 2011 Almunia Package and the Challenges Ahead: Are the New Rules Flexible Enough to Fit the Wide Veriety of SGEI?* In European State Aid Law Quarterly 2, p. 17-35, 2012; Sauter W., van de Gronden J., *Taking the Temperature: EU Competition Law and Health Care*, in Legal Issues of Economic Integration 38 n°3, p. 213-241, Kluwer Law International, 2011;

[293] Sauter W., *Case T-289/03, British United Provident Association Ltd (BUPA), BUPA Insurance Ltd., BUPA Ireland Ltd v. Commission of the European Communities, Judgement of the Court of First Instance of 12 February 2008,* in Common Market Law Review 46, p. 269-286, Kluwer Law International, 2009; Sauter W., *Public Services in EU Law,* Cambridge University Press, 2014, p. 142-143;

[294] For the public/private divide see Gallo D., *I Servizi di Interesse Economico Generale: Stato, Mercato e Welfare nel Diritto dell'Unione Europea,* Giuffré Editore, 2010; Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021, pp. 316-317;

However, in 2008 the Irish Supreme Court judged the risk equalization system, unconstitutional and the judgement was not appealed. BUPA remained a singular case, opening a breach in the Altmark case law to ensure a balance in social security and solidarity-based cases.

6. The Almunia package

In 2009, the Member States were asked to report on the implementation of the Monti-Kroes package. The results demonstrated concerns among the members especially for the notion of economic activity, the effect on trade, how to control overcompensation and the relationship between State Aid and Public Procurement[295]. Most Member States also asked to raise the de minimis threshold especially for SSGIs[296]. Well, to introduce a more structured framework for SGEIs, and in line with and amending,[297] the previous Monti-Kroes package[298], the Commission issued another package in December 2011, with new state aid rules for SGEIs, called the "Almunia" Package (after the then Competition Commissioner Joaquin Almunia), which entered into force in January 2012. This new legal framework had the objective to clarify the rules, reduce the administrative burden on local and small SGEIs and take into account the different ways of organizing European public services in the EU[299]. Commissioner Almunia stated that, efficient public services are necessary to realize values such as solidarity, social cohesion and social justice[300]. It is a great opportunity to consolidate the social market economy principle. The societal background of the package was a

[295] See, Szyszczak E., *Soft Law and Safe Havens*, ch. 13 in Social Services of General Interest in the EU, Neergaard, Szyszczak, van de Gronden, Krajewski (eds.), Springer, pp. 332-334, 2013;
[296] The process of consultation started in March 2011 and was completed in July 2011. The results are available on the Commission's web site: http://ec.europa.eu/competition/consultations/2010_sgei/reports.html
[297] Buendia Sierra J. L. and Munoz de Juan M., *Some Legal Reflections on the Almunia Package*, in European State Aid Law Quarterly 2, 2012, p. 63-81; Righini E., *The Reform of the State Aid Rules on Financing of Public Services, paving the way towards a Clearer, Simpler and more diversified Framework,* in European State Aid Law Quarterly 2, p. 3-16, 2012;

[298] After the Monti-Kroes package had expired in 2011, the Commission started a consultation among stakeholders and the result was the adoption of the new package.
[299] Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy: "*Reform of the State aid rules for Services of General Economic Interest"* SPEECH/11/901.
[300] *Ibid.*

world shaken up by the 2008 financial crisis and a need to use social services as a tool to mitigate the social impact on citizens, in danger to be left out from society: exactly how economic services had been fundamental to increase jobs and efficient allocations of resources.

Hence, the package consists in the SGEI Communication[301]; a horizontal Decision[302]; a Commission Regulation[303] on *de minimis* aid and an EU Framework Communication[304].

All these acts are supplemented by the Commission Staff Working Document's Guide to the application of the EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular, to social services of general interest[305].

The Monti-Kroes package applied to SGEIs the same procedure verifying the absence of overcompensation, conversely, this package contributes to better understand the definition of SGEIs, the difference in economic and non-economic SGIs, how Member States enjoy a wide discretion in defining this concepts and the Commission's limited power to identify only manifest errors of assessment, and a progressive simplification for those SGIs exempted from prior notification to the Commission[306]. The formal review begins with the fulfilment of the four Altmark conditions and later, whether the aid could be compatible under article 106(2)

[301] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8/04;
[302] Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest OJ 2012 L 7/13;
[303] Commission Regulation on the application of art. 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest OJ 2012 C 8/23-27;
[304] Communication from the Commission, European Union framework for State aid in the form of public service compensation OJ 2012 C 8/15-22;
[305] Commission Staff Working Document "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" SWD(2013) 53 final/2;
[306] Buendia Sierra J. L. and Munoz de Juan M., *Some Legal Reflections on the Almunia Package*, in European State Aid Law Quarterly 2, 2012, p. 63-81; Coppi L., *SGEI Compensation in the Almunia Package – An Economics View,* in European State Aid Law Quarterly, 2, p. 37-50, 2012; Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021, p. 326;

TFEU. The package fixes three methods of compensation: the costs must be calculated using the allocated costs methodology; the profit must be based on the typical profit of the sector and the benefits must be netted out of the compensation granted.

The Communication clarifies that state aid rules are applicable only to economic services and gives specific rules for the public powers, social security, health care and education[307]. The exemptions brought by the package extends the scope to social needs and social inclusion[308]. A more flexible approach is adopted to address SGEIs under which Member States enjoy full discretionary powers[309]. The difference between economic and non-economic is just illustrative and not exhaustive, because the definition is related to the case, taken into consideration, and susceptible to change[310]. Whether the market is liberalized or not, the potential in distorting EU competition derives from the possible reduction for undertakings to offer their services on that market. The 2013 Guide on SGEI, specifically states that, even if there is only one operator within a region or local community, the interest for other operators from other Member States, willing to provide the same service cannot be excluded[311]. Even the undertaking dimension does not affect the possible application of state aid rules, provided that no threshold is set to determine the absence of trade distortion, but the Communication recognizes local and small businesses as not affecting trade between Member States. In the end, for the entrustment of the SGEI mission, the first Altmark condition requires an act of entrustment[312], the Communication does not give an exhaustive list of "acts", but it suggests to identify the nature, the scope and the general operational conditions. After the BUPA case, in social services, the Commission could use a more

[307] Communication see fn. 89, points 28-29-30;
[308] Coppi L., *SGEI Compensation in the Almunia Package – An Economics View,* in European State Aid Law Quarterly, 2, 2012, pp. 37-50;

[309] Merola M., Ubaldi T., *The 2011 Almunia Package and the Challenges Ahead: Are the New Rules Flexible Enough to Fit the Wide Veriety of SGEI?* In European State Aid Law Quarterly 2, 2012 pp. 17-35;

[310] *Ibid.*, par. 2;
[311] See Commission Staff Working Document point. 36; also fn. 39, Case C-587/18 P, *CSTP Azienda della Mobilità SpA v European Commission;*
[312] *Ibid*., para. 3.2

extensive interpretation of the Altmark criteria, especially for the "act" of entrustment, which had been accepted as implicit in that case[313]. There is a possibility to limit the wide discretion enjoyed by Member States in shaping an SGEI mission, which is the EU harmonization exercised in that specific field, surely the possibility for Member States is to impose more obligations but not less[314].

The *de minimis* Regulation deals with SGEIs serving an economic mission, which could be exempted due to the small and local dimension, although they meet the same features of article 107 TFEU, they are not able to affect trade between Member States[315]. It is not necessary a prior notification to the Commission but, the aid must be under EUR 500.000 per undertaking, over three fiscal year. The Commission has amended the *de minimis* Regulation 1998/2006, fixing higher monetary requirements to allow possible compensations for additional costs, deriving from the SGEI performance[316]. Apparently, a higher amount does not refer potentially to more money, the new Regulation ceilings apply to guarantee below the granted loan, which reduces the possible compensation amount for the undertaking[317]. Plus, the Regulation is applicable only if it is possible to calculate the gross grant *ex ante,* without a prior risk assessment[318]. The Regulation does not require other elements for its application, so it leaves unanswered the issue of social services not compliant with the Decision.

The Decision has the aim to simplify rules on state aids, including SSGIs, and the possibility for economic SGIs to conduct social services, keeping separate accounts to demonstrate the exact amount of compensation (the same condition requires in the Monti-Kroes package). The Decision applies to compensations granted to SGEIs in the medical care, hospital and social needs services, not exceeding an annual amount of EUR 15 million[319]. This amount reduces the amount required in

[313] See para. 5 on the BUPA Case.
[314] See Buendia Sierra fn. 88, p. 70.
[315] See article 2 of the Commission Regulation 8/23.
[316] Commission Regulation 1998/2006 of December 2006 on the application of articles 87 and 88 of the Treaty to *de minimis* aid OJ L379/5.
[317] See Article 3.2; see also Buendia Sierra J. L. and Munoz de Juan M., *Some Legal Reflections on the Almunia Package*, in European State Aid Law Quarterly 2, 2012, p. 77;
[318] Schoenmaekers S., Devroe W., Philipsen N., *State aid and public procurement in the European Union,* Intersentia, 2014;

[319] Article 2(1)(a)(b)(c) of the Decision;

the Monti-Kroes package which was EUR 30 million. These compensations must be considered compatible within the internal market and no prior notification is necessary, if the conditions are met[320]. Moreover, the Decision does not specify the nature of the body entrusted with the mission, in particular those entrusted with a social service (health and medical care, social needs), it is not mentioned the public or private nature, neither the exclusive performance of social services. Especially, in the field of social security or supplementary pension schemes, it is up to the Member States to interpret in a broader sense the list of the Decision, bearing into consideration that the Commission considers it exhaustive[321]. Article 4 touches the first Altmark criterion, the act of entrustment, which after the BUPA case, causes confusion over its structure and content. What counts is the clear indication of the obligations, duration, the entrusted undertaking and the description of the compensation mechanism and its parameters. Social services under the Decision, are covered by less legal certainty, but it is avoided the application of efficiency requirements, typical of economic services, indeed, it is important to rely on the flexibility demonstrated in the case law, recognized to the Altmark criteria.

The last document issued, is the Framework Communication. The categories of services not falling under the scope of the *de minimis* Regulation and the Decision, might fall under the Framework Communication. Here, it is possible to find large-scale aids, also having important cross-border effects. This Framework introduces stricter and more precise requirements for aids falling under its scope: the entrustment act, the duration period, compliance with the Transparency Directive, absence of discrimination and possible methods of compensation; the new method introduced is the "avoided net cost", the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations (which is the difference between the net cost for the provider, operating with the

[320] Article 3;

[321] Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, p. 328 in Hancher L., Ottervanger T., Slot P.J., *EU State Aids,* Sweet&Maxwell, 2021; Gallo D., *Services of general economic interest and state aid in EU law: the challenges for the Court of Justice after the "Almunia Package"*, ch. 8, in Marquis M., Cisotta R. (eds) *Litigation and Arbitration in EU Competition Law,* Edward Elgar Publishing, 2015, p. 194.

PSO and the net cost for the same provider, operating without the PSO[322]); the expected costs and revenues must be listed in the entrustment act, based on reasonable parameters. A long duration entrustment or a service already present in the market may cause, serious distortive effects in competition and violate the Union's interests[323]. The Framework explicitly prohibits the Member states to confer public service obligations to services already present in the market and provided satisfactorily, under normal market conditions, limiting the margin of discretion enjoyed by national authorities[324].

However, the most controversial and difficult prerequisites introduced, are the prior public consultation, before the entrustment and the respect of the EU public procurement rules[325]. The public consultation is required to better understand and fulfill the users' needs and assess if the service could be provided by the market (the presence of a market failure[326]). In a recent case, the Court states the importance of this prior public consultation and defines it appropriate to analyse all operators' interests[327]. The EU is responsible to choose a body in charge of the consultation[328].

As for the public procurement procedures, the Communication is not clear on the automatic compatibility with the state aid rules, whether the procedure has been correctly followed nor, if the public procurement procedure is sufficient to avoid overcompensations[329]. It is also unclear whether undertakings entrusted with an SGEI mission without having participated to a tendering procedure, are performing an incompatible service under EU law[330].

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[322] For a recent application of the different methods in calculating the amount of compensation granted see Case T-316/18 *Prvnì novinova spolecnost a.s. v European Commission,* 15 October 2020, ECLI:EU:T:2020:489, para. 244-280;
[323] Para. 2.9(55)(56); of the Framework Communication;
[324] See Melcher M., *Article 106(2) TFEU in Case Law. Internalization and Customized Balancing of Welfare and Market Interests,* in Austrian Law Journal, vol. 6(1), 2019, p. 8;
[325] Para. 2.2 and 2.6;
[326] Sauter W., *Public Services in EU Law,* Cambridge University Press, 2014, pp. 44-45;

[327] Joined Cases C-431/19 P and C-432/19 P *Inpost Paczkomaty sp. z o.o v Commission and Inpost S.A v Commission,* 17 December 2020, ECLI:EU:C:2020:1051, par. 37;
[328] Para. 2.2(13)(14);
[329] Para. 2.6(19);
[330] See Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, p. 322; Coppi L., *SGEI Compensation in the Almunia Package – An Economics View,* in European State Aid Law Quarterly, 2, p. 43; Sinnaeve A., *What's New in SGEI in 2012? – An Overview of the Commission's SGEI Package,* in European State Aid Law Quarterly, 2, p. 363, 2012; Righini E., *The Reform of the State*

In 2020, the Commission highlighted the procedure following the Framework criteria in Decision 2020/1411[331]; in order to evaluate the SGEI, it applied this reasoning:

1. The aid was granted for a genuine and correctly defined SGEI in the meaning of Article 106(2) TFEU?
2. The operation of the SGEI was entrusted to the undertakings concerned by way of one or more acts specifying:
    1. the content and duration of the public service obligations;
    2. the undertakings entrusted with these obligations and the territory concerned;
    3. the nature of any exclusive or special rights assigned to the undertakings;
    4. the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation;
    5. the arrangements for avoiding and recovering any overcompensation?
3. The amount of compensation did not exceed what was necessary to cover the net cost of discharging the public service obligations, including a reasonable profit?[332]

The Commission launched an open public consultation on the evaluation of SGEI rules applicable to health and social services and the SGEI *de minimis* Regulation, which lasted between 31 July 2019 and 4 December 2019. The purpose was to obtain the view of all stakeholders (citizens, public authorities) on the efficiency, coherence and relevance of the 2012 SGEI Package[333]. In particular, the

Aid Rules on Financing of Public Services, paving the way towards a Clearer, Simpler and more diversified Framework, in European State Aid Law Quarterly 2, 2012, p. 10;

[331] Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (notified under document C(2020) 1108 OJ L332/20

[332] See Nicolaides P., *A Rare Case of Altmark-compliant SGEI,* in State Aid Uncovered, Lexxion the Legal Publisher, December 2020;

[333] See Factual Summary of the contribution received in the context of the public consultation on the evaluation of SGEI rules applicable to health and social services and the SGEI de minimis

Commission wanted to see whether the package fulfilled the objectives to simplify compatibility and reduce administrative burdens on Member States, for social services, and if the provisions matched the Case Law developed by the Court. It has been almost ten years since the entry into force of the package and it appears the same legal issues endure and the Commission application practice, because of its limits, does not resolve doubts in SGEIs provisions[334]. In the latest *Poste Italiane* judgement[335], where a measure requiring agents responsible for collecting the Italian municipal real estate tax, to hold an account with Poste Italiane and to pay a related fee, constitutes State aid under article 107 TFEU, it is underlined how the first Altmark condition still places conceptual problems; also the Commission's limitation to manifest error, still an uncertain definition; in particular, problems arise in the public procurement procedures, the act of entrustment, the obligations performed and the compensation amounts.

7. Public Procurement and social services of general interest (at-a-glance)

Public procurement generally represents the procedural framework followed by the State to pursue public interests, placing the State itself as a contracting party. When a Member State decides to externalize a SSGI, precisely an ESSGI, entrusting it to a third party, when there is a cross-border element to the procurement the TFEU rules apply. The fourth Altmark condition requires also the employment of a public procurement procedure to respect equal treatment and non-discrimination among other undertakings. Conferring an SGI, generally include a cooperation with other public authorities, an in-house system, authorizations to private parties through concessions or exclusive rights. Public procurement rules apply when a third private party is involved and when the service is provided through an in-house system with

Regulation Ares(2020)1915104 – 03/04/2020 available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11835-Evaluation-of-State-aid-rules-for-health-and-social-services-of-general-economic-interest-and-SGEI-De-Minimis/public-consultation_it;

[334] See Merola M., Cogoni A., *State aid and SGEIs: (Almost) Nothing New Under the Sun (C-434/19 and C-435/19 Poste Italiane),* in Kluwer Competition Law Blog, March 2021;

[335] Joined Cases C-434/19 and C-435/19 *Poste Italiane SpA v Riscossione Sicilia SpA and Poste Italiane SpA v Agenzia delle entrate – Riscossione,* 3 March 2021, ECLI:EU:C2021:162;

a distinct legal entity, two conditions must be fulfilled: the control over the third entity exercised by the public authority must be similar to that exercised over its own departments; the core activities of the entity must be carried out with the controlling public authority. The way through which a Member State decides to attribute an SGI is irrelevant for the application of the state aid rules, if the State decides to award a service, through public tendering, the public procurement rules apply. The aim of public procurement as well as direct provision, is always to avoid distortions in competition and ensure transparency among competitors[336]. The fourth Altmark criterion gives a special place to the awarding of SGEIs through public procurement procedures, as a pre-determination of the analysis, which would be conducted in its absence: "the costs of a typical undertaking, well run and adequately provided with means".

The European framework for public procurement includes three main directives, issued in 2014: Directives 2014/23/EU; 2014/24/EU and 2014/25/EU[337]. Under Directive n°24, SGEIs can be awarded without following the public procurement procedures, if the national procedure ensures transparency and equal treatment of competitors. Particularly, in the social field, the Directive does not deal with the funding of these services and respects Member States discretion in awarding these services as stated in article 14 TFEU and Protocol n° 26.

In any case, article 75 provides that contracting authorities must share their intentions to award a public contract for social services through a prior notice or information, setting out the respective requirements; article 76, requires that Member States in following a public procurement procedure need to guarantee quality, continuity, accessibility, affordability and availability of the service.

[336] See See Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, p. 340-344; Bovis C., *Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?* In European Law Journal 11(1), p. 79-109, Blackwell Publishing, 2005; Schoenmaekers S., Devroe W., Philipsen N., *State aid and public procurement in the European Union,* Intersentia, 2014, pp. 2-19;

[337] Directive 2014/23/EU of the European Parliament and the Council, of 26 February, on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council, of 26 February, on public procurement; Directive 2014/25/EU of the European Parliament and of the Council, of 26 February, on procurement by entities operating in the water, energy, transport, and postal services sectors;

Subsequently, article 77 allows Member States to reserve the participation for organizations exclusively for contracts in the health, social and cultural sectors. Four cumulative conditions must be met: the objective of the organization is to pursue a public service mission; profits must be reinvested in the organization's objective; the management or ownership structure are based on participatory principles; the organization has not been awarded a contract, for the services concerned, within the previous three years.

8. Other possible derogations: the different assessment of articles 107(2) and 107(3) TFEU

After the analysis of the SGEI package, before the Commission had issued these legislations, it would have been possible to derogate article 107 TFEU, thanks to paragraph 2 and 3 of the same article[338]. The difference between these two paragraphs resides, in the discretion enjoyed by the Commission in granting the

[338] Article 107 TFEU: "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. 2. The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission".*

derogations[339]. Aids falling under paragraph 2 are automatically considered compatible within the internal market. The list of aids is exhaustive. For "social aid" the Treaty intended to help consumers from poor backgrounds, under two conditions: the aid must be granted to individual consumers and without discrimination related to the origin of the products. Problems arise when the aid is granted in the same sectors listed in the 2012 SGEI Decision: it could be thought to apply the Decision which does not exclude from its scope aids granted directly to consumers, but from the 2013 SGEI Guide, it can be inferred that vouchers granted to certain categories of individuals to access SGEIs is possible when all conditions laid down in article 107(2)(a) TFEU are fulfilled.

Conversely, in paragraph 3 the Commission has a margin of discretion in assessing the aid, taking into consideration the social and economic context in exam. Letter *a)* of paragraph 3 refers to situations related to underdevelopment and unfavorable to grow, which are below the Union standards. Letter c) of paragraph 3[340] has been applied to ESSGIs instead of article 106(2) TFEU, when a Swedish aid scheme wanted to encourage the construction of special housing for elderly people[341]. Sweden did not design this service as a compensation for an SGEI and the Commission assessed the compatibility under article 107(3)(c): necessity to achieve the result; proportionality to the aims; non-discriminatory effects; the result could not be achieved by the market alone. Also in Germany, in 2017, the Commission had to assess the conversion of an old hospital into a nursing home for assisted living and medical practices[342]. It was necessary due to the impossibility to recover the full investment costs. For cases dealing with social security schemes, the

[339] See Schutze R., *European Union Law,* Cambridge University Press, 2018, p. 774; Jones A., Sufrin B., *EU Competition Law. Text, Cases, and Materials, Sixth Edition,* Oxford, 2016, p. 637.
[340] Article 107(3) TFEU: *"The following may be considered to be compatible with the internal market: (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;"*
[341] Commission Decision of 7 March 2007, Sweden: Measures to promote certain house building (N 798/06);
[342] Commission Decision of 2 June 2017, Germany: Investment aid for nursing home and connected facilities in the city of Dahn (SA.34655) (2017/NN);

Commission allows aids necessary to equalize the rate of social contributions borne by private competitors of national institutes[343].

9. TEMPORARY FRAMEWORK FOR STATE AIDS IN THE CURRENT COVID-19 OUTBREAK: A CONCRETE APPLICATION OF ARTICLE 107(3)(B) TFEU

Under article 107(3)(b) TFEU[344] aids given as a remedy to a serious disturbance in the economy of a Member State may be declared compatible with the Internal Market[345]. In applying this provision, the Commission enjoys a wide margin of discretion involving the assessment of economic and social nature which must be made within the EU, rather than at a national level. The project for which the aid is granted must promote the Union's interests and it must be necessary to achieve the result. Especially, the Commission assesses the exceptional nature of the situation, the direct link between the damage and the disaster and the absence of overcompensation[346].

Over the year 2020, the coronavirus pandemic has imposed on the Member States economic systems, legal adjustments, which also affect the State Aid legislation. Due to the impact of the virus and the limited EU budget, the Commission already clarified that, support to undertakings will come most of all from the Member States. The Commission issued on 19 March 2020 a State aid Temporary Framework[347], based on article 107(3)(b) TFEU[348], whose validity has been prolonged until 30 June 2022, including recapitalization measures. This particular measure is provided as a last-resort measure under specific conditions, not

[343] Commission Decision of 6 July 2010, Finland: Compensation to Arctia Shipping Oy with respect to supplementary pension rights of its employees (N 152/2010);
[344] Art. 107(3)(b): *"The following may be considered to be compatible with the internal market: (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State";*

[345] See Schepisi C*., Aiuti di Stato…o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel "commune interesse europeo",* in Rivista della regolazione dei mercati, 1, 2021, pp. 110-147;
[346] See Rosanò A., *Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law,* in European Papers, vol. 5(1), 2020, pp. 621-631;
[347] Communication from the Commission on a Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final, 19 March 2020
[348] (b) "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State"

exceeding what is necessary to ensure viability and restore the capital before the COVID outbreak (it was set to expire on 31 December 2021)[349]. Otherwise, Member States can choose to notify their measures under article 107(2)(b) TFEU provided that the Commission has a narrower discretion in assessing the compatibility of the aid[350]. This Temporary Framework has already been amended six times since its adoption, to adapt the legal context to the emergency[351]. It is applicable to all notified measures since 19 March and non-notified aid since 1 February. The Commission also guarantees to ease the procedural obligations of the Member States, as an example: direct grants, repayable advances and tax advantages[352]. As an example, the Commission found necessary, proportionate and appropriate a direct grant scheme for e-Health services at home in the Netherlands. To continue to provide social support services, health care services and youth care, e-health applications were the only solutions for these services[353]. However, the Framework aims to mobilize State resources, liquidity and access to finance. In January 2021, the Commission approved a direct grant to the University of Liège, in Belgium, to invest in the production of COVID's related products. Even though the University performed an economic activity, the Commission held that the positive effects on fighting the crisis outweighed the negative effects on competition.[354]

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[349]Communication From the Commission, *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, see amendment C(2021) 8442 final.

[350] See Nicolaides P., *Application of Article 107(2)(b) TFEU to COVID-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence,* in Journal of European Competition Law & Practice, 11(5-6), 2020, pp. 238-243;

[351] Communication from the Commission Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2021/C 34/06);

[352] See Buendia J.L., Dovalo A., *State Aid versus COVID-19: The Commission Adopts a Temporary Framework,* in European State Aid Law Quarterly, 1, 2020, p. 3-7*;*

[353] Commission Decision of 3 April 2020, Netherlands: Direct grant scheme for e-Health services at home under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (SA.56915 (2020/N); see also Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, p. 353;

[354] Decision of the Commission of 12 January 2021, Belgium COVID-19: Investment aid for the production of COVID-19 related products (Université de Liège) (SA.60198) (2020/N)). See Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, pp. 114-115;

Recently, with the Commission Regulation 2020/1474[355], the Commission amended the *de minimis* Regulation for undertakings entrusted with an SGEI, providing the extension of its validity until December 2023 and the evaluation of State aid in the form of public service compensation, applicable to health and social services, taking into consideration all measures related to SGEIs. Point 4 establishes the aim of granting legal certainty to undertakings entrusted with an SGEI and avoiding the increase of administrative burdens, continuing to consider compensations within EUR 500.000 over any period of 3 fiscal years, not State Aids. In case of ESSGIs, included *mutatis mutandis* within the scope of SGEIs, these provisions should be applicable.

The Commission also stated that, it will examine with high priority, all measures notified to recover and restore from the COVID-19 pandemic, supporting a sustainable recovery, and urges Member States to give full priority to social policies and welfare to not leave anyone "behind"[356]. The Temporary Framework contributes to give a coordinated European response to the COVID-19 crisis and it will be important to observe whether the EU institutions would have a less intrusive role in the compliance of national funding within the Internal Market[357]. The flexibility required by the current emergency represents the fundamental criterion to read and apply the State Aid rules which can support citizens and undertakings.

[355] COMMISSION REGULATION (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic; the last amendment doubled the ceilings of aids granted to undertakings.

[356] The European Union decided to answer the extremely difficult situation created by the emergency through the Next Generation EU. An ambitious program which envisages reforms and investments to support and accelerate the digital and climate transition along with a better gender equality and territorial cohesion. Each Member State is required to present the national recovery and resilience plan (NRRP) which will fulfill the missions established by the Next Generation EU. One of these missions especially targets social services, social housing, social inclusion to level disparities and marginalization.

[357] See Gallo D., *Public Services and EU Competition Law. The Social Market Economy in Action,* Routledge-Giappichelli, 2021, pp. 118-119;

10. CONCLUSIONS

The Treaty provisions on Competition law and particularly, State Aid law, find relevance in the field of Services of General Interest in the moment the simple application of these rules obstructs the performance of a mission of general interest. Particularly social services play a key role in pursuing and establishing the Social market economy as a pillar of the European Union. The elements of State Aid assessed in judicial proceedings appear as an illegitimate aid conferred upon certain undertakings in the form, most of all, of public compensations for carrying public obligations or even direct capitalizations, but also favorable tax regimes and other forms of what is considered an advantage. Article 106(2) TFEU constitutes a possible derogation for those measures conferring an exclusive or special right to those undertakings entrusted with a SGEI mission; however, the simple application of this article led to different approaches concerning State Aids either more flexible or more rigid. The Court of Justice took action to give a structured and systematic approach to better assess whether a public service compensation might have been compatible within the Internal Market, in the famous Altmark case. Still, the Commission was urged, given the difficulties met in various cases by the Court (e.g. the BUPA case), to provide a general framework, issuing both hard and soft law acts, taking into consideration the wide margin of discretion enjoyed by Member States in the field of SGIs. The Monti-Kroes and the Almunia packages were the results of several years of implementation and debates around State Aids and SGEIs, Member States wanted clear and precise thresholds as well as legal certainty on the definitions, which still today, in present cases, are not always sure.

CHAPTER 3
SOCIAL SECURITY AND STATE AID LAW

1. FROM SOLIDARITY TO A EUROPEAN SOCIAL MARKET ECONOMY: A MULTILEVEL STRUCTURE SEARCHING FOR COORDINATION

From the analysis carried out in the previous chapter, it has been outlined the possibility to finance social services without triggering the application of EU competition law provisions, in the light of pursuing a mission of general interest, deriving from a solidaristic goal. It has also emerged the difficult cohabitation of economic and social interests in this matter and the understanding of each other's boundaries.

Solidarity is the key element to exclude the economic nature of the activity, the qualification of an entity as an undertaking and the factor which outweighs the protection of market-oriented behaviors[358]. Taking a step backward to the evolution of the social policy in the EU, it is interesting to retrace, how solidarity evolved in the process of the European Integration and the strategy adopted to pursue it.

Starting from the Economic Integration process, solidarity has been combined with different meanings at EU level and it is important to follow the evolution from apparently a simple derogation to a fundamental pillar of the Internal Market. There are different aspects of solidarity that make it more than a simple derogation from the Treaty provisions on competition, it can be seen as a moral responsibility or a duty for Institutional actors or even a fundamental value, such as social justice, featured in the Constitutional Treaty[359]. Even before in the Schuman Declaration in 1950[360] envisaged the creation of the European Union through concrete

[358] See Smejkal V., *Competition Law and the social market economy goal of the EU*, in International Comparative Jurisprudence 1, 2015, pp. 33-43;

[359] See Ross M., *Promoting Solidarity: from public services to a European Model of Competition?* in Common Market Law Review 44, pp. 1057-1080, Kluwer Law International, 2007; In the Treaty Establishing a Constitution for Europe Preamble "The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity"; see also the Charter of Fundamental Rights Chapter IV – "Solidarity";

[360] Declaration made by the French Foreign Minister Robert Schuman on 9th May 1950 in which the creation of the European Community of Steel and Coal (ECSC) is first spoken of; see also Biondi

achievements and a *de facto* solidarity, meaning a solidarity between Member States, having in mind that economic prosperity would have led to better wages, efficient welfare services and social mobility, because of the spill-over effect[361]. The Community since its origins got involved only to ensure the establishment of the Common Market, leaving the Member States to manage their welfare services as their primary responsibility. Conceiving the market as the legitimacy of the European Economic Constitution, met the challenge of the idea of "embedded liberalism", already theorized by Karl Polanyi[362], within which the market is embedded with the social, but in order to avoid a "commodification of labour" (Polanyi), it is necessary a counter movement, a political and regulatory response to protect social relations.

The unparallel development of the economic and social policies in the 80s and 90s required a firm action to reduce the gap between the market and the social dimension: the Lisbon Strategy (2000-2010 and 2010-2020), preferring an open method of coordination through the States' different welfare systems, the financial breakdown in 2008 and the uncertain approach of State aid Law, however contributed to enlarge the gap. Still today, it is largely debated whether the social market economy pursued by article 3 paragraph 3 TEU[363] was a concrete goal to achieve and whether a European Social Model could be stabilized.

A., Dagilyte E., Kucuk E., *Solidarity in EU Law. Legal Principle in the making*, p. 2, Edward Elgar Publishing, 2018;

[361] See Craig P., *The Lisbon Treaty. Law, Politics, and Treaty Reform*, ch. 8, p. 289, Oxford University Press, 2010;

[362] See Polanyi K., *The Great Transformation: The Political and Economic Origins of Our Time,* Beacon Press 2001, 1994; See also Ashiagbor D., Unravelling *the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration*, in European Law Journal, 19(3), Blackwell Publishing, 2013, pp. 304-305; Giubboni S., *Diritti sociali e mercato: la dimensione sociale dell'integrazione europea*, Bologna, Il Mulino, 2003, pp. 84-85;

[363] 3(3) TEU: *"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".*

1.1 SOLIDARITY AND EU TREATIES: FROM THE TREATY OF ROME TO THE 2000 LISBON STRATEGY

The premises to the Treaty of Rome were to establish a common market to facilitate the allocation of resources and impede either the States or the private parties, to prevent the creation of a level playing field through competition and state aid provisions[364]. As a result of the political compromise between the moderate representatives of the labor and the capital[365], the creation, at a European level, of an efficient market alone could have been sufficient to ameliorate welfare systems at a national level. The Treaty provisions devoted to the social policy were articles 117 and 118 EEC, establishing the duty of the Commission to promote cooperation between Member States in the social field, in particular, working conditions, social security and labor law. Under the negative integration obligation, Member States were required not to maintain in force revenue-making monopolies entrusted with an SGEI mission, unless its performance was obstructed, in law or in fact, by the Treaty provision on competition (article 90 EEC, the first version of article 106 TFEU).

During the 70s and 80s, a long debate among scholars created a conflict between those favoring a self-regulating market, without any intervention of the State, avoiding the regulatory competition[366], and those who insisted in filling the gap with strong social policies, pursuing social cohesion, because even the six founding Members had rudimentary welfare systems at the time of the EEC Treaty. In 1986 the Single European Act confirmed the opposition between national and European social and employment policies, giving a minimum harmonization to health and safety of workers, to prevent unfair competition.

After this long discussion, the Treaty of Maastricht accorded to the Commission some competence in the area of citizenship (articles 17-21 EC), social policy

[364] See Craip P., fn. 4, pp. 289-290;
[365] See Hemerijck A., *Changing Welfare States,* ch. 8 *Escaping the Double Bind of Social Europe*, p. 299, Oxford University Press, 2013;
[366] An overview on how the debate developed described in Scharpf F., *The European Social Model: Coping with the challenges of diversity*, in Journal of Common Market Studies (JCMS), 40(4), pp. 645-670, Blackwell Publishers, 2002;

(articles 136-145 EC), employment (articles 125-130 EC) and public health (article 152 EC). Here, article 16 EC[367] recognized SGEIs as "shared values" of the Union and their role in promoting social and territorial cohesion. If article 16 EC raises SGEIs among the common values of the Union, article 10 EC[368] reinforces the obligation upon Member States (as Institutional actors), to reach those missions at a national level[369]. Member States were brought to accept the convergence towards a single set of supranationally established standards.

Rebalancing the social and economic dimensions was an important stage of defining the internal market strategy, indeed in 1997 the Commission's Single Market Action Plan[370] carried out the importance of considering the Internal Market as not "simply an economic structure" but a tool which included social and health provisions along with labor law measures. The whole debate resulted with the Lisbon European Council[371] in reshaping and reforming the goals of the Union, adopting the so called "Lisbon Strategy".

1.2 THE LISBON STRATEGY AND THE OPEN METHOD COORDINATION (OMC)

To give concrete application to the social dimension of the European Union, the European Council along with the European Commission took action to reach a supranational coordinated system among the Member States.

The Treaty of Amsterdam in 1997 encompassed a new Employment Title (article 117[372]): at the Amsterdam summit emerged the need to renew the European social

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[367] Art. 16 EC: *"Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions."*

[368] Art. 10(1) EC: *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

[369] See Ross M., p. 1061; Craig P., p. 295;

[370] Action Plan for the Single Market, SEC(97) 1, final, 18 June 1997;

[371] Lisbon European Council, 23-24 March 2000;

[372] Article 117(1): *"The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and*

policy agenda based on the respect and integrity of national systems. Since the incorporation of this Title, the Union showed a proactive approach in promoting social policies.

In 1997, there was also the extraordinary European Council Meeting in November, to tackle the growing problem of unemployment. Member States were aware of their need to involve the Union in their shared problems of unemployment and social policies, to find common solutions and draft uniform legislation[373]: it gave birth to the European Employment Strategy.

Few years later, this action took form into the Lisbon Strategy: a political agenda for the future Europe, giving equal weight to employment and social cohesion and economic growth, by 2010. The main goal was to maintain national European welfare systems by reforming them. With this overarching framework, after setting out the targets of the Union, the Council established the Social Protection Committee and also the decision to meet every spring to address economic and social questions[374]. The Commission's European Social Agenda[375] was characterized by a tight relationship between the economic growth and social progress, because SGEIs would have been reinforced by high level of social protection.

The Open Method Coordination (OMC) was identified in the strategy, as the best multilevel governance tool to organize and approach Member States' legislations, with interactive benchmarking of national progress towards non-binding common objectives and mutual learning. Around the OMC, there was a commitment to learn by monitoring cross-national progresses, by letting the Member States to choose their best way to implement the common objectives. Moreover, this method of policy-making increases democratic participation and links empirical evidence to a

in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."

[373] See Trubek D., Trubek L., *Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination,* in European Law Journal, 11(3), 2005, pp. 347-348;
[374] Lisbon European Council 23 and 24 March 2000 Presidency Conclusions para. 16-19;
[375] Nice European Council December 2000, Annex I, 8-9;

theoretical framework, without issuing hard law[376]. At the same time, the Commission defines indicators for performance monitoring and convergence, exchanges information and produces compared analysis, while the Council makes recommendations to the Member States. Member States agree to include their progresses in National Reforms Programs (NRPs) which are assessed annually by multilateral peer reviews. Through the OMC, the Union enhances the social dimension and achieves social legitimacy, guiding the policy changes.[377] The process can mobilize all relevant actors, particularly, national stakeholders, social partners and the academic community to modify objectives.

1.3 THE NEW LISBON STRATEGY FOR EUROPE 2020

The multiplication of objectives and the lack of strategic focus raised several critics to the Lisbon Strategy: the Kok Report of 2004[378] highlighted, how the strategy failed to commit Member States to implement the necessary reforms to reach the targets; in 2005 the Commission decided to relaunch the Lisbon Strategy with the Working Together for Growth and Jobs[379], with less emphasis on mutually reinforced social and economic policies and more social inclusion and poverty reduction concerns. Twenty-four integrated guidelines divided into separate areas, constituting the overarching Social OMC with specific objectives. Since that moment, the priority shifted on the concept of labor market *flexicurity,* meaning the creation of more and better jobs through new forms of flexibility and security. It was seen as an instrument of recovery, given the challenges of the European

[376] See Friedrich D., *Policy process, governance and democracy in the EU: the case of the Open Method of Coordination on social inclusion in Germany*, in Policy & Politics 34(2), 2006, p. 369;
[377] See Hemerijck A., fn. 8, pp. 316-318; Daly M., *Whiter EU Social Policy? An Account and Assessment of Developments in the Lisbon Social Inclusion Process*, in Journal of Social Policy, 37(1), Cambridge University Press, 2007, pp. 5-6; Ferrera M., *Amici o Nemici? Integrazione Europea e modelli sociali nazionali,* in Rivista italiana di scienza politica, Fascicolo 1, Il Mulino, 2006, pp. 15-16;

[378] Facing the Challenge. The Lisbon Strategy for growth and employment. Report from the High Level Group chaired by Wim Kok – November 2004;
[379] Communication to the Spring European Council, Working together for growth and jobs. A new start for the Lisbon Strategy. Communication from President Barroso in agreement with Vice-President Verheugen SEC(2005) 192, 193;

employment policies. The European Council adopted eight guiding principle of flexicurity designed to inspire national reforms[380].

To take account of the Europe's changing social reality, in 2007 the Commission organized a public consultation for a new commitment to Social Europe. The result was a Renewed Social Agenda for 2010-2015 with a Communication on Opportunities, Access and Solidarity: Towards a New Social Vision for 21st Century Europe[381]. This consultation gave a vision on the socio-economic restructuring required and how to determine a quick response to rapid socio-economic changes.

Anyway, the Lisbon Strategy came to an end in 2011 with the adoption of the new Europe 2020 Strategy[382]; the legal community doubted the success and results achieved through the Lisbon Strategy[383] but, acknowledged it as the first attempt to correct the market-oriented approach. The new policy strategy was approved in June 2010 by the European Council, it had the explicit commitment to inclusive growth, high employment economy, social and territorial cohesion. Member states are required to set their own national targets to meet the objectives. Most of these objectives remain abstract goals provided that the Union has limited competence and can give just coordination, recommendations and analysis at a national level[384] (Member States such as UK, Sweden and Germany saw this policy coordination as a competence intrusion from the EU), when dealing with social policies. The ability to implement and reach those goals seems a potentiality, which needs more integration and development[385].

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[380] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards Common Principles of Flexicurity: More and better jobs through flexibility and security SEC(2007) 861-862;
[381] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Renewed social agenda: Opportunities, access and solidarity in 21st century Europe SEC(2008) 2156, 2157, 2178, 2184;
[382] Communication from the Commission Europe 2020. A strategy for smart, sustainable and inclusive growth, COM(2010) 2020;
[383] See Hemerijck A., fn. 8, p. 322; Jessoula M., *Europe 2020 and the Fight against Poverty Beyond Competence Clach, Towards Hybrid Governance Solutions?* in Social Policy & Administration, 49(4), 2015, pp. 490-511; Sauter W., *Public Services and the Internal Market: Building Blocks or Persistent Irritant?* in European Law Journal, 21(6), 2015, p. 743;
[384] Articles 151 TFEU and 9 TFEU; Article 6 TEU;
[385] See Ghebrea G., *How Resilient s the European Social Model? Flexibility or/and Security?* in EURINT, 4(1), 2017, pp. 80-81;

1.4 THE SOCIAL DIMENSION OF THE LISBON TREATY

Over the policy coordination given by the Lisbon Strategy, Europe 2020 and the difficulties met by the European Institutions to find a plausible balance between the economic and social sphere, the Lisbon Treaty marked a fundamental step in settling the social market economy framework.

First of all, article 6 TEU, which gives to solidarity binding force and the role of fundamental value: the Charter of Fundamental Rights[386] is primary law and represents one of the foundations of EU law. The Charter contains negative obligations upon the EU Institutions and the Member States, which must respect them in implementing EU law (article 51[387] of the Charter), and positive rights such as social rights. Neither the Charter enhances the EU competence for social rights because Member States negotiated intensively in December 1999, to keep articles general[388] and furthermore, the preamble states that the Charter is a catalogue of already existing rights. Article 36 of the Charter[389] recognizes access to SGEIs and social cohesion but as aspirational values and interpretation, when assessing obstacles obstructing the SGEIs mission. Articles 52 and 53[390] of the Charter also

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[386] Charter of Fundamental Rights of the European Union, [2010] OJ C 83/389;

[387] Article 51 of the Charter: *"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."*

[388] See Paju J., *European Union and Social Security Law*, Hart Publishing, 2017, ch. 7, p. 154; Dawson M., de Witte B., *Welfare Policy and Social Inclusion,* in The Oxford Handbook of European Union Law, Chalmers and Arnull (eds), Oxford University Press, 2015, p. 2;

[389] Article 36 of the Charter: *"The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union"*; analyzed in para. 8.4 ch. 1;

[390] Article 52(3) of the Charter: *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"; Article 53 of the Charter: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or*

limit the possible evolution of the Charter itself stating, it cannot affect or restrict national or international legislation, such as the European Convention of Human Rights, already protecting fundamental rights.

The Lisbon Treaty embodies solidarity in a series of articles: the first one is article 3 TEU[391], which calls upon Member States to increase solidarity and promote economic, social and territorial cohesion. This article represents both the economic and social spheres of the Treaty with its comprehensive definition "social market economy". As a result of the debate on the need to avoid the application of Internal Market provisions, at the expenses of the functioning of the national welfare systems, textual reference to the protection of "undistorted competition" has been omitted, which gave an unseen precedence to the social objectives of the Treaty (Costamagna[392]), but it was offset by "Protocol n° 27 on the Internal Market and Competition", that clarifies how Article 3 TEU ensures a system where competition is not distorted. It is also supported by other provisions in the TFEU, such as article

all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"

[391] Article 3 TEU: *"1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. 4. The Union shall establish an economic and monetary union whose currency is the euro. 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties".*

[392] See Costamagna F., The Internal Market and the Welfare State after the Lisbon Treaty, OSE paper series, n°4, 2011, pp. 5-6;

9[393], which promotes a high level of employment in all its policies, an adequate social protection and social cohesion. It is also important to recall article 14 TFEU and Protocol n° 26 on SGEIs as shared values of the Union. Besides the attention given in the Treaty, it is still perceived as a limit to the application of Internal Market rules rather than solid objectives to achieve.

However, under article 4 TFEU, social policy falls under the shared competence between the Union and the Member States and Title X of the TFEU expressively entitled "Social Policy", contains a specific set of rules and directly claimable rights, but not allowing the EU to do more than "support and complement" Member States' activities in the field of labor and social security law[394]. Member States can be regarded as principal legislators.

Although article 151 TFEU states the Union shall provide employment, improve living and working conditions, adequate social protection and fight social exclusion, most importantly, social security systems are not subject to EU harmonization powers, also recalled in Protocol n°26 in which, non-economic services of general interest are excluded from the scope of the Treaties[395]. An important modification under article 48 TFEU happened because, the EU has its own initiative power[396], without application of the unanimity vote in the decision-making process (instead, when deciding on non-active people under article 21 TFEU coordination is subject to unanimity vote). Anyway, it has a limited scope to social security for migrant workers, focused on coordinating national security systems for workers, who acquire entitlements in different Member States; those inactive are subject to article 352 TFEU that still requires unanimity. After all the codification process the action taken to achieve a social market economy saw a real

[393] Article 9 TFEU: *"In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health";* see also Kucuk E., fn. 3, p. 973;

[394] See Articles 153 and 156 TFEU;
[395] See Smejkal V., fn. 1, p. 34-35; Protocol N° 26 on Services of General Interest TFEU, article 2;
[396] Article 48(1) TFEU: *"The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers;"*

evolution and application trying to coordinate and harmonize solidarity in its different aspects but still limitations are visible and not enough power to ensure a general coordination.

2. THE EUROPEAN FRAMEWORK ON SOCIAL SECURITY

Member States have different national systems which vary on the way citizens become entitle to social security benefits: historically, the two most important division among States are the Bismarck model and the Beveridge model.[397]

The Bismarck model (adopted in Germany, Austria, France and Benelux Countries) refers to the reforms of Bismarck in 1880, aiming to provide healthcare for German workers. It covered those who participated in a professional group, organization, based on the amount of contributions and income, while those inactive were covered by complementary schemes. The cost of the system was divided between the employers and employees and different funds administered the money collected.

The Beveridge model (further developed in Ireland, Denmark, Finland, Sweden, Spain, Portugal, Greece and Italy) was created under William Beveridge in Britain in 1942, at the time of Winston Churchill. It proposed that all working people pay a national insurance contribution to help people who were sick, unemployed or retired and provide a minimum standard of living to everyone. The entitlement was based not on the working conditions but on citizenship. The cost was bear through taxation.

As a result of unparallel development of the economic and social policies, the EU adopted a minimalistic approach to Member States' welfare systems. In the 1984 *Duphar* judgement, the Court of Justice elaborated a formula, which has been repeated over time (also in *Kohll*), "Community law does not detract from the

[397] Ibid.; see also Nistor L., *Public Services and the European Union. Legal Issues of Services of General Interest,* TMC Asser Press, 2011, pp. 18-21; There is also the Nordic model, developed in Sweden, which is universal and financed through taxes; regardless of the working conditions, everyone has a right to certain benefits, pursuing redistribution and social equality.

powers of Member States to organize their social security systems"[398]. However, the Court clarified that Member States should have exercised these powers and complied to the EU fundamental freedoms of movement[399].
The different national social security systems can be generally referred to the different traditions of public services among Member States. The evolution at EU level tried to create an overarching category before with the Services of General Economic Interest (SGEIs) and after with the encompassing category of Services of General Interest (SGIs).

As a particular example of Social services of general interest (SSGI) differentiated by the nature of the activity performed, social security represents systems of insurance that cover the entire life cycle. To cite some of the social security benefits: parental insurance, health insurance, unemployment insurance, work accident insurance, social housing and the pension system. Citizens take part in national security systems by paying taxes and making social contributions. Instead of other forms of insurance, social security is characterized by uniformity, for being compulsory and public.

The legal basis to make coordinated rules in the social security field, despite the different experiences of national systems, can be article 48 TFEU: the Council could enact measures to ensure that Member States' social security scheme do not inhibit labor mobility. Any single Member State can block the process by invoking a danger to an important aspect of its social security system and the process shifts to the European Council, which decides unanimously.

Article 48 TFEU was also used as an interpretation tool by the Court of Justice to promote mobility of workers within the Union[400] and to interpret the objectives of secondary legislation[401].

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[398] Case 238/82 *Duphar v The Netherlands*, 7 February 1984, par. 16; Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, 28 April 1998, par. 17;
[399] Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, 28 April 1998, par. 17;
[400] As an example Case C-67/79, *Fellinger,* ECLI:EU:C:1980:59; as example on the notion of employed and self-employed person Case C-75/63 *MKH Unger*, ECLI:EU:C:1964:19;
[401] As part of the objectives of Europe's Digital Decade, (supporting the digital transformation of public administrations) EU rules on social security coordination call on the Member States to use digital technologies for the exchange, access and processing of personal data required for the application of these rules. The Electronic Exchange of Social Security Information (EESSI) is an IT

2.1 SECONDARY LAW ON SOCIAL SECURITY

Seen as the fundamental tool to accomplish the free movement of workers within the EU framework, Regulation 1408/71 established a system of coordination of the national social security systems. The original construction of the Common Market had the objective to ensure the free movement of persons and remove the related obstacles. Member States remained entitle to determine the content and the limits of their systems on the condition to comply with the fundamental values of Community Law[402]. However, this was already a replacement for Regulation 3/58, which was the first substantial Regulation adopted by the European Economic Community in the field of social security. For the first case requiring an interpretation of this Regulation, the Court of Justice stated that the fundamental value of freedom of movement for workers would have been the ultimate principle in interpreting the law, when the Regulation was not clear enough[403]. The purpose was to affirm the precedence took article 48 TFEU, which steers secondary legislation.

Under Regulation 3/58 the free movement of workers was facilitated by article 12, guaranteeing to a migrant worker to be covered by the legislation of the Member State of destination.

The subsequent Regulation 1408/71 was the real legislative instrument on social security for more than 35 years. It was considered a departure from the Bismarck model of welfare to a more universal "Beveridgean" coverage[404]. For the first preliminary rulings based on this Regulation, the Court of Justice gave a textual interpretation such as in *Callemeyn*[405], dealing with the Belgian social security benefits to the disabled and the notion of "benefits" covered by the Regulation.

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system helping social security institutions exchange social security information across Europe. Further information and related documents can be found here: https://ec.europa.eu/social/main.jsp?catId=1543&langId=en

[402] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community; Paskalia V., *Co-ordination of Social Security in the European Union: an Overview of Recent Case Law*, in Common Market Law Review,46, 2009, pp. 1177-1179;

[403] See Case C-75/63 *MKH Unger v Bestuur*, par. 5;

[404] *Ibid*. Paskalia, p. 1179;

[405] Case C-187/73 *Odette Callemeyn v Belgium,* ECLI:EU:C:1974:57;

Article 2 of the Regulation dealt with the personal scope and the Court of Justice in several cases clarified the reach of it: an "employed person" means a person insured under a national social security scheme, as an application of the insurance principle and current unemployment status[406]; a second category of the personal scope is to be member of a worker's family, entitle to benefits granted on an individual basis in the Member State of employment of the worker; the Court pointed out that the grant of sickness benefits to family members should be conditional on their residence[407].

Article 4 listed the material scope of the Regulation with respect to purely social security benefits and special non-contributory benefits, containing an enumeration of the generally recognized social security risks: sickness, maternity, invalidity, old age, death, unemployment and family. For special non-contributory benefits the Regulation referred to benefits which provide supplementary, ancillary, or substitute cover, against the risks covered by the branches of social security and guarantee a minimum subsistence income; also benefits financed exclusively from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits, are not dependent on any contribution in respect of the beneficiary.

The latest Regulation in this field is Regulation 883/04[408]. It was adopted to solve some criticism raised for Regulation 1408/71 for being complicated and not in pace with national developments. Regulation 883/04 represents the evolution of the previous Regulation, but it continues to establish a complex system[409]. Article 2 defines the personal scope and article 3 the material scope. Article 4 and 5 entail the principle of non-discrimination on the ground of nationality and the principle of

[406] Case C-543/03, *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse,,* ECLI:EU:C:2005:112; this case precized the fundamental principle of being under a social security insurance to fall under the personal scope of the Regulation;

[407] Case C-308/93, *Bestuur van de Sociale Verzekeringsbank v J.M. Cabanis-Issarte,* ECLI:EU;C;1996:169;

[408] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems;

[409] See Paskalia V., pp. 1180-1181; Paju J., *The European Union and Social Security Law,* pp. 31-32;

equal treatment. Article 7 introduces a novelty because it does not give a limitative enumeration of the types of benefits.

The Regulation is applicable if a person moves to another Member State, regardless of the reason for this movement; also people who move after retirement in another Member State. The fundamental fact is the presence of a cross-border situation not limited to one Member State. This criterion was at stake in *Government of the French Community and Walloon Government v Flemish Government Judgement*[410]*,* where the Flemish care insurance introduced insurance for certain costs, occasioned by a state of dependence for health reasons. Initially the insurance was limited to people residing in the Dutch-speaking region. Later, after an infringement procedure, the scheme was extended to people working in the Dutch-speaking region but residing in another Member State. The Court of Justice was asked if this was a purely internal situation and the answer was: the situation was relevant for the Community Law as long as it excluded migrant workers who were thinking of leaving their Country of origin to stay in Belgium, to not give up eligibility for the benefits. The Court militated against any national measure which is capable of hindering or rendering less attractive the exercise of the fundamental freedoms. If these measures have the effect of causing workers to lose the exercise of their rights, they must be classified as obstacles[411]. Even though restrictions may be allowed only if they pursue a legitimate objective, they cannot exceed what is necessary to attain the objective pursued.

3. FINANCING SOCIAL SECURITY: CASE LAW ON SOCIAL SECURITY AND STATE AID LAW

The overall excursus on the origins of social security coordination in Europe leads to the specific topic of this chapter and more generally, the analysis conducted in the first and the second chapter. Despite the Union objective to remove all obstacles to the free movement of workers and the general EU coordination resulting from

[410] Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government Judgement,* ECLI:EU:C:2008:178;
[411] *Ibid*. para. 45-46;

the Treaty provision article 48 TFEU, how Member States organize and manage their national social security system is outside the scope of the Treaties[412]. How the systems get financed may arise issues of compatibility within the Internal market. The source of tension between competition and social policy, has gradually developed since the liberalization process[413]. In one of the first cases in the social security field, *Sodemare*[414] , Advocate General Fennelly explains that social solidarity *"envisages the inherently uncommercial act of involuntary subsidization of one social group by another"*[415]. Pursuing social objectives may lead Member States to withdraw social security operations from the private market. The fundamental notion in cases where State Aid Law applies also in matters dealing with social security systems, is whether the activity may not be considered economic and if the principle of solidarity prevails[416].

The ECJ case law permits to identify three forms of solidarity that exclude the economic activity[417]: the first type is "redistributive solidarity", involving the redistribution of income between those who are wealthy (in terms of finances and health) and those who would be deprived of the necessary social cover. In this context the funds provide cover for all who apply, regardless of their financial status and state of health. The second type is the "financial solidarity" between different social security schemes. Those schemes in surplus contribute to the financing of those with structural financial difficulties (i.e. a risk equalization scheme, which works by taking a portion of all health insurance premiums, through taxation, and putting them into a fund. Then, the fund contributes to finance insurers who have

[412]Case C-159/91 and 160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* ECLI:EU:C:1993:63, para. 6; C-350/07, *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft,* ECLI:EU:C:2009:127, par. 37;

[413] See Gallo D., *Social Security and Health Services in EU Law: Towards Convergence or Divergence in Competition, State Aids and Free Movement?* EUI Working Paper RSCAS 2011/19, p. 2; Smejkal V., *Competition Law and the social market economy goal of the EU,* in International Comparative Jurisprudence 1, p. 36;

[414] Case C-70/95 *Sodemare SA,* ECLI:EU:C:1997:301;

[415] Opinion of Advocate General Fennelly, 6 February 1997, Case C-70/95, par. 28;

[416] See para. 9, ch. 1 for the notion of economic activity and social services of general interest.

[417] Ibid. Gallo D., p. 10; also Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J. (eds.) *EU State Aids,* Sweet&Maxwell, 2021, p. 313; Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 574;

older and sicker customers, making health insurances affordable to everyone). The third type is the "intergenerational solidarity", based on the contributions of active employed workers directly used to finance the benefits paid to the pensioners. These forms of solidarity with the State intervention in the market are necessary because private undertakings run insurance schemes on the basis of the capitalization principle focused on financial investments, which lead to select wealthier and less risky customers. Mostly, Member States may impose public service obligations on undertakings when the market fails to provide what citizens need, through a public act that is sufficiently clear, detailed and compulsory. In addition, Member States must prove the proportionality and necessity to the needs of their citizens[418].

When assessing the nature of the service performed, Social Services of General Interest can be considered in a double division: Economic Social Services of General Interest (ESSGIs) and Non-Economic Social Services of General Interest (NESSGIs). The difference depends on how the Member State decides to organize the service: presence of a competitive market and whether the economic activities may be separated from the non-economic ones.

Non-economic services of general interest (NESGIs) such as statutory and complementary social security schemes, which are solidarity-based are characterized by a series of indexes, elaborated by the Court of Justice through its case law. In *Poucet et Pistre,* the Court declared the insurance system, solidarity-based, because the affiliation was compulsory and both contributions and benefits were fixed by the legislator, regardless the amount of individual contributions[419]. In *Cisal,* a body entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, was recognized its exclusively social function. The non-profit character of the scheme and non-proportionality of the benefits to the insured persons' earnings implies a less-restrictive application of the functional approach by the Court to assess the economic nature. Even though, the insurer may fix a minimum and maximum

[418] See Nicolaides P., *Services of General Economic Interest: Proper Definition and Avoidance of Overcompensation,* in State Aid Hub, Lexxion, January 2019;
[419] Para. 13-15-18;

amount for contributions, the activity is non-economic[420]. When the scheme displays elements of competition such as dependency of entitlements on the contributions paid and the financial results of the scheme, optional membership and for-profit characters, these must not prevail over the social purpose of the scheme, when balancing the economic and social weight.

Also, the possibility to separate economic and social activities may change the final outcome: when the activity is inseparably connected to the social function, it cannot be classified as economic, this was stated in *EasyPay*[421]. The Bulgarian postal operator enabled the payment of retirement pensions and it was asked whether the activity could be deemed part of the management of the public social security service; the social character of the activity must be strictly connected to the national pensions system and in this case, the postal service only handle the payments of retirement pensions[422].

It is not easy for Member States to assess in advance the economic nature of the activity exercised because the Court of Justice interpret the notion on a case-by-case analysis, considering sometimes bodies, despite the presence of solidarity-based elements, as undertakings performing economic activity (*Albany, AG2R)*[423] and other times assessing the same elements as non-economic (*Kattner)*[424].

In judgement T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo,* dealing with the public funding of Italian hospitals, the General Court had to assess whether certain elements of competition could transform a non-economic health care system into economic. Even though the economic services were separated from the social ones, and Casa Regina argued that the Italian health system was not based on the principle of solidarity anymore (patients could exercise

[420] It was permitted in Case C-306/01 and C-355/01 *AOK,* ECLI:EU:C:2004:150, par. 47-55; in C-244/94 *FFSA v Ministère de l'Agriculture,* ECLI:EU:C:1995:392 par. 17-20;
[421] Case C-185/14 *EasyPay v Ministerski savet na Republika Bulgaria,* ECLI:EU:C:2015:716, para. 38-43;
[422] Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 575;
[423] Case C-67/96 *Albany International BV,* ECLI:EU:C:1999:430; Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL,* ECLI:EU:C:2011:112;
[424] Martinovic A., *Solidarity as Key Determinant of Social Security Systems in the EU,* in Revija za socijalnu politiku, 22(3), November 2015, p. 345-346;

choice and economic services were performed), the Court clarified that the system was not profit-oriented and it was controlled by the State. Affiliation was compulsory and benefits fixed by law in proportion to the income of the insured person, and not to the risk[425].

The presence of competition elements encourage operators to improve their management and offer their services in a more efficient way without modifying the nature of the system[426]. This jurisprudence comes from the Slovak-saga (Dovera Case) dealing with the financing of the Slovak social security system and its assessment as an economic activity. The General Court set aside the Commission Decision on allegedly state aid measures granted to the Slovak health insurance company whose sole shareholder was the Slovak State. The decision T-216/15 gave too much significance to the competition elements displayed in the social security system instead of assessing the functional objective pursued by those elements: ensure a degree of efficiency and quality in providing the compulsory statutory social insurance. After the Court of Justice judgement on June 2020, in Casa Regina the General Court applied the same assessment and stated the same principle established in the Slovak Saga[427].

4. CONCLUSIONS

Since the origins of the European Community the Treaties focused on the economic integration of Member States leaving behind the social dimension of the Union. The idea to create an economic community and a level playing field left the solidarity principle more a general principle among Member States, rather than a special objective pursued by the EU. Before the Maastricht Treaty, solidarity was seen as a limit to the application of the Treaty provisions aiming at establishing a liberalized market. It is just, in the 90s, when the process became more than an economic

[425] See T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo,* para. 149; 154-156;
[426] See Nicolaides P., *The Italian Health System is not economic in nature,* in State Aid Hub, Lexxion Publisher, July 2021;
[427] See Chapter 4 for the Case study on The Slovak Saga.

integration, that the social debate among Member States and the Social Partners gained relevance. The competence accorded to the Commission in social rights underlines the willingness to achieve a concretely a European Social Dimension. Thanks to the action taken by the European Council and the Commission in the late 90s social rights started to be seen a goal to attain at a supranational level. Not only the parameter to remove national legislations creating obstacles to the fundamental freedoms but also another goal to enhance the Union's political integration process. Liberalism didn't drag the social cohesion and protection needed at EU level. In this context the early 2000s were focused on creating a social dimension supporting and coordinating the national efforts to complete the integration for the creation of a social market economy. Anyway, as a matter of national law, the EU created a multilayered system to promote some fundamental objectives, always revisited and modified, to avoid an isolation of national welfares. Throughout primary and secondary legislation, it can be found various expressions of different solidarity forms. Different traditions and different organization make a difficult regulation. But from the Member States point of view, the concrete struggle between economic and social spheres, it is visible in cases brought before the Court of Justice, which through interpretation decides whether a national security system can be considered solidarity-based, hence not subject to competition rules. As a matter of public services, social security systems organized at national level raised difficult problems in classifying their nature: economic activities, thus operating as undertakings or non-economic activities falling outside the scope of the Treaty provisions on competition law. Dealing with national systems, state aids provisions challenge the public funding of these systems which in every case where they show both economic and non-economic elements could potentially change the nature of the service performed.

CHAPTER 4
CASE STUDY ON STATE AID AND SOCIAL SECURITY: THE "SLOVAK SAGA"

1. INTRODUCTORY REMARKS

The relationship between social security systems and the EU has been defined by the case law of the Court of Justice stating that "EU law does not detract from the powers of the Member States to organize their social security systems". The reasoning refers to the principle of solidarity. In the long Case dealing with the funding of the Slovak social security system the Commission, the Slovak State and the private operators in the field tried to challenge the definition of "undertaking" and "economic activity" in the social security sector, making the already difficult distinction between the Economic and the Social more complicated. The complicated dialogue between the Commission, the General Court and the Court of Justice showed the different aspects of evaluating competition and social elements in respect to their functions and purposes. The different elements of economic activities and activities pursuing a social function were elaborated over time by the Court and it was accepted the simultaneous presence of both natures as long as they were separable. The decision of the General Court in 2018 to annul the Commission decision on the alleged aid conferred to the Slovak insurer, highlighted how it is still possible to assess a non-economic activity as economic due to the presence of a certain degree of competition (quality, efficiency of the service), and to create a conflict in the case law of the General Court and the Court of Justice, influencing the Commission's assessments of State Aid measures. The main issue is whether providers of non-economic services can compete with each other. The answer given by the Court on 11 June 2020 must be found in the degree of solidarity and competition involved. The relevance of this judgment can also be inferred by the more recent case of July 2021, *Casa Regina Apostolorum della Pia Società delle*

Figlie di San Paolo v Commission (C-492/21 P[428]) because the General Court applied the conclusions elaborated by the Court in the Slovak Saga, restating the general principle on how national social security schemes can be designed and the degree of competition allowed in solidarity-based services: the introduction of competition elements to encourage an efficient and solid management of solidarity-based systems does not change their nature. Universality and solidarity were not affected by these elements which had the only purpose to focus on a well-run company.

2. FACTUAL BACKGROUND

In 1994, Slovak health insurance system changed from a unitary system with one State-owned health insurance company to a pluralistic model where both public and private entities could operate. In 2005 an in-depth reform[429] entered into force and changed the legal status of the entities (profit-seeking joint stock company governed by private law) and the redistribution of the collected health insurance contributions. Ownership regulation allows both the State and private sector entities to be shareholders.

In Slovakia, all health insurance companies (public or private) provide compulsory health insurance for Slovak residents[430], with the possibility to provide voluntary health insurance for those who are excluded from compulsory insurance. Since 2005, Slovak residents can choose among three insurers to obtain a compulsory health insurance package: 1) Všeobecná zdravotná poisťovňa a.s. (VšZP)[431] and Spoločná zdravotná poisťovňa a.s. (SZP), which merged on 1 January 2010 and whose sole shareholder is the Slovak State; 2) Dôvera zdravotná poisťovňa a.s. ('Dôvera')[432], whose shareholders are private sector entities; and 3)

[428] Case in progress; Appeal Case before the General Court T-223/18;
[429] Act N° 580/2004 and 581/2004;
[430] Ibid. Section 3; See European Commission *Your social security rights in Slovakia,* Directorate-General for Employment, Social Affairs and Inclusion, EU 2020;
[431] it was established as the successor of the National Insurance Company (Nàrodnà poist'ovna) of the Health Insurance Fund Administration;
[432] As a result of a merger on 1 October 2005 with another privately-owned health insurance company, the entity is the largest privately-owned health insurance company in Slovakia;

Union zdravotná poist'ovňa a.s. ('Union'), whose shareholders are private sector entities.

Insured persons have the right to opt for a health insurance company of their choice and to switch insurance company once a year. Insurance companies have the legal obligation to admit every person who meets the legal requirements. They cannot refuse a person on the grounds of age, health or disease risks and have to offer basic health insurance at the same price to all persons regardless of these factors. The basic benefit package is not linked to the amount of contributions paid. However, insured persons may add additional benefits of their choice which are offered free of charge as part of the same healthcare package.

The Slovak health insurance system includes a Risk Equalisation Scheme where health insurance companies insuring persons associated with a higher risk receive funds from insurance companies whose portfolio is associated with lower risk.

Following a complaint lodged by Dôvera on 2 April 2007 concerning State aid allegedly granted by the Slovak Republic to SZP and VšZP, the Commission initiated a formal investigation procedure on 2 July 2013.

3. Commission Decision on the measures implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP)[433]

Dôvera, the privately-owned company, lodged a complaint on 2 April 2007 on the grounds of six contested measures allegedly considered state aid: a capital injection by the Slovak Republic into the State-owned company (SZP) between 2005 and 2006; a new State agency with the task to discharge all debts prior to the reform of 2005 of all healthcare facilities and health insurance companies, implementing a discriminatory treatment in the discharging process; a subsidy provided in 2006 to SZP to settle its liabilities; a capital increase in 2010 when VsZP was close to insolvency; several direct transfers, by intervention of the State, to SZP and VsZP

[433] Decision of 15 October 2014 on the measures SA.23008 – 2013/C (ex 2013/NN);

of portfolios of other insurance companies liquidated over time, even though there were other operators interested on the market.

When the parties filed their comments during the investigation, Dôvera stated that the 2005 reform was meant to establish a competitive market and it was pointed out to the fact that insurers compete for healthcare providers through selective contracting and negotiations on price and quality of services. The purely social nature of the system is denied by the possibility to make and distribute profits and the willingness of private investors to invest in operators active in the Slovak compulsory insurance sector[434].

The capital injections and the debt-discharging process highlighted a more favorable treatment of SZP and VsZP than the private operators, adding the failure to demonstrate that the provision of compulsory health insurance is a service of general interest compliant with the Altmark case law and the Commission's SGEI package[435].

On the other hand, the Slovak Republic filed its comments strengthening the position of the compulsory insurance system and clarifying that the system has a social objective, it is based on solidarity (compulsory enrolment, minimum level of benefits guaranteed to all insured persons, contributions are fixed by law and the RES). The goal of the 2005 reform was not to establish a competitive market in the field of social security but to set precise rules for dealing with financial resources allocated to health. The possibility to compete on the quality could be seen as an element that health insurers to operate economically according to a solid management, in the interest of the proper functioning of the system, without changing the non-economic nature of the system as a whole[436]. The Slovak Republic underlined the fact that the reported surplus of VsZP resulted in the creation of a health care fund to cover the use of health care and to finance costly health care covered by the public insurance. It also reported the internal investigation of the Slovak Antimonopoly Office in 2009 which revealed how the

[434] See point 56-57 of SA.23008;
[435] Points 58-59;
[436] Points 65-66;

system was characterized by a high degree of solidarity, health care was provided free of charge and the essential elements are regulated by the State[437].

3.1 The Commission's Assessment of the Measures

At the beginning, the Commission expressed its doubts on the relation and determination of the economic and non-economic nature of the activity concerned and for this reason, it decided to open a formal investigation. After completing the formal investigation the Commission asked the concerned parties to provide more information to assess whether the alleged measures could be considered a violation of the State aid provisions.

Article 107(1) TFEU and the related provisions on State Aid are applicable only if the recipient of the alleged aid is an undertaking under EU law. The settled case law affirms that an undertaking is "any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed"[438]. The economic activity may exist if provided on a given market and whether a market exists may depend on the internal features and organization carried out in the single Member State. Particularly, health care schemes could be considered economic activities when the Member State sets up and structures it with economic specificities. Whether the scheme may be considered solidarity-based the case law of the Court of Justice elaborated a series of elements relevant in this respect: the compulsory affiliation; the exclusive social function; the non-profit purpose; benefits are independent of the contributions made and not necessarily proportionate to the person's income; the scheme is under the State supervision[439]. When the scheme has both economic and solidaristic elements the Commission must weigh the importance of each element and assess how the activity is organized and carried out in that Member State. Due to the compulsory affiliation, medical services provided

[437] Investigation performed by the Antimonopoly Office in connection to the proposed merger between SZP and VsZP, completed on 3 December 2009;

[438] As examples, Joined Cases C-159/91 and C-160/91 *Poucet et Pistre,* ECLI:EU:C:1993:63; Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, ECLI:EU:C:2000:428, para. 74

[439] See *Poucet et Pistre* para. 13; Case C-218/00 *Cisal and INAIL*, ECLI:EU:C:2002:36, para. 45; Joined Cases C-264/01, C-306/01, C-345/01 *AOK Bundesverband*, ECLI:EU:C:2004:150, para. 47-55;

under the health insurance coverage are independent of the contributions paid, insurers cannot refuse a person on the grounds of age, risk or health and each insured person receives the same basic level of benefits[440]. Additionally, the Slovak system is under a strong regulatory framework which establishes the legal status, the obligations and the State supervision.

The Commission's final decision on the evaluation of the measures pointed out the central solidarity objective of the overall system scrutinized. All the features concerning a compulsory insurance program, contributions fixed by law, a guarantee of the same basic level of benefits and a strong regulatory framework, lead to exclude that SZP/VZP could be considered as "undertaking" under article 107(1) TFEU.

Even though the Commission acknowledges the presence of competition elements in this system (the presence of several operators, for-profit activities and the openness to the market), it concludes that they cannot change the nature of a system predominantly solidarity-based and oriented. Moreover, health insurance companies are engaged in quality and procurement efficiency competition to provide the necessary inputs to fulfil their role[441].

The Slovak health insurance system is non-economic in nature, the recipients of the measures are not considered "undertakings", thus not subject to the State Aid rules[442]. Therefore, the Commission stated the lack of reason to examine the other conditions for the existence of State Aid.

4. The Judgement of the General Court in 2018[443]

What contributed to the rise of this saga was the different assessment conducted by the General Court to the appeal brought by Dôvera and the weight conferred to the elements of competition detected in the health insurance system which contested the assessment given by the Commission.

[440] Points 85-87 of the SA.23008 Decision;
[441] Point 93;
[442] Point 100;
[443] Case T-216/15 *Dôvera zdravotnà poist'ovna, a.s. v European Commission,* Judgment of the General Court (Second Chamber) of 5 February 2018, ECLI:EU:T:2018:64;

On 24 April 2015, Dôvera, supported by "Union", brought an action for annulment of the Commission Decision SA.23008 finding no state aid granted to SZP and VsZP by the Slovak Republic.

The applicant's (Dôvera) first plea in law was that the Commission erred in its interpretation of the concept of undertaking which was considered too narrow and limited to the review of the single compulsory health system, when it should have expand the analysis beyond the compulsory domain. The second plea concerned the misinterpretation of the concept of economic activity which resulted in excluding SZP and VsZP as undertakings.

The General Court recalls that to apply the State Aid measures it is necessary the presence of all conditions set out in article 107 TFEU (State resources or intervention, effect on trade between Member States, selective advantage granted and distortion or potential distortion of competition)[444]. In the case of health insurance systems, the Court clears out that the social aim in itself is not sufficient to exclude the economic nature[445] and recalls what are the elements of solidarity required to not be considered economic (compulsory affiliation, lack of direct links between the contributions and benefits, proportionality). The Court continues upholding the Commission's conclusion which considers the Slovak system as non-economic because of the predominant solidaristic elements but it focuses on the possibility for insurers to make and distribute profits and compete on quality offered. Point 64 of the decision contradicts the Commission's conclusion on the ground that the possibility to make and distribute profits shows that "*they are pursuing financial gains"* and this activity is an economic activity despite the strict State regulation on the use and distribution. Moreover, the introduction of certain complementary and preventive treatments in the context of the basic compulsory services makes the health insurers able to differentiate themselves in terms of quality and scope. Besides the compulsory benefits, operators may compete through "the value for money" of the cover they offer. Finally, competition in the system may be found in the power of insured persons to freely choose their provider and switch it once a year which increases the market volatility[446].

[444] Points 45-48;
[445] Points 50-53;
[446] Points 66-67;

The General Court concludes its assessment upholding the applicant complaint and refuses that the Slovak compulsory health system is non-economic in nature, therefore orders the annulment of the Commission Decision.

5. The Judgement of the Court of Justice of 11 June 2020[447]

The Commission and the Slovak Republic appealed the General Court decision and asked to set aside the judgement to the Court of Justice.

In support of their appeals the Commission and the Slovak Republic raised three grounds of appeal[448]: infringement of the obligation to state reasons; the misinterpretation of the notion of undertaking within the meaning of article 107(1) TFEU; the distortion of evidence. The Slovak Republic raise another ground of appeal alleging that the General Court exceeded the limits of its judicial review[449].

5.1 The Opinion of Advocate General Pikamae[450]

Advocate General Pikamae started the assessment on the ground of misinterpretation of the notion of undertaking and economic activity considering that the General Court concluded and classified as economic the Slovak health insurance scheme, on the grounds of: competition between the entities and the presence of for-profit operators other than the entity concerned[451]. The AG did not agree on the interpretation of the General Court that the ability to use and distribute profits, even though the ability was more strictly regulated than other sectors and specific requirements were asked, called into question the non-economic nature of

[447] Joined Cases C-262/18 and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s,* Judgement of the Court (Grand Chamber) of 11 June 2020;
[448] Appeal brought on 16 April 2018 by the European Commission against the judgement of the General Court (Second Chamber) delivered on 5 February 2018 in Case T-216/15: Dôvera v European Commission (Case C-262/18 P);
[449] For the purpose of this Case study the analysis focuses on the second ground of appeal; the first ground of appeal considered the General Court to have failed to fulfil its duty to state reason under article 36 and 53 of the Statute of the Court of Justice; in the third ground, the Commission also complained about the distortion of evidence submitted pointing to a very limited amount of competition, instead the General Court concluded that there was "intense and complex competition";
[450] Delivered on 19 December 2019;
[451] Point 89-90;

the activity, because it was irrelevant starting from the point the operator seeks to make profits. When the General Court recalled the MOTOE judgement[452] to elevate the for-profit element as a characteristic of the economic nature. The reference in the AG opinion, instead, makes the for-profit seeking activity irrelevant to the classification. Non-profit seeking operators can be classified as economic because they can offer goods and services on a given market placing themselves in competition with other operators. The main issue is not the profit-seeking activity but the possibility for the entities concerned to be in competition with each other. In the case at issue, it is important to understand how the Slovak system has been conceived and whether the system must be regarded as open to competition[453]. When the system is hybrid with both economic and non-economic elements, the classification is a "matter of degree". The Slovak health insurance as pointed out in both SA Decision and the General Court decision had all solidaristic elements set out in the case law and also the economic elements which made the General Court tend for the economic nature. The AG recalls the *FENIN* judgement[454] where the nature of the activity depends not only on the act of purchasing goods or services but also the subsequent use of those goods and services. Additionally, the competition on quality and efficiency which weighted for the economic nature, are not so essential and strong to conclude in that sense. In the settled case law insurance schemes were based on the principle of capitalization, optional or mandatory affiliation or determination of the contributions left upon the entities did not create the activities economic in nature. The Slovak system could be compared to the AOK judgement[455] and found a higher degree of competition when AOK permitted to compete in the amount of contributions whose rate was determined independently. The economic regulation on profits was conceived to make social funds operate as effectively as possible to attain the social objective of the system[456].

[452] Case C-49/07 *MOTOE*, ECLI:EU:C:2008:376, para. 27;
[453] Point 113;
[454] Case C-205/03 P *FENIN v European Commission,* ECLI:EU:C:2006:453, para. 78;
[455] Case C-262/01 *AOK Bundesverband and Others,* ECLI:EU:C:2004:150, para. 84-95;
[456] Point 127;

In the same line of reasoning, the Advocate General followed the Commission's assessment on the nature of the entity and activity concerned, giving the same interpretation and functional meaning to the economic elements included.
To conclude, the Advocate General suggested to uphold the grounds of the appeal on the misinterpretation of the notion of undertaking and economic activity conducted by the General Court.

5.2 The interpretation delivered by the Court of Justice

In this dialogue among the Commission, the General Court and the Advocate General, the Court of Justice confirms the original Commission's assessment and follows the AG's opinion. It also concludes its reasoning by acknowledging the application of competition elements to improve efficiency and quality of social security schemes.
The Court of Justice restated in its assessment that State Aid measures under article 107 TFEU can only be applicable to entities considered undertakings. Undertakings must be classified related to the nature of the activity performed. Offering goods and services on a given market according to the settled case law consists in an economic activity[457]. The Court continues restating the principle that Member States are free to organize their social security systems but for the purposes of classifying the scheme as non-economic in nature quotes the elements displayed in the settled case law. Particularly, it is necessary to assess the degree of solidarity involved and the supervision of the State. The Court pointed out how the Slovak Republic entrusts the management of a social security scheme to various insurance bodies without doubt based on the principle of solidarity because the bodies equalize costs and risks between themselves. For the introduction of competition elements, those did not change the nature of the activity which in the same manner as *AOK* judgement, intended to "*encourage operators to operate in the most*

[457] Point 29; Case C-41/90 *Hofner and Elser* para. 21; Case C-437/09 *AG2R Prévoyance* para. 41;

effective and least costly manner possible, in the interest of the proper functioning of the social security scheme[458] *".*

To assess the necessary use and distribution of profits, the Court highlighted how the 2005 Slovak reform obliged all insurers to change the legal status into for-profit joint stock companies governed by private law and for this they could not classified as undertakings. The legal status of the entity is not relevant for the classification.

Also the General Court affirmed in paragraph 66 that there is no competition for the compulsory statutory benefits and the amount of the contributions, even if the insurers can supplement the services provided these are free of charge and allow operators to differentiate themselves in an ancillary manner[459].

The possibility for insured persons to change once a year operator and freely choose the insurance company express the idea of proper functioning of the health system[460].

Competition elements introduced to ensure an efficient and cost-effective management cannot change the nature of the service, which pursues a social objective and applies the principle of solidarity.

Finally, the Court set aside the judgement of the General Court and dismissed the action brought by Dôvera in Case T-216/15.

6. THE POST-DOVERA CONSEQUENCES AND OPEN ISSUES

The essence of a market lies in the voluntary interaction between demand and supply; these transactions are conducted on a voluntary basis and in exchange of remuneration. Dealing with social security schemes based on solidarity, these are non-economic in nature because of the lack of transactions. This traces the difference between private and public social insurers[461]. The Court assessment of

[458] Point 34;
[459] Point 42;
[460] Point 45;
[461] See Nicolaides P., *Health Insurance based on social solidarity is non-economic,* 30 June 2020, State Aid Uncovered, Lexxion Publisher;

the economic elements introduced into a social security scheme pursuing a social objective was to be seen as functional to the social objectives[462].

The General Court on 2 June 2021 delivered a decision in case T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission*[463] where certain elements of competition among hospitals in Italy could change the nature of a health care system from non-economic to economic[464]. The Italian health care system is organized within the national health service (Servizio Sanitario Nazionale) and services are provided free of charge to all patients enrolled. The costs are financed by social security contributions and other State resources. Casa Regina lodged a complaint claiming the Commission failed to assess the extent of economic activities and the applicability of the Altmark conditions.

The General Court noted how all patients could choose hospitals, hospitals are obliged to provide free medical care and have a certain degree of discretion to control their expenditures[465]. These features of competition did not change the nature of solidarity in the Commission's assessment.

To evaluate the nature of the health system the General Court referred to the Dôvera case for the established principle of social objectives pursued, the principle of solidarity and the State supervision. The presence of economic activities and freedom to choose hospital made Casa Regina claim the economic nature of the activity. The General Court stated that the SSN system was characterized by compulsory affiliation, contributions fixed by law and proportional to the income of the insured persons and the same compulsory benefits. The principle affirmed in

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[462] See Gallo D., Mariotti C., *Social Services of General Interest*, ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids 6th Edition,* Sweet&Maxwell, 2021, p. 371; Gallo D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare,* in European Public Law, Vol. 26 N. 3, 2020, p. 576;

[463] The applicant challenged the Commission Decision C (2017) 7973 which rejected the complaint, concerning the compensation of costs incurred by public hospitals in the Lazio Region, that with regard to article 106 TFEU and 107 TFEU the purposes of the application of State Aid are applicable. The Lazio Region's remuneration of public facilities should have complied with the principles established for SGEI and in the Altmark Case and limited the payments to the healthcare facilities undrr public ownership to the forecast reimbursement of costs, according to the criteria of the so-called average establishment, and declare that excessive financing constitutes overcompensation. The applicant also challenges the claim that in Italian law the healthcare system is characterized by the universality of care, that the 100% of healthcare is provided by the national health service, without concretely identified proof.

[464] See Nicolaides P., *The Italian Health System is not economic in nature,* State Aid Hub, Lexxion Publisher, 20 july 2021;

[465] Para. 125 of the case T-223/18;

Dôvera, by the Court of Justice, which permits the introduction of competitive elements intended to encourage operators to improve their management and efficiency[466]; it is restated for Casa Regina in which the SSN performs both economic and non-economic activities separately kept in the hospitals' accounts.

Again, in Casa Regina the Commission moved from the assumption that the principle of solidarity did not allow the presence of competition elements. Instead, this time, the General Court applied the reasoning elaborated in Dôvera and followed the Court of Justice functional interpretation of competition indexes.

The Court of Justice in Dôvera explained how the General Court gave too much significance to the competition elements without considering the functional relation to the social and regulatory framework. The profit-seeking nature was necessary to ensure continuity of the scheme and the attainment of the social and solidarity objectives[467]. The limited nature of the economic elements, the functional use made of them to ensure a solid management and efficient services and the only presence of profit-seeking operators in a health insurance scheme does not make all entities undertakings.

By contrast, it could be objected that the Court's analysis remained theoretical because it didn't examine whether the benefits and premiums under those conditions would have incentivized the insurers efficiency in Slovakia[468]. Professor Nicolaides argued in its analysis of the Dôvera case, that regulating profits did not deny the possibility to increase the insurer profitability once the cost-savings established the necessary reserves. Under certain conditions non-price competition can lead to cost efficiency and extra profit and extra benefits for consumers, but all these effects are the normal competition effects on a liberalized market. The statement that competition was allowed to lead to efficiencies is superfluous because incentives are necessary where operators are not willing to compete. The elements displayed in the case in the Professor's opinion do not help Member States that want to reform their public health systems to raise their efficiency and quality. Once again, the assessment of what constitute an economic and non-economic activity, how much competition elements could change the nature of the service

[466] Para. 164;
[467] Point 40;
[468] The same could be referred to *"Casa Regina";* see Nicolaides P., *ibid* 34;

performed and the dialogue between the Commission and the ECJ are left suitable to be defined only on a case-by-case analysis which does not always follow a straight line.

CONCLUSIONS

The analysis conducted took the steps from the evolution of the Common Market and the progressive establishment of the Social Market Economy as a fundamental value of the European Union. Throughout the construction of the Market it was noted how the Market dimension took over the Social dimension, which gained relevance later in the integration process.

The market-oriented approach guided the interpretation (1980-1990) of the provisions concerning the establishment of a level playing field considering all State monopolies to be dismantled to let the liberalization process take place. The market represented the privileged tool to enhance not only economic but also general interests shared among the Member States. In this context, public services were seen as an exception necessary to save the so-called market failures, where activities are based on the principle of solidarity and have the goal to ensure to all citizens access to essential services.

As a form of exception Services of General Economic Interest were encompassed in the EU primary law without a definition, but with the purpose to recognize the different Member States traditions of public services in the Treaty and the possibility for the State to intervene in the market. The conceptualization of these categories and the wide discretion granted to the Member States to shape their SGEIs missions make more difficult the role of the Court of Justice and the Commission to assess the application of the Internal Market rules. The mission of general interest entrusted by the State may change in relation to the nature of the service provided. The category of Social Services of General Interest was introduced by the European Commission to clarify which activities pursuing social objectives are exempted from the application of the Treaty provisions on Competition law. The Commission stressed the importance of missions of general interest to attain the fundamental values of the Union. It is crucial to understand what may constitute economic activity and consequently what defines an undertaking under EU law for the application of Competition, State Aid or the justification under article 106(2) TFEU.

The Court of Justice actualized over time the meaning of economic activity through its case law, from the *Hofner and Elser* definition to more complex cases dealing with entities performing not only economic activities but also solidarity-based activities. To exclude the economic nature of the service some elements (manifestations of solidarity) were displayed by the Court such as the social objectives, the regulatory framework established under the State control and equal statutory conditions applicable to all users. The Court of Justice decides on a case-by-case analysis which adds several elements to the same pattern that can be found in similar cases. Each case can vary the functional definition of these elements and the degree of both economic and social dimensions which make the analysis different every time and even, with different results at the end of the case.

However, the performance of Social services of General Interest does not exclude, *per se,* the application of State Aid rules because the scope of SSGIs includes Economic Social Services of General Interest that are subject to those Treaty provisions, as well as SGEIs.

After a long theoretical debate and controversial case law, the Court of Justice defined in the leading *Altmark Case* the four conditions required to be qualified as an SGEI (or ESSGI) and be exempted from the State Aid rules.

Subsequently the Commission took action in 2005 to improve the application of the Altmark conditions and make them more flexible to the case at issue.

To elaborate a general framework on SGEIs, in 2012 the Almunia Package introduced a new legal framework to enhance solidarity, social cohesion and social justice, in this field, in the light of the social market economy principle. The effort to give a more precise definition of the various categories and the possibility to fix thresholds over the years have left uncertainty to the Member States, in present cases.

The difficulty and unparallel evolution of the Market and Social dimensions of the Treaty can be found in the multiple facets given to solidarity.

Solidarity originally considered (in the Schuman Declaration, 1950) in the economic theories as a *de facto* effect resulting from the economic integration and

invokable just as a simple derogation to the application of the Treaty provisions. After a long discussion among scholars divided between those favoring a self-regulating market and those insisting in filling the gap with strong social policies, the Commission had the power to start a coordination process to include the social dimension in the market. Along with the European Council, the Commission shaped the political agenda "The Lisbon Strategy" (2000-2010 and 2010-2020) to approach the Member States legislations towards common objectives.

Indeed, the Lisbon Treaty includes several articles on solidarity and acknowledges the "social market economy" as one of the main goals of the Internal Market ensuring that competition is not distorted.

Provided that each Member State has the power to organize its social security systems (also because the evolution of these systems has roots into different models of organization, the Bismarck and the Beveridge model), the Court of Justice clarified that Member States should have complied with the EU Fundamental Freedoms.

Tensions between competition and social objectives grew since the beginning of the liberalization process. The Court of Justice through its case law identified forms of solidarity that exclude the economic nature of the activity. The public funding of solidarity-based statutory systems creates problems because the wide discretion granted to Member States and the complexity of the activity organization may challenge every time the definition of economic and non-economic services.

This is exactly what happened in the "Slovak Saga" (C-262/18 P and C-271/18 P Commission v Dôvera zdravotná poist'ovňa) where the General Court gave too much weight to the economic elements introduced in the Slovak social security schemes without considering the functional effect related to the regulatory framework. The profit-seeking nature of the entities was necessary to ensure continuity and attainment of the social purposes. The Court of Justice stated that the introduction of economic elements to ensure an efficient and cost-effective management cannot change the nature of the service which pursues social objectives and applies the principle of solidarity.

The Dôvera case found immediately application in the more recent case "Casa Regina" (T-223/18) where, following the judgement of the Court, the General Court used the Dôvera formula to interpret the market features and weight the competition and social elements present in the service, but it is soon to affirm that a straight line has been found, when assessing non-competitive entities operating in an open market. Particularly, in this case some aspects have been left aside and surely, the analysis on economic and non-economic activities and the degree of competitive elements in social services should always be subject to a case-by-case analysis.

In conclusion, after the analysis of the Court of Justice case law it could be generally affirmed the necessary presence of three conditions: the State control, provision of social benefits and the principle of solidarity. This classification continues to be challenged when social security schemes are structured both with economic and non-economic indexes because one of them must prevail. In this sense, the Dôvera represents a possible systematization of the functional interpretation of these elements. But this cannot be the final guidance about how to balance the degree of solidarity and competition, the Court found it in this particular case and different future interpretations are still possible.

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