FACULTY OF LAW

Lund University

Oiva Pälsi

Defining Economic Activity in EU Competition Law in Public Health Care Context – Existence of Profitable Solidarity

JAEM03 Master Thesis

European Business Law

30 higher education credits

Supervisor: Martina Axmin

Term: Spring 2021

Contents

Summary

This paper aims to find how economic activity for the purposes of EU competition and state aid law is defined by the CJEU in public health care context, and whether this definition retains its soundness after the most recent decision of the Court in relation to the alleged state aid in the Slovak health insurance scheme. It is argued in this study, that the solidarity exemption employed by the CJEU has become exceedingly broad, rendering private for-profit activities outside the scope of both competition and procurement law, into a regulatory void, the effects of which are not desirable from the viewpoint of the internal market but also not from the Member State. A proposal is made, to abandon the solidarity exemption in its current form, which seems to have, trough the development of case law, become unconscious of the actual meaning of solidarity. It is argued that method based on finding the existence of exercise of public powers and an inseparable connection between the health care service activities and the exercise of these state prerogatives would reflect better the economic realities of public health care service provision.

Preface

It is not perfect, nor is it terrible, but thank God it is done.

Oiva Pälsi

Lund 27.5.2021

1 Introduction

1.1 Aims of this study

This study aims to find how the Court of Justice of the European Union (CJEU) defines economic activity in the meaning of EU competition and state aid law in the public health care context and whether the current definition is capable of reflecting the economic realities of privatized service provision in that context. The study aspires to determine whether the considerations given by the CJEU to solidarity-based activities in accordance with the current definition are too extensive and liable to cause undesirable effects on the internal market. Further, there will be an attempt to propose a more practical approach, focusing on the nature of the actual activities in their economic sense from the viewpoint of the entity involved, instead of the less relevant features of the underlying public health care systems, where these two are not sufficiently connected.

1.2 Background

Public health care may be considered one of the cornerstones of the modern European welfare state. However, it is important in these states and in the European single market not only for its social and political value, but as well for its economic significance. Increasingly liberalized and either fully or partially privatized elements in the national public health care systems in the EU Member States are creating and have for already created new factual markets for the provision of public health care services and insurance. These markets, on which both private and public entities may be operating as service providers concurrently, seem to be progressively categorized as non-economic by the CJEU. This seems to be mostly due to the solidarity features and social aims of their underlying national frameworks.

The privatization or even outsourcing of public health care services is nevertheless, not without consequence in the EU single market. The general issue with this is the question of the applicability of EU single market rules, such as competition, state aid, and public procurement law, to the public health care market, where such a market would seem to exist. The problem is not new, and it has been discussed by many academics and in many CJEU cases before.[1] However, there is still certain ambiguity as to which extent public health care should remain beyond the reach of single market rules when it is taking place in market-like conditions and services are provided by private actors. It would be more convenient to refer to these private health care service providers as undertakings, but since therein lies the very heart of this issue, it would appear somewhat prejudice.

Health care services within the public sphere are generally universal, and as such, are normally considered market failures by design, placing them outside the reach of any EU single market legislation, such as competition, state aid, and public procurement rules.[2] Although, historically these services have usually been provided directly through the state, the trend has already for long been leaning towards more liberalization and thus, more privatization in this sector. [3] EU has actually endorsed this change by encouraging Member States through various means to liberalize their former monopolized service sectors, including welfare services.[4]

Question of the faith of the public services has even been a campaigning point for political groups for and against European market integration, as was demonstrated in France in 2005 when campaigning for the Constitutional

[1] See for example: Joined Cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.* [2020] EU:C:2020:450, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] EU:C:2004:150, Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [2009] EU:C:2009:127

[2] Laura Nistor, *Public Services and the European Union Healthcare, Health Insurance and Education Services*, (published by T.M.C. Asser Press, produced and distributed by Springer 2011) 2

[3] Citation needed, something to demonstrate shift towards privatization in EU

[4] Nistor (n 2) 210

Treaty was ongoing.[5] It seems therefore, clear that there is certain political delicacy surrounding this issue. This renders it all the more difficult for the CJEU to introduce a consistent and reliable tool for categorizing public health care systems and activities as either economic or non-economic. Nevertheless, it would seem that such an instrument is beginning to be in high demand, as the public health care systems within the EU are becoming increasingly complex and contain growing number of economic features to meet their social objectives.

Confusion as to this concept is partially due to political and ideological misunderstandings and differences.[6] Hatzopolous concurs that there is significant confusion fuelled by political differences, in which EU has merely worsened the situation by making everything even more ambiguous via creation of even more confusing terminology, such as services of general economic interest (SGEI), non-economic services of general interest (NESGI), universal services, social services of general interest (SSGI), and so on.[7]

A more clear-cut definition by the CJEU of the concept of economic activity in the context of public health care services would undoubtedly prove precious for Member State governments, courts and competition authorities alike, should they be able to test their proposed or in place public health care systems reliably through more logical and less case-by-case reliant analysis, than that used by the CJEU today.

To add to this, the manifestly narrow interpretation of the concept of undertaking taken by the CJEU especially in the recent *DZP/UZP* case, does not appear a very logical one, due to the way the CJEU considered the

[5] Vesna Tomljenovic, Nada Bodiroga-Vukobrat, Vlatka Butorac Malnar, Ivana Kunda (eds) *EU Competition and State Aid Rules, Europeanization and Globalization volume 3* (Springer 2017) 300
[6] Vassilis Hatzopoulos 'The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities' [2012] European business law review 974
[7] Ibid 979

solidarity within the framework of the insurance system to affect not only the public managing body (public health care organizer) of this system, but also the activities of the private insurers and their public counterpart (public health care service providers), even though all of the latter entities were acting for profit and designed to compete with one another within the insurance market created by the system. It seems likely, that this trend will act as a catalyst to Member State governments and private entities alike to rely on the non-economic nature of their national health care systems, even where these increasingly complex systems mean to gain efficiency through actual market competition, and where private entities are employed to provide the services.

This development seems hardly positive from any viewpoint. It will place competing for-profit entities within the public health care market outside the reach of competition law, wherefrom they themselves in addition to the managing body and the state in question are bound to suffer from. It also places all the entities within this market outside of the scope of state aid rules, which is likely to hamper fair competition and harm at least all private entities within the market, since state entities are most likely to benefit. Finally, it raises the question whether procurement rules should apply to the private entities offering service within this system, since if not economic, these social activities surely should fall within the scope of public procurement.

It is somewhat staggering that the CJEU disapproved of the rather inescapable fact, that not a single private enterprise would provide service on purely solidary basis without rendering itself insolvent quite quickly in the process. Apparently, CJEU in its approach takes no notice to the fact that it is of no consequence for an undertaking, who pays the bill, as long as the bill is duly paid. It seems striking that CJEU would find otherwise, even when the very companies themselves are claiming to be acting as undertakings.

The considerations of the CJEU in relation to the economic features of the Slovak system being in place to ensure continuity and attainment of solidarity objectives, are incoherently employed to underpin the system's non-

economic nature, where the more logically sound choice would have been to consider economic features as what they are.

1.3 Research questions and thesis

The questions this paper aspires to answer are in short firstly, how the existence of economic activity is defined in relation to services within the public health care sector, secondly, what are the shortcomings and negative implications of the existing definition, and thirdly, how to mend the definition in order to avoid the worst of its current implications.

The main argument is that the effects of considerations based on solidarity features of a public health care system, should remain at the level of organizing bodies of the system, namely, the state authorities, and not overly affect the economic status of the profit-seeking entities providing services within or for the system. It is further proposed that this objective could be achieved by focusing the assessment on the existence of socially justifiable state prerogatives in the form of exercise of public powers, instead of the predominance of solidarity features in relation to an activity as a whole.

1.4 Methodology and materials

These questions and thesis will be studied in the light of both primary and secondary sources in CJEU case law and relevant academic views. The analysis is based on legal-dogmatic research. The study will have a critical description of the existing legal framework for defining economic activity followed by a prescription of a framework better suited for the purpose, accompanied by its justification in the existing case law and the economic logic of privatized public health care.

The choice of case law has been done on basis of references and weight given to each case in the secondary sources, as well as case law references made in these decisions by the CJEU. Special focus in relation to CJEU decisions is given to the relatively new state aid case *DZP/UZP*[8]. In the decision CJEU did not consider even the private Slovak health insurers as undertakings, despite the apparent existence of the compulsory health insurance market in which they provided their services in competition with one another, as well as the state-owned insurer. Attention will in addition be drawn to the applicability of the inseparability requirement that the CJEU set out in *Easy Pay*[9] in relation to analysis of the existence of a sufficient connection between the economic and non-economic activities of public health care service provision and organization.

Although not all the decisions used have dealt directly with public health care issues, it seems that there is little reason for discrepancy in the meaning of economic activity between different sectors of public service. Thus, it may be assumed as certain academics have done as well,[10] that the tests derived from CJEU decisions concerning public service sectors other than health care, can be applied to public health care cases similarly. Besides, it is evident that in fields such as public health care, education, national defence, and social security, where the EU has no competence, the CJEU cannot possibly take into account pre-emptively all the different ways in which the Member States will organize these services in the future. Yet, in order to enable the Member States to reliably take into account how the single market rules are going to affect these service systems, CJEU should demonstrate consistence, clarity and simplicity in its decision making in these areas. This too is a good reason to retain coherence between the interpretations of EU law concepts, such as economic activity, across all the relevant fields of their application.

[8] European Commission and Slovak Republic (n 1)
[9] Case C-185/14 *'EasyPay' AD, 'Finance Engineering' AD v Ministerski savet na Republika Bulgaria, Natsionalen osiguritelen institut* [2015] ECLI:EU:C:2015:716
[10] Johan van de Gronden, Mary Guy 'The role of EU competition law in health care and the 'undertaking' concept' [2021] Health Economics, Policy and Law

The secondary sources comprise of academic material, which have been chosen with the aim to include a broad spectrum of fairly recent views on the structure and contents of the current definition, as well as its criticism. Focus is set primarily on material not older than 15 years, as developments in CJEU case law may have affected the relevance of materials beyond that age.

1.5 Delimitations

In relation to CJEU caselaw and other research materials, this study will be limited to sources on information existing and available to the author before the end April 2021. Any sources published after that cannot effectively be used. As for the scope of this study, it will be limited to the existing and potential future interpretations of the concept of economic activity in the context of EU competition and state aid law.

The study will not concern the categorization of public health care service providers in the meaning of the free movement rules, as the debate over whether the definition of economic activity is shared between the free movement regime and competition law, is a separate one.

1.6 Terminology

It may be necessary to clarify certain terminological choices used throughout this study in order to avoid further confusion in this area of already ambiguous terminology. There is a deliberate attempt to employ as self-explanatory language as possible but certain expressions frequently appearing in this study seem better off explained as they are understood by the author.

Public health care system

Public health care system is the national legislative framework, which concerns the organization and provision of public health care services. This

system is generally either tax or insurance-based, and defines which entity is responsible for organizing public health care services, what are these services, and how they are to be organized.

Public health care organizer

Public health care organizer is the national entity legally responsible for organizing the provision of health care services or insurance covered by public health care system. This entity may be a municipality, province, a state within a federation or any other authority traceable to the Member State.

Public health care service provider

Public health care service provider is any entity, private or public, providing the actual health care services as agreed or obliged by the public health care organizer. These entities may be hospitals, doctors, health care centres, centralized purchasers or insurance companies in insurance-based systems, or any other entity offering service within the public health care system. Providers of actual health care services, centralized purchasers and insurers providing health insurance are considered comparable in this terminology, since both provide services to the public health care organizer, albeit that insurers have to purchase the actual services themselves. There is no need to differentiate between insurers, centralized purchasers and actual service providers, for this reason since they all may resort similarly to outsourcing.

1.7 Outline

The outline of the study will be as follows.

The first chapter will address the definition of economic activity as it is currently understood by the CJEU. This chapter will try to present the elements used by the CJEU in assessing the economic nature of a given

activity, as well how these elements, their effect and the general structure of the CJEU's analysis is understood by academics.

The second chapter will aim to identify the major structural shortcomings of the current definition and analysis of the CJEU.

The third chapter aims to assess how the Court of justice's recent decision in *DZP/UZP* has affected the definition of economic activity and which implications this decision bears in practice.

The last chapter will aim to pinpoint the main weakness in the CJEU's approach to the definition and propose an alternative approach, in order to avoid the gravest calamities presented by the current one.

2 The current definition of economic activity

2.1 Economic activity, undertaking, and multiple approaches

Definition of economic activity in EU law is intertwined with the concept of an undertaking, which is to what EU single market rules apply. Undertaking on the other hand, is a term not specifically defined in primary nor secondary EU law, but which has received its meaning from the case law of the CJEU. The interpretation of the definition of an undertaking has been a core question in a number of CJEU decisions. Despite this, there seems to be no single universally accepted approach to determine the status of an entity providing public health care services, at least not among academics, if even the judges of the CJEU.

Instead, the academic opinions on how the analysis is carried out are somewhat diverse, even though they build upon the same basis in CJEU case law. The analysis employed by the CJEU may be seen and presented in a multitude of ways. It is evident nevertheless, that regardless of the different terminology, structure and segmentation used by different authors, most illustrations of the analysis employed by the CJEU appear to consist in fact of what could be called the *Höfner* and *Pavlov* criteria, in one way or another.[11] For this reason, the following sections are constructed principally on the basis of those two 'tests', and their respective elements, even though this does not fully illustrate all the different structures given by various authors to the analysis of the CJEU. There is an attempt, however, to incorporate the main differences and similarities between the various

[11] Caroline Wehlander *Services of General Economic Interest as a Constitutional Concept of EU Law* (published by T.M.C. Asser Press and produced and distributed by T.M.C. Asser Press and Springer 2016) 47

conceptions relating to these tests, their application, and elements in the following sections.

2.2 *Höfner:* could it be sold?

Under what is at this point considered settled case law in *Höfner*[12] and *Pavlov*[13] decisions. In accordance with CJEU analysis in *Höfner*, an undertaking is understood as any entity engaged in economic activity, regardless of its form, legal status, or mode of financing.[14] In addition, it has been clarified by subsequent CJEU case law, that these factors bearing no consequence in the eyes of the *Höfner* criteria, include the profit making nature of the entity in question.[15] This means that both profit making and non-profit-making entities may be categorized as undertakings, if their activities are considered economic. Since this definition does not however, cover the actual meaning of economic activity, a so called 'comparative test' is applied by the CJEU.[16]

2.2.1 Comparative test

The comparative test is in essence, quite simple. The test relies, as the name suggests, in principle on comparing the activity under scrutiny to services already offered, or potentially offered, on the market. If the service in question is or even potentially could be offered under market conditions, it is to be considered economic, or rather capable of being economic, in nature. It is noteworthy, as pointed out previously, that there are different approaches as to whether the comparative test alone is sufficient to determine the nature of an activity, or if it is only the first of the cumulative criteria in the analysis.

[12] Case C-41/90 *Höfner and Elser v Macrotron* [1991] EU:C:1991:161
[13] Case C-180/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] EU:C:2000:428
[14] Wehlander (n 11) 48
[15] Hatzopoulos (n 6) 987
[16] Wehlander (n 11) 48

In practice, the analysis under the comparative test is nevertheless, seemingly simple. The comparative test appears to, in effect, consist of a single criterion, which has been presented with very slight variations by the majority of authors. Gronden's interpretation of that criterion appears to be that the potential to offer a service on a market has to be understood as meaning that there is a possibility to offer the service in question on a market without state intervention.[17] Hatzapoulos considers, the main question the main question to be, whether even hypothetical competition exists for the activity in question.[18] Ibrahim, referrering to Buendia Sierra take it, that "According to this definition, any activity that could be exercised by private parties with a sufficient profit-making motive would be deemed an economic activity."[19] It seems thus, widely accepted that the comparative test seeks only to find whether an activity may, even in theory, be carried out by an private entity with a view to a profit. As noted by Ibrahim, this covers in essence, any public service that may be privatized.[20]

2.2.2 In the abstract

It has been argued that the comparative test holds as its sole basis of evaluation the activity in question in the abstract, giving no consideration whatsoever, to the actual legal framework in which these activities is taking place.[21] This notion is also supported to a certain degree by other authors in relation to *Höfner* criteria.[22] This notion seems correct especially in the light of the *Höfner* and *Glöckner*[23] rulings, where the Court based its assessment

[17] Gronden, Guy (n 10) 79
[18] Hatzopoulos (n 6) 991
[19] Amir Ibrahim 'A re-evaluation of the concept of economic activity for the purpose of EU competition rules: the need for modernisation' [2015] European Competition Journal 265, 267-268
[20] Ibid 268
[21] Gronden, Guy (n 10) 79
[22] Erik Kloosterhuis 'Defining non-economic activities in competition law' European Competition Journal [2017] 117, 122 and Okeoghene Odudu 'Are state owned healthcare providers that are funded by general taxation undertakings subject to competition law?' European Competition Law Review [2011] 231, 234-235
[23] Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] EU:C:2001:284

of the economic nature of the activities not on the actual or potential profitability of the activities in question within the existing legal framework of their provision in the respective Member States, but on their potential profitability in essence (in the void of state intervention). Even though this approach might initially appear somewhat illogical, this does not pose a threat to the rational of the evaluation scheme overall, since the comparative test appears only to form the more 'abstract' part of the complete analysis employed by the CJEU, while the second step (*Pavlov* test) is a more concrete one, taking into account the legal framework of the provision of services.

Even though seemingly dissenting views have been expressed by some authors, most prominently perhaps, by Gronden,[24] the comparative test thus seems only to be accountable for determining whether the activity in question can even hypothetically be considered as a service, in the sense that it usually is provided against payment. For this reason, the comparative test makes no distinction between activities undertaken for-profit or without profit. If a possibility exists, to undertake a given activity profitably, it counts as a service usually provided against remuneration, whether or not this is the case in a specific scenario. It is no surprise thus, that the CJEU finds majority of activities, including social services, unless directly involved with the exercise of public powers, to satisfy the criteria of the comparative test and consequently to be considered as services also in the meaning of EU law.[25]

As for instance, Odudu argues, in order for an activity not to qualify as a service, it must be non-excludable by nature, meaning that no one, not even those not willing to pay, can be prevented from enjoying the service.[26] An example of an activity considered non-excludable by the CJEU could be air-traffic control, as the Court in *Eurocontrol*[27] stated that the 'services' of air-traffic control has to be provided to all aircraft regardless of their ability or

[24] Gronden, Guy (n 10)
[25] Wehlander (n 11) 50-51, Johan van de Gronden, Wolf Sauter 'Are state owned healthcare providers that are funded by general taxation undertakings subject to competition law?' Legal Issues of Economic Integration [2011] 213, 217
[26] Odudu (n 22) 234
[27] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] EU:C:1994:7

willingness to pay for it, since in order for the service to function even for the paying 'customers', air-traffic control has to control even the free-riders. This is very true even in the abstract. Odudu further uses smallpox vaccination as an example of non-excludable activity in health care context, arguing that these sorts of vaccines require high percentage of vaccinated population before the benefits arise in form of herd immunity, which necessitates vaccinating also those unable to pay, as even the paying 'customer' receives no benefits before sufficient coverage has been reached.[28]

Interestingly, the CJEU seems nevertheless, to occasionally have mixed up the non-excludable nature of an activity in the abstract with non-excludability due to the effects of state intervention. This seemed to be the case in *Cali*[29], where Advocate General Cosmas considered that the surveillance of safety procedures to avoid oil spillage in the Harbour of Genoa-Multedo, delegated from port authorities to a private company, were non-excludable, since the surveillance had to be done on every vessel regardless of whether it had paid the fee.[30] The Court did not refer to this argument specifically, although it remained that the activity was non-economic. The *Cali* case will be addressed more closely under section (exercise of public powers). Cosmas' argument nevertheless highlights the problematic nature of the test rendered in the abstract. Quite clearly such surveillance services themselves are capable, in principle, of being sold under market conditions, but it is the specific aim of environmental protection and rules affecting the provision of those services that renders them non-excludable. Thus, the activities, in the abstract, would not be non-excludable, but they are that only because of state intervention.

This may be reason why the comparative test has been suggested to be of no relevance in relation to activities constituting exercise of public powers, since

[28] Odudu (n 22) 236
[29] Case C-343/95 *Diego Calì & Figli Srl and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] EU:C:1997:160
[30] Case C-343/95 *Diego Calì & Figli Srl and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECLI:EU:C:1997:160 Opinion of AG COSMAS ECLI:EU:C:1996:482 para 49

the CJEU apparently refers to Member State's own evaluation of the activity rather than the comparative test in these situations.[31]

2.3 Pavlov: is it being sold?

2.3.1 A more concrete step

As explained above, the comparative test derived from *Höfner*, is not complete in the sense that its satisfaction does not directly result in the activity being necessarily considered economic. There is a further step in the analysis of the CJEU. It has been argued that the comparative test only allows the determination of whether the activity in question can even in theory be offered on a market, in other words if the activity can be categorized as service in the first place, but not whether this actually is the case in a given scenario, and that only when this service is actually offered on a market, it constitutes economic activity.[32] This argumentation is based on the criteria introduced by the CJEU first in the field of health care in the *Pavlov* decision.[33] The *Pavlov* criteria for economic activity in short, is 'offering of services or goods on a given market', a criterion derived from case *Commission v Italy*[34], where it was established in relation to customs agents.

Nevertheless, there have been also opinions suggesting that this criterion is applied only in cases relating to public health care systems and public health care organizers, and not in relation to all types of public health care service providers. Gronden, most prominently, appears to refer to the *Pavlov* test as the 'concrete' test as opposed to the 'abstract' test, which corresponds to the comparative test derived from *Höfner*, and argues that 'concrete' test is not applied in relation to certain types of service providers.[35] This argument

[31] Wehlander (n 11) 49
[32] Wehlander (n 11) 50
[33] *Pavlov* (n 13)
[34] Case 118/85 *Commission v Italy* [1987] EU:C:1987:283 para 7
[35] Gronden, Guy (n 10)

however, is made with reference to the *Pavlov* decision itself, in which the CJEU precisely assessed whether the activity in question consisted of actually offering goods or services on a given market.[36]

Wehlander's point of view, thus seems better reasoned, as it seems that the *Pavlov* criteria differentiates between potential and actual offer of services and goods on a market, and to confirms that only actual offering of services constitutes economic activity in the meaning of EU law. Gronden's theory seems neither supported by the findings of Kloosterhuis, who argues that the CJEU has, in their case law following infamous *Höfner* decision, clearly demonstrated that the analysis is not done only in the abstract, but takes into consideration concrete factors such as, remuneration and existence of actual competition.[37] Gronden's notion may nevertheless, not be completely unsound, as the CJEU does in practice show tendency to end up in different conclusions in relation to different types of service providers, which has been noted by Sauter as well.[38] In the author's opinion however, this does not appear necessarily to be the result of a deliberate use of different methods of analysis by the CJEU, but rather consequence of poor application of the same functional method by needlessly differentiating insurance services from the more conventional service provision as managing activity.

However, as pointed out by Wehlander, the CJEU has not clearly defined what are the elements that should be considered in this context and what is the substantial difference between the comparative test and the *Pavlov* test.[39] After all, even Advocate General Jacobs in his opinion on *Pavlov,* mentioned that the "The activity in question must be capable of being carried on, at least in principle, with a view to profit."[40] This would seem as reference to comparative test. Thus, the status of the *Pavlov* test is quite confused. In practice anyhow, the *Pavlov* test offers in any case more challenging analysis

[36] *Pavlov* (n 13) para 75
[37] Kloosterhuis (n 22) 123
[38] Wolf Sauter 'The impact of EU competition law on national healthcare systems' European Law Review [2013] 457, 465
[39] Wehlander (n 11) 52
[40] *Pavlov* (n 13) Opinion of AG Jacobs ECLI:EU:C:2000:151, para 107

than the comparative test. Finding potential profitability of a given activity in the abstract resembles a study of the economic viability of the given activity without a specific context, a requirement which seems easily met by all but technically non-excludable services, which are very few in number. The evaluation of whether or not a service is in fact offered on a market, in comparison, is not as simple, as goods and services in the meaning of comparative test, may be actually provided in a multitude of different ways.

In practice, the test applied by the CJEU consists of multiple factors, none of which appears to be completely decisive by itself.[41] It is, therefore, not surprising that there seems to be no single universally accepted interpretation of the requirements set by the *Pavlov* test, amongst academics, similarly as there is no agreement even on whether this test is applied in every situation. Regardless of which approach is followed, the *Pavlov* test would in practice seem to twine around a number of distinguishable elements, namely solidarity, exercise of public powers and inseparable connection between an economic activity and either one of the afore mentioned. These elements, their application and basis in CJEU's case law, will be addressed below.

2.3.2 A positive definition?

Among other obscurities presented by the analysis of the economic nature of activities, is the question of whether *Pavlov* test establishes positive criteria to verify the existence of an offer on the market, or are there conversely, only elements implying the lack of it. Authors, such as Hatzopoulos and Nistor for instance, seem to prefer the 'exemption' approach, arguing that any activity satisfying the comparative test is considered economic activity as such, but that there are a number of factors that may exempt these services from being considered economic.[42] This is while Wehlander at least, instead relies on an argument that there are certain positively defined elements identifiable as the

[41] Wehlander (n 11) 51
[42] Hatzopoulos (n 6) 990-991 and Nistor (n 2) 145

Pavlov criteria, which when met, indicate that the service in question is actually offered in a market and is thus economic in nature. Although, these approaches differ on theoretical level to a great degree, the factors considered to affect the analysis appear similar, regardless of the approach taken.

Wehlander, who seem to have developed this *Pavlov*-based theory the furthest, argues that the requirements of the *Pavlov* test, or 'offered on a market' criterion, can be condensed to the following two main cumulative criteria: 1. Compensation criterion, 2. Agreement criterion.[43] The compensation criterion requires that the service provider receives some remuneration for the provision of the service, as well as bears financial risks of his actions.[44] The criterion is based on the fact that the CJEU has consistently taken the existence of remuneration, referring at least to the form of finance of the entity in question, into consideration even in its most far reaching decisions.[45] Agreement criterion, requires on the other hand, that the service provider has to be able to influence the economic terms of the provision of the services.[46] It is also suggested by Wehlander, in relation to the last element, that while solidarity, social aim related to the activity affect the assessment, they are not decisive in this evaluation if the service provider retains a sufficient degree of control on the economic terms of the agreement concerning the service provision.[47]

This argument may be understood as a reference to state control in the way that any amount of solidarity does not affect the nature of the activity if the state control over the activity is weak enough to leave room for the service provider to negotiate the terms of service provision. According to Wehlander therefore, compensation paid for the provision of the service and to service provider's ability to influence the economic terms of the agreement relating to the service provision are the two decisive elements employed by the CJEU,

[43] Wehlander (n 11) 53
[44] Ibid 52
[45] Ibid 51
[46] Ibid 53
[47] Ibid

in finding that a service is actually offered on a market.[48] This argumentation seems by far the most developed in the direction that the notion of 'offered on the market' from *Pavlov* incorporates considerations of solidarity as well. Thus, according to Wehlander's approach, there seems to be no specific need to consider solidarity as a separate element of the analysis employed by the CJEU, since the true qualification may be made by assessing if the service provider can, in any way, influence the conditions under which it provides the services in question. This way Wehlander seems to argue, that through remuneration and agreement criteria, economic activity can be positively defined.

2.3.3 Solidarity as an exemption

In comparison to Wehlander, most authors, Hatzopoulos among them, rely on similar elements derived from the case law, but instead of considering them as positive indicators of existence of an offer on the market, and thus economic activity, employ them oppositely as means of turning otherwise economic activity into non-economic, by a way of exemption. Thus, it appears that Hatzopoulos does not consider the *Pavlov* test necessarily as a cumulative separate criterion following the comparative test in the CJEU's analysis, but more as a part of the comparative test itself, or as reference to the *Fenin* rule[49]. The two exemptions Hatzopoulos identifies from the CJEU's case law, are namely: 1. exercise of public powers, 2. activities based on solidarity.[50] First one of these exemptions has already been considered previously, while the latter one will be considered in this section.

As said, the CJEU in its case law has identified certain indicators, which suggest that activity may be non-economic, even if it concerns provision of services in the meaning of the comparative test. Although, there is no clarity on whether the CJEU has in fact established positive criteria for the definition

[48] Ibid 60
[49] See section 2.3.5
[50] Hatzopoulos (n 6) 991

of ‘offer on the market’ and thus, for economic activity, or only exemptions to the comparative test, both approaches concern the element of solidarity.

In *Poucet Pistre* the CJEU stated that activity, which is regulated so as to only fulfil a social function, is not to be considered economic.[51] This case seems to have been the beginning of long line of case law by the CJEU establishing the effect of solidarity on their analysis regarding economic nature of an activity.[52] Solidarity appears to play an increasingly important role in CJEU’s case law. It is also one of the least clear elements to the analysis, as has been pointed out by some authors.[53]

In practice the CJEU assesses to what degree the service provision in question embodies solidarity, in comparison to commercial or actuarial elements, and if the activity is considered to be driven predominantly by solidarity, it is considered non-economic. As with the general structure of the analysis undertaken by the CJEU, there are different theories suggested by authors as to the application of solidarity in the analysis. Therefore, these different approaches will be studied below, with focus, however, on the elements shared between the different suggestions in order to try and find the most thoroughly established lines of argumentation.

Again, even though Gronden as well agrees with solidarity having an effect on the assessment in general, he suggests that the this only applies to evaluation of activities of the public health care organizers and systems themselves, and not those of service providers.[54] As explained in the previous section, authors have provided different views as to how the solidarity factors affect the categorization of an activity. It may be considered as a part of Wehlander’s positive criterion for an offer on the market,[55] or separately as

[51] Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] EU:C:1993:63 para 18
[52] Wehlander (n 11) 51, Hatzopoulos (n 6) 983 and Wolf Sauter *Coherence in EU Competition Law* (Oxford University Press 2016) 209-210
[53] Hatzopoulos (n 6) 982
[54] Gronden, Guy (n 10) 79
[55] As according to Wehlander, see previous section ”Exemptions or positive criteria?”

an element capable of diverting an otherwise economic activity to non-economic.[56] The factors derived from the case law considered to indicate the existence of solidarity within an activity, however, appear similar regardless of which view is taken on their effect and the general structure of the analysis.

These factors indicating solidarity within the activity under scrutiny, as identified for instance by Hatzopoulos and largely agreed by many authors as well, are in relation to health care funds, namely: 1. social objective of the activity, 2. compulsory nature of the participation and contribution, 3. contributions paid not being linked to risks covered, 4. benefits received by insured persons not being linked to contributions paid by them, 5. benefits and contributions being decided under state control, 6. strong overall state control over the activity, 7. redistribution of collected contributions instead of capitalization and/or investment, 8. cross-subsidization between different schemes, and lastly, 9. non-existence of competitive schemes by private entities.[57] Opposite elements, such as optionality, profitability, link between contributions and benefits, etc. are naturally considered to indicate economic activity.[58]

As explained under the previous section, Wehlander, identifies similar factors as parts of her agreement criterion, although she appears to consider the amount of state control (or conversely the amount service providers potential to influence the agreement) as a more important feature, rather than the amount of solidarity itself.[59] Similarly to what Wehlander argues, Sauter and Hatzopoulos agree that none of the factors listed above seems by itself to be considered decisive by the CJEU, and in many cases activities under analysis incorporate both these as well as the opposite factors, leaving the analysis reliant on balancing these elements against one another in order to decide which are predominant in relation to the activity in question.[60]

[56] As according to Hatzopoulos and Sauter among others, see also previous section
[57] Hatzopoulos (n 6) 983, Sauter (n 52) 209-210 and Nistor (n 2) 154
[58] Sauter (n 52) 210
[59] See section 2.3.2
[60] Hatzopoulos (n 6) 984 and Sauter (n 52) 210

It seems apparent, and has been noted by academics, that this practice leaves considerable room for discretion, and consequently results in decrease in legal certainty and consistency in the CJEU rulings.[61] The point of this argument also seems accurate in the light of more recent CJEU case law in the field of public health care, particularly in the Court of Justice's *DZP/UZP* ruling, where seemingly profitable and competitive activities of both private and state owned insurance companies providing service for public health care system, were first considered economic by the General Court, and after appeal to the Court of Justice, non-economic.[62] This decision, which will be scrutinized more thoroughly subsequently, highlights the fact that determining what is the sufficient amount of solidarity to verify an activity as non-economic is not a simple task, as well as the fact that solidarity can be understood very broadly. In the situation presented by that case, the General Court and the Court of Justice came to different conclusions based on the same factors and overall assessment. It also worth noting, that there seems to be difference as well in the way some Advocates General approach the assessment of solidarity compared to the judges of the Court of Justice. Most notably in this regard, Advocate General Maduro in *Fenin* and Advocate General Jocabs in *AOK*, who took in both occasions rather different approach from that of the respective subsequent rulings of the Court of Justice.[63]

Therefore, it seems that there are at least two different main approaches in relation to the 'offered on a market' criteria. The major difference between these viewpoints in practice being the fact Hatzopoulos, unlike Wehlander, does not seem to consider the *Pavlov* criteria as positively defining what constitutes an offer on the market, and in general, not necessarily as a separate criterion from the comparative test. There are arguments in favour of both points of view. It is difficult to establish whether one of these approaches is

[61] Sauter (n 52) 210 and Hatzopoulos (n 6) 982-983
[62] *European Commission and Slovak Republic* (n 1)
[63] Case C-205/03 *P Federación Española de Empresas de Tecnología Sanitaria (FENIN)* Opinion of AG Maduro EU:C:2005:666 and *AOK* (n 1) Opinion of AG Jacobs EU:C:2003:304

more correct than the other, since CJEU itself does not clearly refer to either directly in its case law. Instead, the Court at least in its more recent case law, seems to simply refer to overall assessment of the nature of the activity,[64] not clearly identifying whether it considers there to be a positive definition to this end.

What, however, seems somewhat clear, is that regardless of which approach is taken, not all services, which are 'can be sold' in the meaning the comparative test, are 'offered on the market' even when they are connected to an activity. Regardless of whether there is a positive definition for determining when services are offered on a market or if there are only exemptions to the comparative test's results, both of these are connected to considerations of solidarity.

To sum up, it is evident that solidarity has a considerable effect on the overall analysis regarding the economic nature of an activity. The effect appears to be based on an overall assessment of extensive set of factors, which the CJEU has established over a period in its case law. There is no clarity as to what is amount of solidarity required for an activity to be considered to fulfil an exclusively social function, i.e., how many of the solidarity factors have to be present in a given scenario. It seems in practice however, that none of the factors on the list is decisive on its own.

Even though Wehlander's positive definition approach presents seemingly simpler and more robust tool for analysing this question, this is not necessarily the case. Similarly, to the perhaps more mainstream approach of assessing the effect of solidarity presented above, Wehlander's positive definition does not positively specify which is the absolute degree of influence that a service provider has to have for the agreement criterion to be satisfied. The problem is principally the same as with the exemption solidarity assessment, although it is more focused on the state control element, instead

[64] *European Commission and Slovak Republic* (n 1) paras 30-31

of the overall assessment of the predominant features of the activity in question.

2.3.4 Exercise of public powers as an exemption

Another element employed in the CJEU's analysis as a way of exemption as mentioned earlier, is the exercise of public powers. As with solidarity, academics have constructed different theories around the application of this exemption, and the CJEU's case law around the issue is not entirely coherent. It is anyhow clear, that the exercise of public powers or authority within the activity in question bears an effect on its categorization as economic or non-economic.

EU law does specify what is to be defined as public powers or authority, but the CJEU, or at least its Advocates General, often refer to statement made by Advocate General Mayras in relation to meaning of public authority in Reyners, that: "Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens."[65] Thus, it is usually considered that activities falling within this 'imperium' of state domain constitute exercise of public powers. However, it has to be recalled that the CJEU's case law far from consistent in this regard. Most prominently, in *Höfner* Advocate General Jacobs raised this argument, although considering the employment procurement in question to be of economic nature anyhow, but the Court ignored this notion, however returning to it later in *Eurocontrol* as well as *Cali* onwards.[66]

[65] Case 2/74 *Reyners v Belgian State* [1974] EU:C:1974:68
[66] Kloosterhuis (n 22) 125

The theory of exercise of public powers not constituting economic activity is derived largely from the CJEU's case law in *Eurocontrol* and *Cali*.[67] As said previously, in *Cali*, the CJEU in those circumstances did not consider monitoring and enforcing safety procedures by a private entity in an oil harbour to constitute economic activity. As noted earlier,[68] the CJEU's reasoning in *Cali* appears to circumvent the comparative test all together, and instead refers to three factors affecting the assessment, namely 1. the nature of the activity, 2. its aim, and 3. the rules to which it is subject to.[69] The CJEU considered that these factors in the circumstances in *Cali* demonstrated that the surveillance activity was connected to exercise of powers, which are typically those of a public authority.[70]

The approach taken by the CJEU in *Cali* could, and in fact have been criticized, since it evidently deviates without any reasoning or reference from the already existing *Höfner* regime. As Kloosterhuis argues, it appeared that CJEU rendered the site issues the main issues in its argumentation.[71] Interestingly enough, while the Court did not directly refer to *Höfner* ruling in *Cali*, it did so in *Eurocontrol*.[72] This would seem to enable the argument, although the CJEU does not specifically state it, that it might not consider the surveillance services non-excludable and thus, non-economic *per se*, but that it only for the fact that they are connected to the exercise of public powers, which renders them that. The Court's reasoning in *Eurocontrol* could be seen as supporting this argument, as the Court refers to Eurocontrol's activities 'taken as a whole', considering their nature, aim and rules to which they are subject to, a reasoning carried along to *Cali*.[73] This also brings into mind the overall assessment' that the CJEU applies in relation to solidarity exemption.

[67] *Eurocontrol* (n 27) and *Cali* (n 29)
[68] See section 2.2.2
[69] *Cali* (n 29) para 23
[70] Ibid para 23
[71] Kloosterhuis (n 22) 127
[72] *Eurocontrol* (n 27) para 18
[73] Ibid para 30

In addition, it is not entirely clear to how does the CJEU assess the 'nature' of the activity, when assessing the nature of the activity, if not by considering whether they are in principle, commercial or industrial, or in other words, satisfy the comparative test. This element seems mostly paradoxical as a part of the analysis, in this regard. This dilemma is evidently present in the opinion of Cosmas in *Cali.*[74] Considering also the fact that the Court in *Cali* referred to the activities in question being linked to, apparently not in themselves constituting, exercise of public powers, it remains unclear why should the comparative test be considered irrelevant in these cases.

In *Eurocontrol*, the activities of flight control were truly non-excludable, as it is clearly impossible to provide these services effectively only to aircraft, whose owners are willing to pay. In this regard, *Cali* seems different. Unlike Odudu argues,[75] the surveillance services in *Cali* do not appear non-exclusive as such. If, for instance, the regulation in Italy had differed so, that each vessel coming to port would have had to procure and pass surveillance on its own initiative, not unlike to how cars have to pass their MOT, before being allowed in, the surveillance service could indeed be provided in a competitive market both in theory and, Italy willing, in practice, which is more or less in direct analogy to CJEU's reasoning in *Höfner*. Thus, it seems that in *Eurocontrol* the Court would not necessarily had had to refer to exercise of public powers, considering that the activity did not seem to fulfil even the *Höfner* criteria. In *Cali* on the other hand, this would not have been the case, although Advocate General Cosmas rightly noted that the activity, as it stood under the Italian regime, could not be competitive.[76] This conclusion, however, was clearly incorrect in the light of *Höfner*. Thus, it seems that the nature of the activity does not in fact bear any significant meaning in the assessment of whether the activity is considered as exercise of public powers, although reference to this effect is constantly made.

[74] *Cali* AG opinion (n 30) para 42
[75] Odudu (n 22) 235
[76] *Cali* AG opinion (n 30) para 49

Thus, it clearly seems that the CJEU considers that activities fulfilling the comparative test are capable of being rendered non-economic if they are sufficiently connected to exercise of public powers by their aim and the rules to which they are subject. Since the sufficient connection between economic and non-economic activities has been extensively considered

2.3.5 Connection between economic and non-economic activity

Another element, not in itself constituting an exemption, but rather demarcating the scope of the two aforementioned exemptions, is the connection between economic and non-economic activity. It seems almost uniformly accepted among academics, that following the CJEU's decision in *Fenin*[77], buying from a market does not constitute an offer, and therefore economic activity on its own, unless the procurement is linked to a commercial activity itself.[78] This notion seems rather futile in that only buying into market without subsequent offer to sell would not satisfy even the comparative test in any case, as there is no possibility to profit by merely buying even theoretically. In practice however, the *Fenin* reasoning means that seemingly economic activities, such as purchasing and selling of medicinal goods and services is not considered economic, if they are connected to provision of services fulfilling an exclusively social function or to exercise of public powers.

In fact, the approach of the CJEU could be questioned in the light of decisions taken on national level, for instance in Poland in relation to the National Health Fund[79], and in the UK in *BetterCare*[80]. Although, the latter ruling was

[77] *Fenin* (n 63) para 25
[78] Hatzopoulos (n 6) 990 and Wehlander (n 11) 51
[79] Vassilis Hatzopoulos 'Healthcare in the internal market' Panos Koutrakos, Jukka Snell (eds) *Research handbook on the law of the EU's internal market* (Edward Elgar Publishing Limited 2017) 156-157
[80] *BetterCare v The Director General of Fair Trading* [2002] CAT 7 [2003] E.C.C. 40

even noted by Advocate General Maduro in his opinion concerning *Fenin*[81], the CJEU, however, ignoring this notion seems to have consistently held that the purchasing of goods and service cannot be dissociated from their subsequent use.

Naturally, in most situations, it is clear that the activity in question does not consist of only buying, but there is a subsequent use involved for the goods or services bought. Thus, where this argument is raised, the focal point most often is whether the subsequent use is non-economic, and whether the activity in question is sufficiently connected to this subsequent use, in case it is deemed non-economic. In practice, CJEU seems to mean that economic activities may be defined in the context of the nature of the activity on the downstream market, i.e., the subsequent use, if they are sufficiently connected to it.

Graells has noted that after *Fenin*, the CJEU has established a stricter approach in relation the 'connection' required between the non-economic and economic activities, in order to consider the latter as non-economic too.[82] He points out, that the CJEU in *Easy Pay*[83] in fact required that the activity in question must be inseparably connected to the non-economic activity. According to Graells, the 'inseparable connection' required by the CJEU, may be broken into two clear elements: alternative delivery methods, and instrumentality.[84] The case concerned Bulgarian retirement pension scheme, and more precisely, money order services connected to it. The CJEU considered that since money orders are only one valid method for delivering the pensions, pointing out that the same could be and was achieved by bank transfers for instance, and that the use of the single money order company was purely instrumental in handling the payments of the pensions, its

[81] *Fenin* AG opinion (n 63) para 24
[82] Albert Graells, Ignacio Anchustegui 'Revisiting the concept of undertaking from a public procurement law perspective - a discussion on EasyPay and Finance Engineering' [2016] European Competition Law Review 93
[83] *Easy Pay* (n 9)
[84] Graells (n 82) 95

activities were not inseparably connected to the pension scheme as such.[85] Thus, the activity was likely to be considered economic, although the final assessment was for the Bulgarian court to do.

Interestingly, the *Easy Pay* ruling has not been referred to even remotely as often in the recent case law, compared to *Fenin*, even though it would seem that the CJEU's argumentation in *Easy Pay* would apply *a fortiori* to similar situations also in the field of public health care. In fact, it would seem unlikely that the Court could end in the same result in *Fenin* should the case be considered under the more stringent rule established in *Easy Pay*. From an economic perspective in any case, the *Easy Pay* rule seems to be sounder. This seems especially true when the activities of an intermediary, such as a centralized purchasing body are considered.[86]

It is unclear what is the relationship between the *Eurocontrol/Cali* case line and *Fenin/Easy Pay* case line, as both make reference to connection between economic activities and either exercise of public authority or solidarity exemption. There would seem to be no logical reason to differentiate between the situations presented by these lines of cases, although the CJEU quite clearly does so. The reason is found probably rather in political than judicial logic, since it is apparent that especially by following the stricter, nevertheless more rational approach, requiring inseparable connection between economic and non-economic activities as in *Easy Pay*, the CJEU likely could not accept reasoning such as in *Cali*, as justifying the non-economic nature of the surveillance activities in those circumstances.

2.3.6 Conclusions on the *Pavlov* test

As is evident, there is no single approach as to the structure or decisive elements of the second step of the CJEU's analysis on economic nature of an

[85] Ibid 95-96
[86] Graells (n 82)

activity. Scholars have approached the structure and contents as well as the application of the 'offered on a market' criterion, or *Pavlov* test, in multiple ways and it is difficult to distinguish one as more correct than the other. The CJEU has not either succeeded in rendering the analysis less ambiguous, rather the opposite is true. Definitive conclusions are there by challenging to draw the case law or from the academic thought.

There are, nevertheless, some elements and lines of argumentation more consistently appearing in the CJEU's case law, as well as academic literature on the topic, regardless of the approach take on the structure of the analysis. Based on these findings, the *Pavlov* or 'offered on a market' criterion seems to build in principle upon assessment of three factors, namely, 1. solidarity, 2. exercise of public powers, and 3. inseparable connection of the activity in question to either one of the previous elements.

2.4 Overall conclusions on the CJEU's current analysis

The preceding study of CJEU's case law and academic views on it seem to have demonstrated the lack of a single accepted structural approach to the definition of economic activity, either by the academics or the CJEU. CJEU's definition of economic activity in its case law has fluctuated from a very broad interpretation to so narrow one, that even the private entities carrying out those activities for profit, could not regard it as non-economic by any means.[87] Thus, however, it can be said with relative certainty about the CJEU's analysis, is that it affords in essence, for two kinds of assessment criteria for a given activity, namely in the abstract (*Höfner* criterion)[88] and in the concrete circumstances (*Pavlov* criterion)[89]. These levels of assessment may be seen either as creating separate cumulative criteria or alternatively as two separate

[87] *European Commission and Slovak Republic* (n 1) para 25
[88] See the respective section
[89] See the respective section

methods applied in different situations, yet the CJEU has not in its case law confirmed either of these approaches, although support may be found for both.

In this regard, CJEU's assessment appears inconsistent, or at least not transparently structured. Clearly, the CJEU, regardless of how this method is conceptualized by academics, has found ways to categorize activities which are, in principle, economic (in the meaning of *Höfner* criteria) as non-economic when they are deemed to 1. fulfil exclusively social function,[90] 2. constitute exercise of public powers,[91] or 3. are sufficiently connected to either one of these.[92] While attempts have evidently been made by academics to piece together the elements used by the CJEU in its case law into a transparent clearly structured analysis, and some authors insist that despite the seemingly inconsistent case law, at least some form of a definable functional method exists,[93] the CJEU itself does not appear refer or consistently apply a specific structure in its analysis.

In the light of the CJEU's reasoning in its decisions, particularly relating to solidarity exemption, it seems that the CJEU employs what it refers to as overall assessment, not evidently relying on any given rigid structure of analysis.[94] It appears thus, that the CJEU applies these exemptions not so much in accordance with any consistent method, but more as ways of justifying, on a case-by-case basis, the nonapplication of competition law in a specific situation. The fact that any given case before the CJEU is at least seemingly decided on one-by-one basis, each on their individual circumstances, has been highlighted by some authors.[95] If this is true, it would at least explain why deducing a single, dependable, and unambiguous

[90] See the respective sections
[91] See the respective section
[92] See the respective section
[93] Kloosteruhis (n 22) 119
[94] Specifically in *European Commission and Slovak Republic* (n 1) para 30, *Kattner Stahlbau* (n 1) para 44, C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] EU:C:2011:112 para 47
[95] Odudu (n 22) 232

definition for economic activity from the CJEU's case law has proven to be such a demanding task even for hordes of academic thinkers.

3 Shortcomings of the current definition

3.1 General lack of legal certainty

The current definition and test regime, regardless of, or perhaps owing to its seemingly simplistic formula, is far from perfect. Often cited in the CJEU's case law, is the elegant definition that "any activity consisting in offering goods or services on a given market is an economic activity."[96] As demonstrated however, by the preceding study into the multitude of approaches and proposed structures of the interpretation of this definition, the definition, although presented in this quite simple form, is far from unambiguous.

The current definition has left considerable room for interpretation, not so much because of the simplistic nature of the comparative test, or the *Höfner* criteria, but owing to the more convoluted assessment in relation to the *Pavlov* criteria, the more concrete part of the analysis employed by the CJEU. This appears to be due to consideration given to both solidarity elements as well as those relating to exercise of public powers, on this evaluation. The overall assessment employed by the CJEU aims at finding whether solidarity elements within the activity considered, outweigh its economic elements, which clearly creates a field of discretion to the CJEU in setting a balance between these elements.

Regardless of whether the solidarity elements are considered as a part of Wehlander's agreement criterion or perhaps the more widely accepted solidarity exemption, the problem of this assessment remains the same. As previously demonstrated, the CJEU has established a number of factors which may be used to identify solidarity embodied within a given activity. However,

[96] *European Commission and Slovak Republic* (n 1) para 29, *Pavlov* (n 13) para 75 and C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] EU:C:2002:98 para 47, and Case C-82/01 P *Aéroports de Paris v. Commission* [2002] EU:C:2002:617 para 79.

none of these factors, not even profitability, is considered decisive on its own.[97] The recent case law of the CJEU, and more specifically the differing opinions of the General Court and the Court of Justice on the same matter, have also highlighted the difficulty of drawing the line between economic and non-economic activity. In other words, the CJEU has not been particularly successful in clarifying, what is the required amount of solidarity within an activity satisfying the comparative test, for this activity to be considered non-economic.

The problem would seem to be in essence, the same regarding exercise of public powers exemption. The lacking definition of public authority in the first place in addition to the somewhat unclear connection between the *Höfner* and *Cali* case lines, and the general difficulty in assessing which, in principle economic activities, are to be considered as sufficiently connected to either those consisting of exercise of public powers, or provided to fulfil an exclusively social function, to be regarded as non-economic themselves. This practice is further complicated by the inconsistencies of the CJEU decision making between the *Fenin* and *Easy Pay* case lines.

As the definition of economic activity as it stands derived from the CJEU's case law necessitates a case-by-case analysis of the activity in question by essentially balancing the elements pointing toward either solidarity or public powers against the commercial ones, it would be of utmost significance to know where this balance need be struck. The CJEU, as pointed out in the previous section, has not been successful in setting a transparent standard to this end. It thus is evident, that the task of interpreting which services, service providers and systems of public health care are to be considered as economic activities, is not an easy one. This appears mostly to be due to amount of discretion left by the CJEU's inherently vague assessment regarding the two lines of exemptions.

[97] Sauter (n 52) 210, Hatzopoulos (n 6) 983-984

The most obvious negative effect resulting from the present definition of economic activity in the public health care context, is the lack of legal certainty for Member State governments and competition authorities alike, when attempting to determine whether an existing or planned public health care system, or rather the activities carried out within it, should fall within the scope of competition rules. As has been pointed out by academics, national competition authorities are forced to act in interpreting EU competition rules in health care context due to lack of sufficiently clear CJEU precedents in this area.[98] As explained previously, this task has not proven easy even for CJEU itself, considering the different approaches taken by some Advocates General and different results derived by the General Court and the Court of Justice.[99]

3.2 Unnecessary differenciation between types of service providers

Another issue brought up clearly by Gronden already for some time, and already touched upon in this study, is the fact that service providers within public health care systems, appear to receive different treatment in the face of the CJEU's analysis depending on their type, that being either a managing body, or insurer, or a service provider in the more conventional sense, such as hospital, doctors.[100] Although Gronden apparently seems to insist that this is due to different structure and method of analysis applied in these cases, this argument has been questioned, as explained earlier.[101]

Regardless of whether Gronden's assertion is correct or not, the argument is without doubt based on the finding that results of the CJEU's assessments tend to favour insurers and funds over the service providers more directly

[98] Johan van de Gronden, Erika Szyszczak 'Introducing Competition Principles into Health Care: a Case Study of the Netherlands' [2014] Medical Law Review 238, 253
[99] See section 2.3.3
[100] Gronden, Guy (n 10), Gronden, Szyszczak (n 98) and Gronden, Sauter (n 25)
[101] See section 2.3

connected to the provision of health care services in their traditional meaning, which seems correct in itself.

3.3 Effect on the applicable rules

Another consequence, also quite apparent as it is the focal point of many of the cases before the CJEU, is the effect of the categorization of activity in the applicability of competition and state aid law. Competition and state aid rules do not apply to non-economic activities.[102] Although differing opinions by some scholars have as well been identified by for instance, Hatzopoulos, the general understanding would appear to strongly suggest that economic activity in effect sets the boundaries for the application of competition and state aid law.[103] Thus, the imminent implication, and indeed a major result of many of the CJEU's decisions relating to public health care systems, is that when the CJEU considers the activities in question to of non-economic nature, these activities fall outside EU's competition and state aid rules, embodied in 101, 102 and 107 TFEU.

Nevertheless, it has to recalled that the toolbox of internal market rules is not so swiftly emptied, as public procurement rules[104] might still apply to the non-economic activities. Hatzopoulos, most prominently, has insisted that whenever, as he refers to them, genuinely non-economic activities are awarded to private entities, the public procurement rules begin to apply.[105] Incidentally, he also has considered this 'indisputable fact' as a reason for not broadening the definition of economic activity,[106] apparently as he considers

[102] Wehlander (n 11) 60-61
[103] Hatzopoulos (n 6) 973-974, Sauter (n 52) 75, Graells (n 82) 94
[104] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Concessions Directive) [2014] OJ L94/1, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (Public Sector Directive) [2014] OJ L94/65, and 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 [2014] OJ L 94/243 (Utilities Directive)
[105] Hatzopoulos (n 6) 1007
[106] Ibid

the interests of the functioning of the market to be sufficiently secured by either one of the sets of rules.

This reasoning would be logical if it were true, yet this does not seem to be the case in the circumstances presented by the less conventional models of public health care systems, where the provision of services may be fully or partially privatized, even between competing profit-making private and public entities, and still be considered non-economic by the CJEU, as was the case in *DZP/UZP*. This is for the reason, that as Hatzopoulos correctly stated already when making the afore mentioned argument, the scope of the procurement rules unlike that of competition and state aid law, is dependent not only on the nature of the activity but also on the nature of the entity carrying out the activity.[107] Procurement rules only apply to contracting authorities and bodies governed by public law.[108] It also seems evident that private service providers, do not necessarily count as either of the aforementioned. Indeed, Hatzopoulos too appears to have receded to some degree from his earlier submission, noting that the status of private undertakings as contracting authorities is at least unclear.[109] Therefore, there appears to be a gap big enough for a private, profit-making entity to slip through.

3.4 Private service providers in a regulatory void

3.4.1 Gap between the scopes of competition and public procurement rules

The previous findings bring into question the theoretical eventuality, seemingly not very often considered neither by the CJEU or academics, that private entities providing service within or for a public health care system

[107] Hatzopoulos (n 6) 986
[108] Utilities Directive (n 104) article 3 and recital 12, Public Sector Directive (n 104) article 2 recital 10, Concessions Directive (n 104) article 1 recital 21
[109] Hatzopoulos (n 79) 150

may fall into a regulatory void if their activities on any level of the service provision is considered non-economic. This situation arises when these entities are not considered to carry out economic activity, and thus are not placed within the scope of competition and state aid law but are not considered as contracting entities or bodies governed by public law, in the meaning of public procurement law either. This appears to be the situation in the rather recent *DZP/UZP* decision by the Court of Justice.

It is important to note however, that this possibility appears to only be relevant in situations where a non-economic nature of the activity is derived from the solidarity exemption, and the activity is carried out by a private entity. This is for the reason that, while competition and state law do not regard the nature of the entity carrying out the activity as relevant, procurement law does.[110] Therefore, even though it is possible to arrive at a seemingly similar situation through the exercise of public powers exemption as well, it would seem more likely in practice that an private entity exercising public prerogative would fit within the definition of an body governed by public law, if not that of an contracting authority.

Therefore, when certain premises are met, private entities and their activities, at least for the part connected to provision of public services, are not subject to any EU internal market rules. The mere inapplicability of internal market rules as such to an activity, might appear as inconsequential at first, but this would be a feeling of false safety. This 'regulatory void' so to speak, created by the gap between the scope of the definition of economic activity and that of the public procurement rules, might prove to bear negative consequences not only on the upstream market from where these service providers procure their goods and services, but as well on the side of the public health care organizer, and eventually the citizens taxed or insured under the public health care system.

[110] Hatzopoulos (n 6) 986-987

3.4.2 Consequences of the gap

To understand the risks related to this scenario, it is only necessary to recall the reasoning behind regulating competition, state aid and procurement in the single market in the first place. These are considered to be welfare and efficient allocation of resources ultimately for the benefit of the consumers.[111] It has also been noted that while the rules applying to competition and public procurement differ in their scopes, they still share their goal of securing competition, either on, or for the market.[112]

Upon the realisation of this eventuality, these private entities, in theory at least, are free to exercise any uncompetitive behaviour imaginable for as long as this behaviour is related to the services they provide for the public health care. Naturally, this would likely affect the competitive elements, incorporated in some of these modern health care schemes, such as the one in question in the *DZP/UZP* case, in a negative manner.

In addition, unlike the public contracting authorities, namely the health care organizers in this context, these private entities not being subject to procurement rules, are capable of affecting, not only the public health care service market they are operating on, but also the markets from which they are procuring services and supplies from. This creates a considerable threat of uncompetitive behaviour and abuse on the down-stream market for the suppliers. It is necessary to recall that these sorts of effects especially on the supplier side of the market are not unprecedented. Most notably, in *Fenin* and perhaps even more relevantly, in *AOK*, where the entities, albeit carrying out what was considered non-economic activities, caused problems on the market from which they procured, in effect by ways of abuse of dominant position and cartel respectively.

[111] Sauter (n 52) 64–68
[112] Hatzopoulos (n 6) 992

4 Problem with the solidarity exemption: exceedingly broad scope leading to a regulatory void

4.1 The role of *DZP/UZP* decision

The regulatory void seems to, in effect, be the creation of the rather recent *DZP/UZP* decision made by the Court of Justice. The case concerned the economic nature of the activities of insurers providing service within the public health care system of the Slovak Republic. Although seemingly similar to the pre-existing *AOK* and *Kattner Stahlbau* cases, the features left outside the Court of Justice's evaluation of the nature of the activities would seem to suggest that *DZP/UZP* bears essentially different implications, and that the outcome of the Court of Justice's ruling has in effect, broadened the solidarity exemption creating a regulatory void, which will not benefit the fulfilment of social functions pursued by the activities.

The decision is interesting in many ways, but here it is necessary to highlight three specific points of interest, in order to demonstrate the ways in which the decision differs from the existing caselaw, and consequently, creates a new, broader scope for the solidarity exemption. These will be addressed below.

4.1.1 Similar assessment, different outcomes

As argued in the previous part of this study, the definition of economic activity as it stands, is not perfect. What was also highlighted, is the fact that the existing definition, as interpretated by the Court of Justice, creates a gap, a regulatory void in other words, in between the fields of application of internal market rules (competition and state aid) and public procurement rules, where this may not be desirable.

This possibility appears to be caused by the broadening of the scope of the solidarity exemption in the recent *DZP/UZP* case, after Court of Justice's ruling on the appeal before it. The case itself, as previously argued, stands as testimony of the difficulty of drawing a line between economic and solidarity-based services. The conclusion to which the Court of Justice arrived, however, appears to have, while saving Slovakia from a costly state aid sentence, done it with the price of creating potentially a much greater calamity.

The Court of Justice decided differently with the General Court in the *DZP/UZP* case. This is interesting in the sense that the General Court applied the same overall analysis that the Court of Justice used in its own ruling.[113] The Court of Justice simply assessed the preponderance of solidarity within the activity of the insurers differently. The General Court argued that the activities of the insurers were of economic nature primarily for the reason that they were carried out in profit-seeking intention, and that the insurers were in competition, albeit only regards to quality.[114] Interestingly, as the Advocate General Pikamäe pointed out, even the General Court acknowledged the significant, or apparently caused by linguistic misunderstandings, even the predominant social, solidary and regulatory features of the activity.[115] The Court of Justice, unlike the General Court considered that the presence of these two economic features could not call into question the predominance of social and solidarity features embodied in the activity.[116]

[113] Compare: Case T-216/15 *Dôvera zdravotná poist'ovňa v Commission* [2018] EU:T:2018:64 paras 51-53 and *European Commission and Slovak Republic* (n 1) paras 30-32
[114] *Dôvera zdravotná poist'ovňa* (n 113) paras 62-66
[115] *European Commission and Slovak Republic* (n 1) Opinion of AG Pikamäe EU:C:2019:1144 para 62
[116] *European Commission and Slovak Republic* (n 1) paras 61–62

4.1.2 Profitability and solidarity

Profit-seeking potential played major role in the argumentation between the courts. In relation to profitability of the activity, the Court of Justice took considerably more lenient, and arguably more objective-oriented, yet more subjective, approach than the General Court. While the General Court considered that the stricter regulation concerning the distribution and use of profits in relation to the activities in question is of no consequence if the service providers are capable of seeking profit, the Court of Justice argued that the profit-seeking opportunity was embedded to the systems social aims, in order to ensure its continuity.[117]

This appears to suggest, that the Court of Justice did not necessarily consider profitability even as an indication of economic nature of the activity as such, as it seemed to be justified by the framework of the system. This notion is interesting, when considered in the light of the Court of Justice's argumentation in *AG2R*[118], and especially Sauter's interpretation of that ruling suggesting that solidarity excludes private profit seeking activities.[119]

As said previously, this development demonstrates the difficulty in the assessment of economic nature created by the CJEU's ambiguous approach to the matter in general. The decision also verifies that although the elements identified as parts of the analysis of economic nature in the previous part of this study, are employed by the by the CJEU, in this case by both the General Court and the Court of Justice, their weight in the assessment may be affected by the fact that they are considered 'justified' by the court. This seems to support the argument, that the CJEU's overall assessment is not limited to only ticking boxes from the list of solidarity elements derived from the

[117] *Dôvera zdravotná poist'ovňa* (n 113) para 64, *European Commission and Slovak Republic* (n 1) para 40
[118] *AG2R* (n 94)
[119] Sauter (n 38) 466

previous case law but may also contain justification-like reasoning even in relation to specific economic elements.

Although Court of Justice's ruling does not in any way appear contradictory to CJEU's previous case law, it appears to broaden the interpretation of activities being considered as solidary to include also concretely profitable ones.[120] Somewhat conversely to the argumentation in this decision, it has been consistently held that profitability is not a necessary requirement for an activity to be categorized as economic, as mere potential to this end will suffice.[121] It is also quite apparent from the context in which this reasoning have been raised, that it is based on the idea that Member States should not be allowed to shelter genuinely economic activities from competition rules by simply awarding them to non-profit entities or regulating them so as to render them nonprofitable.[122] However, the Court of Justice took the view that the existence of evident and concrete profit-seeking capability did not subtract from the solidarity of the activity.

4.1.3 Nature of the entities

As explained earlier, the nature of the entity plays no role in the CJEU's assessment on the nature of an activity.[123] Although this is the case, it is necessary to point out that the *DZP/UZP* deviated from the existing similar cases in relation to this factor. While the entities in the closest comparing cases, in *AOK* and *Kattner Stahlbau* were bodies governed by public law,[124] the entities under scrutiny in *DZP/UZP* are private profit-seeking companies.[125]

As said, this fact has no bearing on the analysis carried out by the CJEU, yet it nevertheless is not without consequence when considering the implications

[120] Compare to *AOK Bundesverband* (n 1) and *Kattner Stahlbau* (n 1)
[121] Hatzopoulos (n 6) 990-991
[122] *Ambulanz Glöckner* (n 23) and *Höfner* (n 12) respectively
[123] See 2.3.3, and Hatzopoulos (n 6) 987
[124] *AOK Bundesverband* (n 1) para 5 and *Kattner Stahlbau* (n 1) para 5
[125] *European Commission and Slovak Republic* (n 1) para 2

of the decision made by the Court of Justice in relation to the nature of the activities of these entities. This meaning will be further explained subsequently.

4.2 In comparison to *AOK*

4.2.1 Similar activity?

AOK decision has been compared by some authors to the circumstances present in the *DZP/UZP* case.[126] This is understandable, since there is a considerable amount of similarity between the situations in these two cases, if comparison is limited to the solidarity elements in the insurers or funds activities, or in other words, the factors which the CJEU considers relevant in its analysis on the economic nature of activities. In both cases, premiums and benefits were unlinked,[127] and the entities could not compete on benefits.[128] In addition, both systems incorporated a risk equalization scheme.[129] Although seemingly very similar, on practical level of consideration, the *AOK* and *DZP/UZP* cases appear to differ due to the profit-seeking potential of insurers in *DZP/UZP*. Where in *AOK*, the associations were entirely non-profit,[130] this was not the situation in the Slovak case for the insurers.

However, as the Court of Justice argued, the mere fact that the insurers were able to seek profits did not render the circumstances so essentially different, that it would have justified different outcomes in these two situations. Indeed, following the CJEU's box ticking practice, the comparison is very close. Not nevertheless, forgetting the amount of discretion the CJEU has retained with

[126] Gronden, Guy (n 10) 80-81
[127] *AOK Bundesverband* (n 1) para 52, *European Commission and Slovak Republic* (n 1) para 59
[128] *AOK Bundesverband* (n 1) para 52, *European Commission and Slovak Republic* (n 1) para 42
[129] *AOK Bundesverband* (n 1) para 53, *European Commission and Slovak Republic* (n 1) para 9
[130] *AOK Bundesverband* (n 1) para 51

its overall assessment, even a different outcome would not have been surprising.

Therefore, although a difference in the circumstances between these two cases exists, this notion is of no consequence in the reasoning of the CJEU, as it relates to factors not traditionally falling within the scope of

4.2.2 Similarly justified in the economic sense?

Although apparently similar in the face of CJEU's definition of economic activity, the circumstances in *AOK* and *DZP/UZP* would seem to differ when scrutinized outside of those premises. This raises the question of whether or not the two situations can be similarly justified from a more economic point of view.

Noteworthy is the difference between the alleged breaches of EU internal market law. *AOK* concerned basically a cartel, set up by the German sickness funds to cap the maximum prices of medicinal products to a certain amount. In the *DZP/UZP* on the other hand, the question was about state aid granted to the one state owned insurer in the Slovak Republic. As however, has been deduced from the case law, namely from the CJEU's reasoning in *AOK* and *Fenin* cases, neither the existence, in effect, of a cartel or abuse of dominant position affecting the upstream market does not by itself have any bearing on the nature of the activity of the entities exercising those activities as explained earlier.[131]

While, although criticized,[132] the result *AOK* ruling seems anyhow acceptable from a pragmatical point of view in the economic sense. Although effectively

[131] *AOK Bundesverband* (n 1), Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [2006] EU:C:2006:453, see section 2.3

[132] Jennifer Skilbeck 'The EC Judgment in Aok: Can a Major Public Sector Purcaser Control the Prices It Pays or Is It Subject to the Competition Act?' [2004] Public Procurement Law Review 95 (note)

a cartel in, the scheme of setting the maximum purchase prices for medicinal products by the associations did not provide any advantage to them, but at least seemingly benefitted the cost effectiveness of the insurance scheme on the level of its organization (state level). The advantage created by the purchase pricing cartel was therefore directly forwarded to the state as the organizer public health care, as the sickness funds themselves would be unable to benefit from it. Whether the alleged state aid in the *DZP/UZP* case could be justified under similar logic, seems doubtful.

Firstly, the cartel between the sickness funds in *AOK* did not directly benefit any of the funds participating and being a maximum purchase price arrangement, it did not have the immediate effect of decreasing competitiveness of the funds on their procurement market, as they were still free to push purchase prices even lower individually. In other words, the cartel in economic sense, did not compromise the logic of the public health care systems framework. The aid measures granted to the one state insurer in *DZP/UZP* on the other hand, seemed to be contradictory to the competition-based framework of the public health care system in the Slovak Republic, thus compromising the proper functioning of that system, unlike the aforementioned cartel in *AOK*.

Secondly, as pointed out previously, since the sickness funds in *AOK* apparently could not profit from their activities in any case, unlike the insurers in *DZP/UZP*. Therefore, in the Slovak system, the entities providing services could in fact gain an advantage themselves from any uncompetitive behaviour or state aid, without this advantage necessarily being forwarded to the organizing level at any point. It seemed that the Court of Justice found a way, while relying on the predominance of solidarity features, to justifying the profit-seeking ability of the insurers as a necessary element of the underlying framework of the public health care system.

It indeed seems logical, that profitability would be major incentive for increasing effectiveness of the service provision in this context. But even if

profitability is an integrated and logical element in the public health care system, which admittedly is by its goals and on the level of its organization solidarity-based, does this justify the nonapplication of competition law on the insurers' activities, based on the system's aims? This would seem doubtful, as it did in *AOK* as well, recalling that competition rules aim at securing the competitiveness in the market, application of which thus appearing to have more positive than negative effects on the public health care systems from the viewpoint of their goals. Regardless of this basic argument, the CJEU decided differently in *AOK*, and by crude analogy, the same reasoning would seem to fit *DZP/UZP* as well, although this outcome does not seem justified by any logic of economy.

It thus seems, that while the two situations evidently are comparable by way of analogy in the context of CJEU's assessment relating to economic activity and solidarity exemption, the similar outcomes in these decisions cannot necessarily be justified in the economic sense. Therefore, even though in harmony with the existing case law of the CJEU, the Court of Justice's decision in *DZP/UZP* would seem to broaden the practical scope of solidarity exemption into realms, where it can no longer be economically justified when assessing the implications of such an exemption. In this respect, it should be remembered, that pragmatical solutions could occasionally be considered better than purely principle-based ones, as Kloosterhuis argues.[133]

4.2.3 Implications on practical level– a hypothetical scenario

The implications of the broadening of the solidarity exemption, and its implications in the form of the regulatory void created by this scope can be perhaps best demonstrated by introducing a short hypothetical scenario. Following the reasoning of the Court of Justice in both *AOK* and *DZP/UZP*, an activity carried out by a private profit-making entity should be considered non-economic if, under an overall assessment, it is considered to be

[133] Kloosterhuis (n 22) 120

predominantly solidarity-based.[134] Thus, it would seem indisputable that any system organized in a similar manner compared to that of the German of Slovak systems in *AOK* and *DZP/UZP* should be considered as non-economic.

However, simply by taking a combination of the different circumstances in those two cases, not affecting the CJEU's evaluation of the activity's nature, namely the profit-making capability of the service providers from the Slovak system, and the purchase price cartel from the German system, we arrive at a conclusion where profit-making entities are capable of taking an advantage for their own benefit in increased profit, of uncompetitive arrangements at the expense of their suppliers, and ultimately, of those insured. At no point, would the benefit of this uncompetitive action necessarily be forwarded to the public health care organizer, nor would the activity be under the scope of competition or public procurement rules.

This outcome seems hardly desirable from viewpoint any other than that of the service provider placed in this commercially favourable situation. Still, it would seem to be the inevitable result of the CJEU's existing method analysis of the economic nature of an activity. The causes leading to this undesirable outcome are derived from factors outside the scope of the CJEU's analysis on the economic nature of an activity, namely the nature of the entity, and from those, which by themselves are not considered decisive in relation to seemingly solidarity-based activities, such as profitability.

In the author's opinion, this example demonstrates the potential risks caused by the forever broadening scope of the solidarity exemption. At least, it would be interesting to see how the CJEU would approach a situation, such as the one described here. It should not, in theory, be a difficult assessment for the CJEU, since the scheme would closely resemble those in earlier case law by analogy regards to elements considered in the solidarity assessment. On the

[134] *European Commission and Slovak Republic* (n 1), *AOK Bundesverband* (n 1)

other hand, deviating from the existing standard of solidarity assessment would have to reasoned in some way. One can only guess to which direction the reasoning would refer to.

4.3 Conclusion: has the scope of solidarity exemption become exceedingly broad?

As demonstrated in the above sections of this study, the circumstances in *DZP/UZP* case are sufficiently different from the comparable existing caselaw, for the argument to be made that this decision has rendered the scope of solidarity exemption broader than what it was before. This is due to the fact, that previously the exemption in relation to similar public health care systems, has identified as non-economic mostly entities which have been entirely non-profit, and besides have been categorized as bodies governed by public law.

It has been demonstrated that this new scope is liable in creating a gap, a regulatory void so to speak, between the fields of application of competition and procurement rules. Furthermore, its has been demonstrated which kind of potential risks this new eventuality raises in the market-place, especially in relation to the upstream suppliers of goods and services for the public health care service providers. Lastly, it has been shown that these risks are not economically justified by the aims nor effectiveness of the underling systems of public health care.

5 Saving the functional definition, return to the roots of solidarity

5.1 Recapitulation of the flaws in the current definition

Before proposing a solution, it is necessary to recall the problems indicated with the CJEU existing way of defining economic activity. It can be said with certainty, that the list presented here is by no means exhaustive, but it aims only in recapping the main issues brought up in this study.

The three major issues introduced previously in this study are the amount of ambiguity, seemingly unjustified different treatment of different types of service providers, and the discretion regulatory void caused by overly broad solidarity exemption in relation to private entities.[135] These flaws bear negative effects on both the legal certainty for the Member States as well as on the proper functioning of the internal market.

5.2 Gronden's proposal

Interestingly, while in this study, the concern that the broadened scope of solidarity exemption is liable to create problems on the market and in general, Gronden continually appears to consider the application EU competition law rules to privatized public health care services as strikingly odd in the first place.[136] His general opinion appearing to be, that the CJEU does not pay due attention to the complex and important nature of the activities of the conventional health care service providers when they offer their services for

[135] See section 3
[136] Gronden, Szyszczak (n 98) 241, Gronden, Guy (n 10) 79

or within a public health care system.[137] This is one of the initial premises, where Gronden's view point does not appear to be logically sound, as it has been demonstrated in this study, that the application of competition rules in relation to private entities offering services against remuneration are more likely to have an positive, rather than negative effect on the attainment of the social and solidary objectives of the underlying public health care systems, when these rely on efficiency gains brought by competitive environment.[138]

Therefore, it is clear that from the outset, Gronden's proposition on how to reimagine the definition of economic activity or the analysis thereof, is not the most likely one to be accepted by the author, it will be considered for reasons of academic integrity, despite the difference in the premises of thought.

In short, Gronden's proposition relies on the so-called 'three-prong' test, which relies mainly on analysis of the funding of the service, the nature of the underlying system and linkage between this system and the service in question.[139] However, while admittedly this theory is based on interpretation of CJEU caselaw, it does not appear as the most rational approach to defining the activities in question.

In simple terms, Gronden's interpretation and theory appears to be that the CJEU, in its CEPPB decision, initiated a new test for determining the nature of an activity of a service provider within a system, which concurrently bears both economic and social features.[140] The three-prong test as the name suggests, consists of three cumulative criteria, namely 1. predominantly public funding behind the supply of the services or products, 2. public interest objective of the funding and 3. close relation of these services or products to that objective. According to Gronden and Guy, when these three criteria are simultaneously met, the activity of the service provider in question should be

[137] Gronden, Guy (n 10) 83
[138] See section 4.2.2
[139] Gronden, Guy (n 10) 83–88
[140] Ibid

considered non-economic, despite the fact it would be considered economic by the standard of the abstract test.[141]

Although admittedly based on CJEU's case law, that is in the field of education, the three-prong test would not seem suitable new tool for tackling the problems identified in this study, apart of course, for the problem of inequal treatment of the different types of service providers. It is evident, that the three-prong test would do nothing to suppress the problem of the regulatory void, rather it would quite clearly add to this problem significantly by even further broadening the applicability of the solidarity exemption into masses of market actors, now considered as undertakings for the purposes of competition law.

5.3 Proposal: Exercise of public powers as the sole exemption

5.3.1 Recognizing true solidarity and its connection to exercise of public powers

In order to attempt to mend the issues caused by the CJEU's method of analysis, it is necessary to try and identify the true source of the problem. As explained, most elements and structures stated or interpreted to be part of the CJEU's definition of economic activity, can and have been criticized for one reason or another. In relation to public health care cases, the criticism appears mostly to concern the application of the solidarity exemption as either too narrowly, as Gronden seems to think, or too broadly, as argued in this study.[142] However, it seems that the cause of most of the controversies could be identified to result from a misunderstanding of the CJEU on a more substructural level, than that of the assessment of predominance of solidarity

[141] Gronden, Guy (n 10) 85-88
[142] See previous section Gronden's proposal

in its current solidarity exemption regime. It may be found, that the CJEU has, over its years of decision-making in this field, become misguided as to the concept of solidarity and its necessary implications in the context of public health care.

According to Nistor, solidarity means the equal and just sharing of burdens, and advantages.[143] Evidently, the CJEU has at least initially had similar understanding of the term, as the elements it considers to indicate the solidarity within an activity clearly show.[144] Regardless of this fact, the CJEU does not seem to fully grasp the essential idea of this concept, as it now accepts mere predominance of solidarity features as evidence of the non-economic nature of an activity.[145] As shown in this study, the CJEU does not consider even the existence of concrete profitability as a feature capable of deterring the application of the solidarity exemption incorporated in its definition of economic activity.[146] As a result, the CJEU has accepted activities not only potentially, but concretely profitable to the entity exercising them, as exempted from the scope of competition law. This indicates the lack of understanding of the CJEU of the principal structure, on which economic activities exist.

It is evident, that solidarity, in its true form, could be defined in the commercial context as a definite market failure.[147] The argument submitted that solidarity-based activities, following the abovementioned theory, are necessarily non-exclusive by nature,[148] seems nevertheless, only partially to be true. As argued previously, not every activity produced on non-exclusive terms, such as the surveillance service in *Cali*, is necessarily non-exclusive in the abstract, rendering it non-economic in the face of the *Höfner* criteria.[149] It is only true, that the provision of a service, specifically an economic one, on

[143] Nistor (n 2) 154
[144] See section 2.3.3
[145] Ibid
[146] See section 4.1
[147] Kloosterhuis (n 22) 133-136, Odudu (n 22) 234-235
[148] Ibid
[149] See section 2.3.4

non-excludable terms requires intervention by the state, and thus cannot be taken up by private entities, whether or not profit-making. In its early case law around this issue, the CJEU appeared to acknowledge this fact, when it considered that where the provision of services required high degree of solidarity, private entities could not carry it out, since they were unable to enforce participation, unlike the state could.[150]

The exercise of true solidarity therefore, by reason of logic, necessitates the exercise of public powers. Thus, it appears odd that the CJEU in practice applies separate criteria in relation to finding that activity constitutes the exercise of public powers and that it fulfils an exclusively social function. That is not to say, that the CJEU's assessment under the exercise public powers exemption would be flawless, but it seems clear in any case, that the existence of true solidarity is structurally connected to the exercise of public powers.

5.3.2 Difference in organizing and providing health care services in a solidarity-based system

Having established the essential connection between the existence of solidarity and the exercise of public powers, it is necessary to consider, on which levels and in relation to which actors of public health care system's basic structure this connection exists. In doing this, the inherent difference between organizing and providing public health care services may be observed.

Organization of public health care undoubtedly could be considered one of the core functions of a modern welfare state. It has been established already in the early case law of the CJEU in the context of public health care, that the

[150] Kloosterhuis (n 22) 128-129

organization of the public health care is a competence of each Member State and not that of the EU, as is clear in the light of Article 168(7) TFEU.[151]

This term, however, should not be understood in a too broad meaning. Although indisputably a Member State competence, there appears to be nothing in that notion suggesting that the EU law could not affect any member within a public health care system, although the theory proposed by Gronden would seem to lead to such an outcome. Therefore, it is important to correctly understand what are the different functions that a public health care system incorporates in the context of its members.

The public health care organizers are, in essence, always rather directly connected to the state. Depending on the individual model of organization of the system employed in each Member State, the management, or organization, of public health care services may be entrusted to different entities such as municipalities, regions, ministries or any state entity which is capable of exercising public powers to the extent necessary to render plausible the provision of, in principle economic, services on non-excludable terms to the public. Incidentally, these entities are for the same reasons, seemingly always contracting authorities or bodies governed by public law for the purposes of public procurement law.

Thus, the public health care organizers are acting based on the solidarity principle in the terms concrete meaning, as they have the necessary authority to either tax the general public or enforce their mandatory participation on insurance schemes. These activities could not be considered economic, even based on the public powers-exemption. More importantly, their activities would not fulfil even the comparative test, as no market-based activity could rely, even hypothetically, on taxing right or enforcement of mandatory participation.

[151] Case 238/82 *Duphar BV and others v The Netherlands State* [1984] EU:C:1984:45 para 16 as cited in *Poucet & Pistre* (n 51) para 6

Public health care service providers on the other hand, are not necessarily public entities, as they are concerned only with the provision of services of essentially economic nature, such as medical services or those of health insurance. While these entities provide service, from the viewpoint of their patients and customers, on solidarity-basis, their activities are not solidarity-based from their own viewpoint.[152] The fact that the activities of public health care service providers are seemingly solidarity-based, is the consequence of solidarity existing on the level of public health care organization, where public powers can be and are exercised to fulfil social objectives. For the part of the service providers, the activities are simply an example of a publicly financed commercial activity.

It appears thus, that the CJEU has not recognized the inherent difference between truly solidarity-based activities and those, which although related to the provision of services aimed at fulfilling an exclusively social function, are nevertheless inherently economic, as they lack the connection to the exercise of public powers and incidentally, to the actual solidarity-based functions of their underlying public health care system. These kinds of activities are, for at least by any practical means, those of the service providers who provide services, albeit being of solidary nature from the viewpoint of their recipient, against remuneration and potentially for profit, to the public health care organizer. As Graells points out in relation to centralized purchasing bodies, the service they provide is not only their primary function, but also the sole purpose of their existence.[153]

5.3.3 How to define economic activity in public health care service provision

Having established that solidarity in the context of public health care service provision, can exist only in tandem with exercise of public powers, the question remains, if all types of service providers, private and public, offering

[152] *European Commission and Slovak Republic* (n 1) paras 2, 25
[153] Graells (n 82) 97

conventional services or insurance, should be considered to carry out economic activity in the meaning of EU competition law? To answer this question, it is necessary to recall the case line of *Fenin/Easy Pay*.[154] If it can be established, that the service provision is sufficiently connected to the exercise of public powers, and therefore the true solidarity, on the level of organization of the public health care system, the service provider should be considered not to carry out economic activity. Naturally, this again brings up the controversy of what constitutes a sufficient connection in this case. As argued in previously, it would seem that the CJEU's approach in *Easy Pay* was more economically sound, than the more lenient one in *Fenin.*[155]

Only the public health care service providers that do not count as contracting authorities or bodies governed by public law and lack the prerogative to enforce participation or to tax or even sufficiently divide the risks between themselves, are likely to be those, whose activities in themselves do not constitute exercise of public powers. Therefore, the connection between the service provision activity and the exercise of public powers needs to be established only in situation where these kinds of entities are involved.

It is not to say, that the assessment of activities under the CJEU's instrumentality and alternative delivery method criteria of *Easy Pay* would be easy.[156] For the part of any entities who provide services following any kind of public procurement procedure, the answer seems obvious. As these entities are competing for the opportunity to provide the services in question, they are evidently interchangeable. There is therefore little doubt as to the existence of alternative delivery methods or to the instrumentality of the role of those service providers in general. Thus, it would seem that in accordance with this approach, the insurers for instance, in a system such as the one in *DZP/UZP* would likely be considered undertakings, and their activities economic. This finding, would also seem to reflect the true nature of their activities better,

[154] See section 2.3.5
[155] Ibid
[156] Graells (n 82) 95-96

than the one Court of Justice came to. Although admittedly strict, the CJEU's approach in *Easy Pay* is not entirely unambiguous, and it is to be recalled that even in that case the final assessment remained to be done by the national court.[157]

Nevertheless, it can be concluded that following this approach, and abandoning the semi-solidarity-based assessment employed by the CJEU in its current form, the definition of economic activity would start to reflect more the actual economic circumstances in the context of public health care service provision. While doing so, this approach would most importantly, be likely to diminish or eliminate entirely the risks presented by the regulatory void, created by the current overly broad interpretation of solidarity exemption by the CJEU. Additionally, the employment of a single exemption regime for the exercise of public powers, instead of the current dual exemption regime including the faulty solidarity exemption, would seem likely to simplify the task of Member State governments and competition authorities, as well as that of the CJEU itself, in assessing the nature of a given public health care activity.

[157] *Easy Pay* (n 9) para 43

Conclusion

It has been said already decades ago, that defining economic activity within the meaning of EU competition law is a difficult and unthankful task.[158] This notion indeed seems well reasoned even to this day, in the light of this study and its preparation. Nevertheless, and even in absence of definite answer to many questions, this study has hopefully managed to present the existing premises by which the CJEU defines economic activity and some of the issues caused by this current approach.

Specifically, it has been demonstrated, how the Court of Justice's ruling on *DZP/UZP* has broadened the scope of the solidarity exemption granted for activities provided to fulfil an exclusively social function, to a degree, where this exemption cannot anymore be justified economically or even by the social aims it supposedly protects. This study proposes a new direction for the CJEU in assessing the economic nature of public health care service provision, focusing on the separation of the solidarity-based services from their not necessarily solidarity-based provision. The proposed approach is based on the finding that solidarity in the public health care context exists only in combination with the exercise of public powers. Thus, assessment of the existence of exercise of public powers, or an inseparable connection thereto, in relation to a given public health care service provision activity, would be commendable way for finding the true economic nature of that activity.

The proposed approach is not itself without problems, but it, nevertheless, would seem to provide a clearer and economically sounder basis for the definition of economic nature, compared to the existing one. Most importantly, the proposed approach would be likely to ensure, that risks caused to the proper functioning of the internal market by the regulatory void

[158] Ibrahim (n 19) 265 in reference to Buendia Sierra *Exclusive Rights and State Monopolies Under EC Law* (Andrew Read, OUP 1999) para 1.152

created by the gap between scopes of competition and state aid, and public procurement law, would not be materialized, at least not in the scale which the current approach of the CJEU allows.

Literature

1. Graells A, Anchustegui I, ‘Revisiting the concept of undertaking from a public procurement law perspective - a discussion on EasyPay and Finance Engineering’ [2016] European Competition Law Review 93
2. Gronden J, Guy M, ’The role of EU competition law in health care and the ‘undertaking’ concept’ [2021] Health Economics, Policy and Law 76
3. Gronden J, Sauter W, ’Are state owned healthcare providers that are funded by general taxation undertakings subject to competition law?’ Legal Issues of Economic Integration [2011] 213
4. Gronden J, Szyszczak E, ’Introducing Competition Principles into Health Care: a Case Study of the Netherlands’ [2014] Medical Law Review 238
5. Hatzopoulos V, ‘The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities’ [2012] European business law review 974
6. Hatzopoulos V, ’Healthcare in the internal market’ Panos Koutrakos, Jukka Snell (eds) *Research handbook on the law of the EU’s internal market* (Edward Elgar Publishing Limited 2017)
7. Ibrahim A, ’A re-evaluation of the concept of economic activity for the purpose of EU competition rules: the need for modernisation’ [2015] European Competition Journal 265
8. Kloosterhuis E, ’Defining non-economic activities in competition law’ European Competition Journal [2017] 117
9. Nistor L, , *Public Services and the European Union Healthcare, Health Insurance and Education Services*, (published by T.M.C. Asser Press, produced and distributed by Springer 2011)
10. Odudu O, ’Are state owned healthcare providers that are funded by general taxation undertakings subject to competition law?’ European Competition Law Review [2011] 231
11. Sauter W, ’The impact of EU competition law on national healthcare systems’ European Law Review [2013] 457

12. Sauter W, *Coherence in EU Competition Law* (Oxford University Press 2016)
13. Skilbeck J, 'The EC Judgment in Aok: Can a Major Public Sector Purcaser Control the Prices It Pays or Is It Subject to the Competition Act?' [2004] Public Procurement Law Review 95 (note)
14. Tomljenovic V, Bodiroga-Vukobrat N, Malnar V B, Kunda I (eds) *EU Competition and State Aid Rules, Europeanization and Globalization volume 3* (Springer 2017)
15. Wehlander C, *Services of General Economic Interest as a Constitutional Concept of EU Law* (published by T.M.C. Asser Press and produced and distributed by T.M.C. Asser Press and Springer 2016)

Table of Cases

1. Case 2/74 *Reyners v Belgian State* [1974] EU:C:1974:68
2. Case 118/85 *Commission v Italy* [1987] ECLI:EU:C:1987:283
3. Case C-41/90 *Höfner and Elser v Macrotron* [1991] EU:C:1991:161
4. Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] EU:C:1993:63
5. Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] EU:C:1994:7
6. Case C-343/95 *Diego Calì & Figli Srl and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] ECLI:EU:C:1997:160 Opinion of AG Cosmas EU:C:1996:482
7. Case C-343/95 *Diego Calì & Figli Srl and Servizi Ecologici Porto di Genova SpA (SEPG)* [1997] EU:C:1997:160
8. Case C-180/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] EU:C:2000:428
9. Case C-180/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] EU:C:2000:428 Opinion of AG Jacobs ECLI:EU:C:2000:151
10. Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] EU:C:2001:284
11. Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] EU:C:2002:98
12. Case C-82/01 P *Aéroports de Paris v. Commission* [2002] EU:C:2002:617
13. Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] EU:C:2004:150
14. Case C-205/03 *P Federación Española de Empresas de Tecnología Sanitaria (FENIN)* Opinion of AG Maduro EU:C:2005:666
15. Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [2009] EU:C:2009:127

16. Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] EU:C:2011:112
17. Case C-185/14 *'EasyPay' AD, 'Finance Engineering' AD v Ministerski savet na Republika Bulgaria, Natsionalen osiguritelen institut* [2015] EU:C:2015:716
18. Case T-216/15 *Dôvera zdravotná poist'ovňa v Commission* [2018] EU:T:2018:64
19. Joined Cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.* [2020] EU:C:2020:450 Opinion of AG Pikamäe EU:C:2019:1144
20. Joined Cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.* [2020] EU:C:2020:450

Legislation

1. Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 47–390
2. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Concessions Directive) [2014] OJ L94/1
3. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (Public Sector Directive) [2014] OJ L94/65
4. 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 [2014] OJ L 94/243 (Utilities Directive)