Nailing the Jellyfish: Social Security and Competition Law

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As the growing number of cases before both the Court of Justice[1] and the European Commission shows, the question whether and to what extent the Treaty's competition rules apply to social security systems and their operators' activities has become increasingly topical. Elements of competition have been or are being introduced - in different ways and to different degrees - into public social security systems in a number of member States. Where does this leave the competition rules? This article - which deals solely with statutory social security[2] - does not pretend to give the final answer to this question which, in fact, has been discussed for as long as social security schemes have existed. Rather, it attempts to highlight some central issues. It will analyse the Court's case-law relating to the concepts of "undertaking" and "solidarity" and will address issues raised by the exercise of market power of social security bodies vis-à-vis third parties on other markets.

The reasons for which, towards the end of the nineteenth century[3], the States were entrusted with providing their citizens with a pension as well as with cover against accidents, illness and invalidity were primarily twofold. One the one hand, there was wide-spread concern both about the speculative way private insurers were doing business at that time and their perceived inability correctly to assess the risks involved. On the other hand, in the absence of efficient supervision, the long-term viability of private

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1 See Cases C-115/97, *Brentjens/Stichting Bedrijfspensieonsfonds voor de handel in bouwmaterialien*; C-219/79, *Drijvende Bokken/ Stichting Bedrijfspensieonsfonds voor de vervoer- en havenbedrijven* and C-67/96, *Albany International BV/Stichting Bedrijfspensioensfonds Textielindustrie.* Advocate-General *Jacobs* delivered his opinion on 28 January 1999

2 References to "social security" in this article are to be understood in this way. For the applicability of EC competition rules to social protection in the wider sense, as it is at stake in the cases referred to in note 1, see *Gyselen,* L'applicabilité des Règles de Concurrence Communautaires à des Régimes de Protection Sociale, Liber Amicorum Michel Waelbroeck, Ed. Bruylant [1999], forthcoming

3 The German health, accident and old-age insurance schemes for workers, for example, were set up between 1883 and 1889

insurers was considered to be too uncertain to entrust them with long-term obligations vis-à-vis citizens[4].

Today, those concerns are no longer being voiced to justify insurance monopolies. Quite to the contrary, in view of exploding health care budgets and the looming pensions crisis there seems to be greater confidence in the long-term reliability of private than of State schemes. Be that as it may, most member States have retained their social security systems more or less as monopolies[5], financed partly by general taxes or by compulsory contributions to bodies set up to run those systems. Obviously, such monopolies - enjoying by definition a dominant position - are in principle apt to come into conflict with the basic objectives of competition policy. But do they necessarily also come into conflict with the competition *rules*[6]? That depends, first of all, on whether or not the entities running those schemes are to be regarded as "undertakings" in the meaning of Articles 85 and 86 of the Treaty. Since this question will turn out to be crucial, it will be explored in some detail below.

THE NOTION OF UNDERTAKING IN EC COMPETITION LAW

It is inherent in the principle of an open market economy with free competition, as referred to in Article 102 a of the Treaty, that competition rules only apply to behaviour which is, in the widest sense, of an economic nature. Thus, the notion of undertaking - which delimits the scope of application of the competition rules - must be a *functional* one, focussing on the subject-matter the entity in question is concerned with (as opposed to its institutional characteristics). The Court has itself adopted this approach:

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4 *Heinze,* Die substitutive Krankenversicherung, ZfdgV [1996] 281, 283; *Giesen,* Sozialversicherungsmonopol und EG-Vertrag [1995] 161

5 Exceptions include the Netherlands and Germany which have both opted for a "mix" of public and private schemes, complementing each other.

6 The Court has recently confirmed that the social security field - like other allegedly special ones like energy, transport, broadcasting, insurance, banking and sports - is in principle subject to the provisions of the Treaty. See Cases C-120/95, *Nicolas Decker/Caisse de maladie des emloyés privés*, [1998] ECR I-1831, at paragraphs 23 to 25 and C-158/96, *Raymond Kohll/Union des caisses de maladie,* ECR [1998] I-1931, at paragraph 19 to 21. In fact, the Court had already applied the competition rules in several social security cases which will be discussed more fully below. In short, the social security field is not *per se* exempted from the EC competition rules.

In *Hydrotherm/Compact*[7] the Court had to decide whether an agreement concluded by one company with three other parties (all of which were controlled by one of the three), could be considered to be "an agreement to which only two undertakings are party" for the purpose of applying the (old) exclusive dealings block exemption. The Court held that

> "[i]n competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the *subject matter* of the agreement in question"[8].

The Court confirmed this functional approach in *Höfner* where it coined a phrase that henceforth was to become the standard definition:

> "[T]he concept of an undertaking encompasses every entity engaged in an *economic activity*, regardless of the legal status of the entity and the way in which it is financed."[9]

The Court's substance-oriented approach - treating as irrelevant organisational features like legal status and way of funding - is clear. However, the difficulty lies elsewhere: what precisely is an "economic activity"?

The Court itself has approached this crucial issue in two complementary steps. First, it has established a general principle as to the circumstances under which an activity is to be considered as economic. Second, it has specifically excluded certain activities from the scope of the general principle.

The principle: actual or potential competition

In *Höfner*, cited above, the Court had to decide whether the German Employment Office (hereinafter *Bundesanstalt*) was to be qualified as an undertaking. The *Bundesanstalt's* statutory aim was to achieve and maintain a high level of employment, to improve job distribution and thus to promote economic growth. In practical terms, the *Bundesanstalt*

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7 Case 170/83, [1984] ECR 2999

8 at paragraph 11, emphasis added

9 Case C-41/90, *Höfner/Macrotron,* [1991] ECR I-1979, at paragraph 21, emphasis added

was entrusted with bringing together prospective employees with employers as well as with administering unemployment benefits.

Given these undoubtedly social objectives, the German government claimed before the Court that the *Bundesanstalt*, being a public agency, was not an "undertaking" in so far as its services were provided for free (at least not subject to direct remuneration). The Court was not convinced by this argument. Instead, it ruled that

> "[t]he fact that the employment procurement activities are *normally* entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement *has not always been,* and *is not necessarily*, carried out by public entities"[10].

On the face of it, the Court considers that an activity is of an economic nature if it faces actual or potential competition by private companies, thus establishing a strong presumption for the economic character of any activity.

The Commission took the same view when, *inter alia*, assessing the fees charged by the *Régie des Voies Aériennes*, a public body charged both with securing air transport safety in the Belgian airspace and with running Brussels National Airport. As far as the construction, development, maintenance and operation of the airport was concerned, the Commission considered those activities to be

> "[e]conomic activities which might be carried on, *at least in principle,* by a private enterprise for profit"[11].

This "naturalistic"[12] understanding of State activities was received with scepticism by some academics because it effectively brings all activities, from medicine to education, into the ambit of competition law since they all *can* be - and indeed are - performed also by private companies.

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10 at paragraph 22, emphasis added

11 Commission Decision 95/364/EC of 28 June 1995, OJ [1995] L 216, emphasis added

12 *Kovar*, Droit communautaire et service public: esprit d'orthodoxie ou pensée laicisée, [1996] RTD eur. 215, 227

In any event, the Court has more recently confirmed its broad understanding of the term "economic activity". In a case similar to *Höfner*, the Court had to decide whether public placement offices, enjoying a statutory monopoly on the Italian employment market, were undertakings within the meaning of EC competition law. In its submission to the Court, the Italian government pointed out that the activities of these offices were based on the principle of national solidarity and that they were entirely non-profit-making. The Court, however, simply referred to its ruling in *Höfner* and found the activities in question to be of an economic nature[13].

The exception: the exercise of *imperium*

The second approach is merely the mirror image of the general principle: certain State activities have been singled out by the Court as not being of an economic nature.

One can think of only one area where the State, by definition, faces neither actual nor potential competition by private companies: the exercise of *imperium*. Official authority emanates from the sovereignty and the majesty of the State. Whoever is in the position to exercise *imperium* enjoys prerogatives outside the general law, privileges of official power and powers of coercion over citizens[14].

The Court had the opportunity to apply these principles when it was requested to decide whether the *European Organisation for the Safety of Air Navigation* (better known as *Eurocontrol*) - an organisation set up by international convention and charged with establishing and collecting charges levied on users of air navigation services on behalf of the convention's contracting states - was to be qualified as an undertaking. The Court held that

> "[t]aken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of *powers*

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13 Case C-55/96, *Job Centre Coop arl (II),* [1997] ECR I-7119, paragraphs 24, 25

14 Advocate General *Mayras'* classic definition in his Opinion in Case 2/74, *Reyners/Belgian State*, [1974] ECR 631, 667

> relating to the control of supervision of air space which are *typically* those of a public authority"[15].

This decision is fully in line with the classic functional approach. The Court assessed the nature of the *activities* concerned and considered that Eurocontrol was vested with rights and powers of coercion with regard to users of air space which derogated from ordinary law and are typically only enjoyed by a public authority.

The issue of surveillance activities re-surfaced in a case involving anti-pollution surveillance services performed by a private company in the oil port of Genoa. As in the cases concerning certain dock-work[16] and piloting services[17], the port of Genoa had granted a monopoly to one undertaking for the services in question. A shipping company refused to pay the anti-pollution service fees, pointing out that it had neither requested nor made use of those services. Before the Court the Italian government argued that anti-pollution surveillance cannot be compared to dock-work and piloting services. The Court agreed that protection of the environment falls into the category of core State activity, holding that anti-pollution surveillance services were

> "a task in the public interest which form part of the *essential function* of the State as regards protection of the environment in maritime areas. Such surveillance is connected by its nature, its aims and the rules to which it is subject with the exercise of *powers* relating to the protection of the environment which are *typically* those of a public authority"[18].

Another example for an act emanating from the State's *imperium* and thus *typical* for a public authority is granting a license, concession or approval. In *Bodson*[19] the Court had to decide whether a concession contract concluded between a French municipality and a

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15 Case C-364/92, *SAT Fluggesellschaft v. Eurocontrol*, [1994] ECR I-43 at paragraph 30, emphasis added

16 Case C-179/90, *Merci Convenzionali Porto di Genova/Siderurgica Gabrielli*, [1991] ECR I-5889

17 Case C-18/93, *Corsica Ferries Italia/Corpo dei Piloti del Porto di Genova,* [1994] ECR I-1783; Case C-226/96, *Corsica Ferries France SA/Gruppo Antichi Ormeggiatori del porto di Genova,* [1998] ECR I-3949

18 Case C-343/95, *Diego Calì & Figli Srl/Servizi Ecologici Porto di Genova SpA*, [1997] ECR I-1547, at paragraphs 22 and 23, emphasis added

19 Case 30/87, *Bodson/Pompes funèbres des régions libérées,* [1988] ECR 2479

provider of funeral services fell under Article 85. The Court answered in the negative, holding that a municipality, when granting such concession, is acting in its public authority capacity and thus is not engaged in an economic activity. In the same vein, the Court held that authorising the opening of tobacco outlets (and thereby controlling their number) by AAMS, the entity operating the Italian tobacco monopoly,

> "(a)mounts in effect to the exercise of a State right and not to an economic activity *stricto sensu*"[20].

Likewise, the Court held in *Lagauche*[21] that Article 90 did not apply to the granting of type-approval for radio transmitters and receivers by RTT, the Belgian telecommunications authority, which acted under the authority of the competent minister. Since RTT's sole task in this case was to check that radio equipment complied with the requirements determined by the minister in the framework of his regulatory powers, its activities were held to be merely incidental to the exercise of such ministerial powers and thus not of an economic nature.

It is a necessary consequence of the functional approach taken by the Court that an activity neither loses its economic nature by the mere fact that it is exercised by the State or by a State body (as in *AAMS* with regard to AAMS' activities other than granting authorisations) nor becomes economic by virtue of the fact that it is performed by a private company (as in *Calì*). More particularly, when assessing activities of State bodies the Court has insisted on the distinction between the role of the State as public authority, exercising *imperium*, and its other functions, this distinction flowing from the recognition that

> „[t]he State may act either by exercising public powers or by carrying on economic activities [...]. In order to make such a distinction, it is therefore

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[20] Case C-387/93, *Banchero*, [1995] I-4663, at paragraph 48; see also Commission decision 98/538/EC of 17 June1998, *Amministrazione Autonoma dei Monopoly di Stato,* [1998] L 252/47, hereinafter *AAMS*, where - in addition - AAMS' activities other than granting authorisations were at stake, i.e., the production, importation and wholesale distribution of tobacco products.

[21] Joined Cases C-46/90 and C-93/91, *Procureur du Roi/Jean-Marie Lagauche and others,* [1993] ECR I-5267

> necessary, in each case, to consider the activities by the State and to determine the category to which those activities belong"[22].

When applying the distinction between public authority and economic activity it is irrelevant whether the activities *outside* the scope of core public authority functions serve the general economic interest (i.e., constitute a *service public*) or not. The two terms mean different things. Whereas the exercise of *imperium* can by definition never be an economic activity, activities which serve the general *economic* interest are, by virtue of Article 90(2), subject to the competition rules unless and to the extent to which it is shown that their application is incompatible with discharge of their particular tasks. Examples include activities in the fields of telecommunications, postal services, television, energy or transport.

Finally, one could argue that an entity no longer engages in an economic activity if it does not have, with regard to parameters of competition, a sufficient degree of autonomy in carrying on that activity[23]. An alternative view would be that the degree of managerial autonomy enjoyed by the entity when carrying out the activity is not relevant for defining the latter's nature. An activity remains economic in nature even if some or all of its essential elements are not determined by the entity itself but by, for example, the State.

In such a case, the activity would be considered as being carried on not by the entity, which lacks competitive autonomy, but by the State itself. This would admittedly cast the net wider, but would appear to follow from the fact that the Court considers it to be irrelevant whether the State is acting directly via its administration or by way of an entity set up for that purpose and endowed with special rights[24].

The consequence of this view is that the question of autonomy would play a role only when assessing whether the entity is itself to be held responsible for an eventual breach of competition law[25].

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[22] Case 118/85, *Commission/Italy,* [1987] 2599, paragraph 7

[23] Advocate-General *Jacobs* takes this view in his Opinion cited in note 1, at paragraphs 339 *et seq*

[24] Case 118/85, *supra,* paragraph 8

[25] Joined Cases C-359/95 P and C-379/95 P, *Commission and French Republic/Ladbroke Racing Ltd*, [1997] ECR I-6301, at paragraph 33

A novel category

On the basis of this conceptual framework the question whether health, pension and other insurance services rendered by social security schemes are of an economic nature would not appear difficult to answer. Insurance services are *as such* of an economic nature. They neither have "always been" nor are "necessarily" only carried out by State bodies but are, to the contrary, offered by private undertakings. Of course, there is a strong *prima facie* argument to say that health and pension insurance covering (almost) the entire population are ”universal services“, the provision of which may justify or require special monopoly rights, i.e., compulsory affiliation. For this sort of situation, where a balance of proportion must be struck, the Treaty has provided the appropriate mechanism in Article 90(2)

The Court, however, has chosen a different solution. Instead of assessing the insurance services according to their nature, which is undoubtedly economic, and then reviewing the special monopoly rights granted to the entities providing them under Article 90 (2), the Court has departed from the functional approach. It has excluded the provision of social insurance services, to which affiliation is compulsory, altogether from ambit of Community competition law on the basis of the ”solidarity principle“. In effect, the Court has thereby added a fourth category of activity to the previously existing (1) non-economic activities involving the exercise of *imperium*, (2) economic activities fully subject to competition law and (3) economic activities of general interest subject to Article 90 (2).

THE NOTION OF SOLIDARITY

The very purpose of insurance is to mutualise risks, i.e., to form a group of people who are all exposed to the same type of risk (be it car accident, earthquake or death). However, the risk will generally turn into a liability only in few instances, and all members of the group share the cost of compensation. The more homogenous and numerous the insured risks, the more precisely the optimal level of premium can be calculated.

The concept of solidarity, however, goes beyond mere mutualisation in that it provides for a transfer of wealth - not based on insurance principles - among members of a given risk group or among different groups. Solidarity can take a variety of forms:

In certain situations, the scope of a risk group is extended by law or agreement to all persons meeting certain general criteria, e.g., profession, citizenship, sector of economy. The purpose of providing universal access to cover against certain risks for the members of such groups is to ensure that those whose personal risk profile is unattractive (too many accidents, living in an earthquake zone or too old, to stay with the above examples) are not left without cover. This situation may be called type one solidarity.

Within every risk group certain members - by virtue of their individual characteristics - will always face a greater risk that others. Since all members of the group have to bear the costs for the risk each one faces, it would only seem to be fair that those who (statistically) contribute a higher probability of liability also contribute a proportionally higher premium. However, in certain risk groups this link between probability of liability and level of contribution is being severed. All members pay the same amount of premium although some are more likely to turn into a liability than others. Thus, within such a group, the less risky members subsidise the more risky ones (type two solidarity).

Another variant of intra-group subsidisation is the one going from the richer to the poorer. As in the previous example, there is no longer any link between the individual risk profile and the level of contribution. But in this scenario, in addition, the level of contribution is proportionally linked to income. Despite different levels of premium, the level of compensation remains the same for all group members. Some may even be exempt from paying any premium at all (e.g., in cases of unemployment, sickness, disablement) without this having an effect on the compensation to which they are entitled (type three solidarity).

With regard to State pension schemes, another form of intra-group subsidisation can be observed. Those schemes provide for the immediate disbursement of collected contributions to the recipients. In other words, the active members of the group pay for the retired (according to the so-called pay-as-you-go principle). In the long term, this also involves inter-generational subsidies as the active members belong to a different (younger) generation. Obviously, this brand of solidarity (type four solidarity) rests on the assumption - aptly referred to as the generation contract - that those who contribute today will themselves one day receive the agreed benefits, which it is assumed will be financed by the next generation's contributions. The other way of financing pension schemes, as offered by private insurers, is for each member to accumulate his

contributions until the day he is entitled to receive them, plus the return on the investment (so-called capitalisation method).

The last variant of solidarity relevant for the present discussion operates among different schemes. Under this concept, profitable schemes subsidise loss-making ones. Such inter-scheme solidarity can operate via a common fund to which all schemes must contribute or by systematically siphoning off the profits from one scheme and transferring it to another (type five solidarity).

APPLYING THE SOLIDARITY EXCEPTION: CHASING THE JELLYFISH

The Court had created this novel category in his *Poucet and Pistre* decision of February 1993[26]. The preliminary questions put to the Court arose from proceedings brought by Messrs Poucet and Pistre against two social security schemes in France, affiliation to which was compulsory (one providing sickness and maternity insurance and the other one old-age pension for self-employed persons). Both refused to pay their contributions, claiming that they should be free to take out equivalent private insurance. In other words, they challenged the monopoly rights enjoyed by those schemes. In order to ascertain whether these schemes did abuse their dominant positions, as alleged by the plaintiffs, the *Tribunal des Affaires de Sécurité Sociale de l'Hérault* requested the Court to rule on whether such organisations were to be regarded as undertakings.

The Court identified the following variants of solidarity. First, the scheme covered all members of the risk group, irrespective of their risk profile (type one solidarity). Second, contributions were proportional to income, some (low income) group members enjoying exemption (type three solidarity). The old-age scheme was financed as a pay-as-you-go system (type four solidarity). Finally, there was also inter-scheme solidarity since loss-making schemes were compensated by profitable ones (type five solidarity).

Most importantly, however, the Court stressed that it considered compulsory affiliation to be indispensable for maintaining solidarity both as between the persons insured and as between the different schemes. Compulsory affiliation was held to be both an inherent feature and a logical consequence of the solidarity principle.

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[26] Joined Cases C-159/91, C-160/91, [1993] ECR I-637

Subsequently, the Court in *FFSA*[27] had to assess a supplementary, optional retirement scheme for self-employed French farmers. For the management of this scheme a monopoly was granted to the CNAVMA fund, and contributions paid to it were tax-deductible. A number of commercial insurance companies - not enjoying this tax advantage and accordingly suffering a competitive disadvantage - had challenged *inter alia* the legal basis of the decree providing for the tax advantage before the *Conseil d'Etat,* alleging an infringement of Articles 86, 90 and 92 of the Treaty.

In replying to the preliminary questions submitted by the *Conseil d'Etat*, the Court took the opportunity to clarify and focus its analysis. First, the pursuit of a social objective was held not to be apt to exclude the economic nature of an activity[28]. This was in line with the Court's rulings in *Höfner* and *Job Centre* where the German and Italian governments, respectively, had in vain insisted on the social nature of providing employment procurement services. Second, the lack of profit motive was considered irrelevant[29], a position equally in line with *Höfner.*

Then the Court turned to the decisive criterion whether the social security scheme in question was based on the solidarity principle, the latter inherently involving compulsory affiliation[30]. In this respect, the Court underlined that affiliation to the scheme under consideration was voluntary (no type one solidarity). In addition, there was a link between contribution and benefit (no type four solidarity). On the other hand, the Court identified elements of type two and three solidarity (no link between contribution and risk and possibility of temporary exemption).

The Court found the degree of solidarity to be insufficient to remove the scheme from the scope of the competition rules. Consequently, the Court went on to apply the general principle outlined above and concluded that schemes such as the one under consideration face actual or potential competition from private insurers and thus perform an economic activity (albeit with a social purpose and without profit motive). The *Conseil d'Etat*

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27 Case C-244/94, *Fédération Française des Societés d'Assurances,* [1995] ECR I-4013 (hereinafter *FFSA*)

28 at paragraph 20

29 at paragraph 21

30 paragraph 15

subsequently ruled that the monopoly rights granted to CNAVMA, in particular the tax privilege, violated Article 86 and 90[31].

Finally, in *García*[32], the Court was requested by the *Tribunal des Affaires de Sécurité Sociale* for Tarn-et-Garonne to rule on the interpretation of the third non-life insurance Directive which excludes from its scope of application insurance services rendered in the framework of statutory social security schemes[33]. The plaintiffs had argued that the statutory monopoly granted to social security schemes providing health, maternity and old-age insurance for certain parts of the population were incompatible with the Directive. However, given the clear and precise wording of the relevant provision in the Directive the Court had no difficulty in confirming that it did not apply to statutory social security systems.

SOLIDARITY AND SPECIAL MONOPOLY RIGHTS: AN ATTEMPT TO NAIL THE JELLYFISH

In all the cases discussed above, the contentious issue was the monopoly rights granted to the entities managing the social security systems in question. In *García,* the Court summarised its reasoning for sheltering social security systems, affiliation to which is compulsory, from the competition rules as follows:

> "[S]ocial security systems such as those in issue in the main proceedings, which are based on the principle of solidarity, require compulsory contributions in order to ensure that the principle of solidarity is applied and that their financial equilibrium is maintained"[34].

Thus, the Court did not allow the monopoly rights to be challenged by either the insured or private insurers. Without compulsory affiliation, the Court concluded, the schemes in question would be unable to survive. This may be true. The question remains, however, whether this is a compelling reason for excluding the entire activity from the application of the competition rules, instead of assessing the exclusive rights (i.e., compulsory

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31 Decision of 8 November 1996, Receuil Lebon 441

32 Case C-238/94, *García/Mutuelle de prévoyance sociale d'Acquitaine and others,* [1996] ECR I-1673

33 Article 2 (2) of Council Directive 92/49/EEC, as amended

34 Case C-238/94, *supra,* at paragraph 14

affiliation) attached to it under Article 90 (2). Indeed, there are a number of activities which contain elements of solidarity and thus have in the past raised issues of exclusive rights.

In all member States, a universal postal service has been established in order to ensure that communication among individuals - a vital need of society - is met. For that propose, such service must be offered throughout the national territory at an average level of quality - and at a single tariff: No matter how remote the place of despatch, how far and burdensome the distance to be covered or how difficult to reach the destination may be, every user of that service pays the same tariff. Thus, there is type two solidarity (same fee despite different risk profiles). The inhabitants of densely populated areas, where such service is cheaper to provide, subsidise inhabitants of more isolated areas, where the service is more expensive to run. Solidarity is implemented by the public service provider who has to "overcharge" the users of the best inter-connected services in order to cover the losses incurred by rendering less-used services.

One way of financing the implementation of such solidarity is to grant special rights, i.e., to establish a statutory monopoly. If a competing service provider were allowed to concentrate only on the profitable part of the service - which would be equivalent to risk selection in the insurance field - the public provider, who remains under the obligation to offer the universal service, would have to raise its tariffs for the less used services, thus frustrating the social purpose of the scheme. It is precisely for that reason that the Court has protected the exclusive rights granted to a provider of postal services of general interest[35] and that the relevant Community measures aim at ensuring that the universal postal service is being safeguarded in the course of the planned liberalisation of this sector[36]. The parallel to solidarity in the social security field is obvious.

More generally, type three solidarity, i.e., redistribution of wealth within a group, features in a number of services considered to be of general interest for the use of which certain parts of the population (e.g., the elderly, students, soldiers, unemployed, disabled and users with special social needs) pay only a reduced or no contribution at all.

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35 Case C-320/91, *Paul Corbeau,* [1993] ECR I-2533

36 see Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997, [1998] O.J. L 15/14; a similar approach is taken in the field of telecommunication

Examples include postal and telecommunication services but also broadcasting, individual transport and cultural services.

Moreover, elements of solidarity can be found elsewhere in the insurance field. For example, certain (individual or group) life insurance policies provide for elements of type three solidarity in that no fees are due in cases of accident, illness or invalidity. As far as type five solidarity is concerned, common funds are used in the field of private insurance as well, in particular to protect policy-holders of insurance companies going bankrupt.

Finally, universal access – by means of compulsory affiliation - to basic insurance services (and thus intra-group subsidisation) does not necessarily require monopoly rights. In many countries minimum insurance against, *inter alia*, car accidents or fire is compulsory, no matter how often or whether at all the policyholder will actually cause a liability for his fellow group members.

As was demonstrated above, the solidarity-based immunity for compulsory social security services fits only awkwardly into the conceptual framework set up by the Treaty and so far applied by the Court. According to this framework, an activity is not part of core public authority if it faces at least potential competition by private undertakings. To the extent that the special right inherent in compulsory affiliation must be regarded as necessary for ensuring solidarity within a risk group or between several ones, that right - which excludes competition – should fall to be assessed under Article 90 (2).

In addition, even under the traditional functional approach certain social security services may be excluded from the application of the competition rules. For example, it could be argued that re-integrating released prisoners into society by providing and supervising medical and psychological treatment is as much a core State function as is convicting and punishing criminals. The same could be argued for other forms of social and welfare payments.

In the field of insurance *stricto sensu* it is difficult to see how private insurers could ever offer general insurance against long-term unemployment or social hardship, due to the lack of objective criteria for risk calculation. In the same vein, it would appear impossible that any private undertaking could offer a pension scheme which rests on the members' faith that future generations will continue to honour the generation contract.

Apart from those (and maybe other) particular social security services, neither the phenomenon of solidarity nor the fact of compulsory affiliation connected to it appears to support the conclusion that social insurance services can under no circumstances be offered by private insurers and that they should therefore be exempted altogether from the ambit of competition law.

Rather, the decisive argument for relieving the member States from their duty to justify their statutory social security monopolies under Article 90 (2) seems to be that, according to the Court, Community law does not detract from the powers of the member States to organise their social security systems[37]. Therefore, as Community law stands at present[38], a member State may, in exercise of the above-mentioned powers it retains, determine the conditions governing the rights and obligations to adhere to a social security system[39]. In other words, member States may design their social security systems in a way that - by virtue of compulsory affiliation - excludes, or at least seriously reduces, competition from private companies. According to the Court, challenging those monopoly rights would jeopardise the viability of the solidarity-based schemes which, in turn, would encroach on the powers retained by the member States[40].

THE BOUNDARIES OF ANTITRUST IMMUNITY ENJOYED BY ENTITIES MANAGING SOCIAL SECURITY SCHEMES

In essence, the Court has conferred absolute immunity from the Treaty's antitrust rules to the provision of insurance services under the above-described conditions (as opposed to relative immunity usually granted under Article 90 (2)). The question remains, however, whether the fact that member States may shield, within the above-described limits, by means of compulsory affiliation the provision of *social security services* from competition by other insurance companies implies that *all other* activities performed by the entities providing those services enjoy antitrust immunity on other markets as well.

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[37] Case 238/82, *Duphar/Netherlands*, [1984] ECR 523, paragraph 16

[38] Although the "Social Protocol" of the Maastricht Treaty provides for a Community competence with regard to social policy, Article 2 (5) only sets a minimum standard. The Community may only assist and complement social policy measures taken by the member States.

[39] Case C-349/87, *Paraschi*, ECR [1991] I-4505, at paragraph 15

[40] see Case C-238/94, *supra,* paragraphs 14 and 15

Entities managing social security schemes frequently engage in commercial activities outside their core public mission. In most instances, such "out-of-area" activities are connected to the core mission. Examples include investing on capital markets, contracting out or demanding certain health care services or purchasing medical equipment or pharmaceuticals. Due to the considerable market power represented by such monopoly entities - typically representing very large groups of compulsorily affiliated people - their commercial behaviour can have important effects on the markets concerned and, in particular, on other market participants. The crucial issue is whether, for the purpose of competition law analysis, such commercial activities on other markets are also covered by the antitrust immunity conferred by the Court on the core social security services.

Two arguments could be advanced in favour of extending antitrust immunity to such commercial activities.

First, since the entities' commercial activities - despite being *as such* undoubtedly of an economic nature - serve the purpose of fulfilling their core social security mission, the immunity for the latter must necessarily and automatically cover the former activities as well.

Second, as a result of the fact that the core social security services benefit from antitrust immunity, there is no down-stream "market" for providing those core services to the insured. Consequently, whenever these entities become commercially active vis-à-vis third parties, they are operating on the demand side only. This is in effect for "private consumption" which, it is generally accepted, is not subject to competition law.

The proposition that an activity on an up-stream market is not subject to competition rules if there is no down-stream activity linked to it would, if it were true, have wide-ranging consequences because the State and State bodies regularly operate as purchasers (up-stream) without at the same time re-selling to the citizens (down-steam). Examples include joint buying or boycott by public bodies. Both arguments shall now be addressed in turn.

Ancillary or distinct activities?

To start with, it should be recalled that the Court has held that public entities can exercise both public powers and perform economic tasks and that both categories need to be

assessed separately[41]. The Commission has followed this approach in, *inter alia*, its decisions in *Régie des Voies Aériennes* and *AAMS*, referred to above.

The Court has so far ruled twice on the issue of activities being ancillary to non-economic ones. Both in *Eurocontrol* and *Calì*, referred to above, the plaintiffs in the national proceedings had also challenged the charges collected by the entities concerned for their (non-economic) surveillance services. The Court held that such charges were "an integral part of" and therefore could "not be separated from" the activities in question[42]. In addition, Eurocontrol was deemed to exercise its powers as a public authority when collecting the charges. The Court's analysis cannot be criticised: if the services in return for which the charges are paid are held to be non-economic in nature, the "activity" of collecting them should not be assessed any differently. It would not make sense to separate the service from its remuneration.

The situation is different, however, where the entity managing the social security system commercially operates outside its core mission.

In *van Schijndel*[43], Advocate-General *Jacobs* had to examine whether a certain pension fund in the Netherlands was subject to the competition rules. Advocate-General *Jacobs* specifically took note of the fact that funds such as the one under review operate as major investors on capital markets and are thus subject to Community legislation concerning cross-border fund management and investments. However, *in its relation with its members* the fund was held not to act as an undertaking but as a social institution shielded from competition law[44]. In its judgement, the Court did not deal with the question whether the fund concerned was to be qualified as an undertaking.

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41 Case 118/85, *supra*

42 Case C-364/92, *supra,* paragraph 28 and Case C-343/95, *supra,* paragraph 24. It is submitted that the wording used by the Court when assessing the activities in *Eurocontrol*, "[…] taken *as a whole* […]", should be understood in this (limited) way. See also *Kovar*, Droit communautaire et service public: esprit d'orthodoxie ou pensée laicisée, [1996] RTD eur. 215, 224 and *Idot*, Nouvelle invasion ou confirmation du domaine du droit de la concurrence?, Europe, Chronique No 1, 1996

43 Joined Cases C-430/91 and C-431/93, *van Schijndel and van Veen/Stichting Pensioenfonds voor Fysiotherapeuten,* [1995] ECR I-4705

44 Opinion in Joined Cases C-430/91 and C-431/93, *supra,* at paragraphs 64 and 65

In *Sodemare*[45] the Court had to rule on the compatibility with Articles 3(g), 5, 52, 58, 59, 85, 86 and 90 of a statutory provision in Italy's Lombardy Region governing the participation of private operators in the health-care system, in particular with regard to managing old people's homes. The applicant, a private company specialised in running such homes, was not allowed to enter into the administrative arrangements necessary for being reimbursed for mandatory health-care services because the relevant provisions required the operators to be non-profit ones (thus excluding commercially operated homes).

The Italian and the Dutch governments in their submissions relied on *Poucet* to argue that the regime in force in Lombardy, because it forms part of a social welfare scheme, escapes the Treaty provisions. Advocate-General *Fennelly* dealt with this argument at great length, concluding that whereas the provision of solidarity-based social security services does not *as such* constitute an economic activity, the behaviour of such bodies with persons *other* than the insured can, none the less, be economic in character[46]. In its judgement, the Court did not address this issue.

Thus, the behaviour of a social security body on a third market, e.g., as an investor on capital markets or when concluding contracts with providers of health-care services, would appear to be capable of being of an economic nature even if its core activity rendered vis-à-vis its members enjoys immunity under the *Poucet* reasoning. Moreover, it would appear to be irrelevant whether the economic activity serves the purpose of providing the core social security service in question. Indeed, in *van Schijndel,* the Advocate-General considered the fund's investment activities on capital markets to be of an economic nature although they were described as being *necessary* to fulfil the fund's core social security mission.

Finally, the proposition that activities on markets other than the one for providing core social security services are not covered by the *Poucet* immunity appears to be supported by the rationale standing behind this immunity. As set out above, the member States have retained their powers to organise their social security systems in a way that removes, by means of compulsory affiliation, all or part of the social security services from access by

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[45] Case C-70/95, *Sodemare/Regione Lombardia*, [1997] I- 3395

[46] at paragraphs 29 and 30 of his Opinion

private insurers. This rationale aims at safeguarding the power enjoyed by the member States and not at presenting the entities concerned with a *carte blanche* with regard to their commercial behaviour on other markets, whatever the relationship with their core services.

The exercise of buyer power by the State and State bodies

Another situation where social security bodies operate, in connection with their core social mission, on other markets is when the relevant regime obligates them to provide the insured *in natura* with medical goods or services (e.g., drugs, wheelchairs or ambulance facilities) which those bodies have first to purchase from third party suppliers. This is the case, *inter alia*, in Germany. Since both German and European competition law share the same functional understanding of the term undertaking, it is of interest to briefly set out the pertinent case-law with regard to the scope of application of the German competition act.

In Germany, the proposition that an activity on an up-stream market (e.g., as a purchaser of medical goods or services) is not subject to competition rules if there is no down-stream activity linked to it was put forward in the early nineteen-sixties when it was argued by some that if an entity - in particular the State - were active solely on one side of a market, such activity would be closer to private consumption than to entrepreneurial activity and should thus not be subject to (German) competition law[47]. Others took the opposite view and argued that is irrelevant whether or not an entity operates regularly on both sides of the market[48].

The German *Bundesgerichtshof* was confronted with this issue in 1961 when it had to decide whether a regional public social security fund was subject to German competition rules when dealing - as a purchaser - with suppliers of medical equipment. It was generally accepted that the relationship between those funds and the insured was exempt from the application from German competition law. Thus, the court had to decide whether or not the fund performed an economic activity on the demand side of the market for medical equipment despite the fact that it did not re-sell the goods to the

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47 See e.g. *Köhler*, DVBl [1964] 217

48 See e.g. *Forsthoff*, Der Staat als Auftraggeber [1963] 29

insured. The court held that the qualification as undertaking on the *demand* side does not depend on whether the entity concerned is also active on the *supply* side.

In the same judgement, the *Bundesgerichtshof* also dealt with the argument that social security funds purchased the devices for "own consumption" because they needed them for fulfilling their statutory duties vis-à-vis the insured (instead of re-selling them). The court brushed aside the analogy between social security funds and private consumers as being "out of touch with reality". Indeed, the reason behind excluding private consumption from the ambit of the competition rules is the typically negligible impact such behaviour has on the market[49]. The effects produced by public bodies exercising their buyer power often are, however, anything but negligible.

In Germany it has since been the prevailing view that the State, State bodies or municipalities perform an economic activity when they acquire goods or services - be it pencils for its civil servants or helicopters for the army - and thus are subject to competition law. In particular, the entities which run the public - and solidarity-based - health care system are subject to competition law when they purchase goods, acquire (medical) services or boycott suppliers[50].

The same is also true for joint buying by State bodies. In line with the functional concept of undertaking, agreements between central purchasing departments of State bodies are - just like any other joint buying arrangement - deemed to be subject to German competition law[51]. German courts have repeatedly held that joint buying agreements between municipalities are to be qualified as illegal buyers' cartels, due to the detrimental effect on competition on the market concerned. Whether or not these bodies also re-sell has consistently been held to be of no relevance.

Similarly, the *Bundeskartellamt* has prohibited joint buying by public hospitals, explaining that the buyer power resulting from that arrangement had detrimental effects

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49 See, e.g., *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht [1993] Art 85 (1) paragraph 38

50 for references see *Langen/Bunte*, Kommentar zum deutschen und europäischen Kartellrecht 1[8] [1998] § 98 GWB, paragraph 19 *et seq* and § 1 GWB, paragraph 16

51 For references see *Bunte,* Die kartellrechtliche Beurteilung von Einkaufsgemeinschaften der öffentlichen Hand, WuW 11/1998, 1037, 1038

on the supply side. Likewise, the *Bundeskartellamt* has qualified the joint buying of fire brigade vehicles by certain municipalities as a buyers' cartel[52].

CONCLUSION

In recent years, there seems to be a growing awareness that insurance schemes based on market economy principles may enhance both efficiency and solidarity, and Member States have begun to introduce such principles to their current monopoly schemes. It is submitted that if the introduction of competition is warranted, then so is the application of the competition rules. And even where there are reasons for not applying the competition rules to certain schemes, in the author's view this non-application should not extend to the competitive behaviour of the bodies administering those schemes as regards their non-core activities.

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52 For references see *Bunte,* Die kartellrechtliche Beurteilung von Einkaufsgemeinschaften der öffentlichen Hand, WuW 11/1998, 1037, 1039, 1040