Non-Economic Activities with Economic Features: the Speciality of 'Hybrid' Social Security systems. Case Comment to the Judgment of the EU Court of Justice of 11 June 2020 *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa* (Joined cases C-262/18P and C-271/18P)

by

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CONTENTS

Abstract

Following two appeals against a judgment of the General Court regarding the qualification of a series of measures of financial support as State aid(s), the Court of Justice clarifies that secondary and ancillary competitive elements within a social security system, and the presence of for-profit operators, are not such as

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to override the non-economic nature of the activities concerned. Therefore, should the characteristics derived from the principle of solidarity prevail, the recipient of the measures will not qualify as an 'undertaking', for the purposes of State aid rules.

Résumé

À la suite de deux recours d'un arrêt du Tribunal concernant la qualification d'une série de mesures de soutien financier comme aide(s) d'État, la Cour de justice précise que ni les éléments concurrentiels secondaires et accessoires au sein d'un système de sécurité sociale ni la présence d'opérateurs à but lucratif sont de nature à l'emporter sur la nature non économique des activités concernées. Par conséquent, si les caractéristiques découlant du principe de solidarité prévalent, le bénéficiaire des mesures ne sera pas qualifié d'entreprise, aux fins des règles relatives aux aides d'État.

Key words: competition law; State aid; undertaking; economic activity; solidarity.

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I. Facts of the case

Dôvera zdravotná poisťovňa a.s. (hereinafter: Dôvera or complainant), one of the Slovakian health insurance bodies, lodged a complaint with the European Commission (hereinafter: Commission or EC) alleging a violation of the EU State aid rules by the Slovak Republic, following six measures that, in its view, unlawfully benefited the two State-owned insurance companies[1] – Všeobecná zdravotná poisťovňa a.s. (hereinafter: VšZP) and Spoločná zdravotná poisťovňa a.s. (hereinafter: SZP). The contested measures included capital increases, the discharge of debts, the granting of subsidies, the creation of a Risk Equalisation Scheme and the transfer of portfolios of liquidated health insurance companies. According to Dôvera, those two 'competitors' are undertakings and shall therefore be subject to competition law, in particular, to EU State aid rules.

For the sake of completeness, it is important to note that the aim of Slovak compulsory health insurance is to ensure the provision of healthcare and the maintenance of a viable health insurance system, on a universal basis. Even though the participation in such scheme is compulsory for most of the population, insured persons have the right to choose a particular company and

[1] These merged on 1.01.2010.

switch once a year. In respect to health insurance companies, while they are all joint stock companies that may, and actually do make profits (for instance by improving their management system or by negotiating better conditions with healthcare providers), their ownership structure varies.[2]

As to the grounds for initiating a formal investigation procedure, the Commission expressed doubts about whether the activity of companies offering health insurance within the compulsory system in the Slovak Republic could be classified as economic from 1 January 2005. In particular, the Commission acknowledged that, due to the complexity and presence of economic and non-economic features, the case demanded an 'in-depth analysis of its different elements and their respective importance within the scheme'.[3]

In response to the opening decision, Dôvera alleged that, as a result of a legal reform of 2004-2005, a competitive market was created, in which 'insurers compete for healthcare providers through selective contracting and negotiations on price and quality of services, and […] marketing campaigns by health insurance companies to retain and attract clients'.[4] Consequently, it could be said that 'SZP/VZP compete with private health insurance companies offering the same service while seeking profit'.[5] In contrast, the Slovak authorities maintained that Slovak compulsory health insurance cannot be qualified as economic, since, '(a) The system has a social objective. (b) The system is based on solidarity, in particular in view of the following: (i) compulsory enrolment for Slovak residents; (ii) all the insured are guaranteed the same minimum level of benefits; (iii) contributions are unrelated to benefits on an individual level, as contributions are fixed by law (no competition on prices); (iv) there is risk-solidarity among insurers: RES and community rating. (c) There is a detailed regulatory framework, subject to supervision by the State: status, rights and obligations of all health insurance companies are established by law'.[6]

By decision of 15 October 2014,[7] the EC considered that the contested measures did not constitute State aid, since the activity of those health insurance bodies are non-economic in nature and, therefore, they do not qualify as 'undertakings' for the purposes of Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter: TFUE).

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[2] They may be State-owned or privately-owned companies.

[3] Commission Decision (EU) 2015/248/EU of 15.10.2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by Slovak Republic (OJ 2015 L 41/25), hereinafter: the Commission Decision, para. 51.

[4] Ibidem, para. 57.

[5] Ibidem.

[6] Ibidem, para. 63. 'RES' meaning Risk Equalisation Scheme.

[7] Ibidem.

Following an action brought by Dôvera at the General Court (hereinafter: GC), whereby it sought the annulment of the EC decision, the GC analysed, in its judgment of 5 February 2018,[8] the relative relevance of the scheme's social, solidarity and regulatory features. It did so, in order to conclude that both the insurers' ability to make, use and distribute their profits, and the existence of a certain degree of competition as to the quality and scope of the services provided by operators within the Slovak compulsory health system, had a bearing on the economic nature of the activity. In the GC's view, these circumstances, together with the insured person's freedom to choose and switch operators, contribute decisively to establishing the existence of 'intense and complex competition'[9] within the health insurance system in Slovakia. Finally, the GC concluded that the economic nature of the activity depends on the 'presence on the market of operators seeking to make a profit' rather than on 'the mere fact of being in a position of competition on a given market'.[10] Based on such assumptions, the GC annulled the EC decision.

The European Commission and the Slovak Republic appealed the judgment to the Court of Justice (hereinafter: Court or CJ), which, by its judgment of 11 June 2020,[11] set aside the judgment of the GC. In particular, the Court stressed the residual and ancillary nature of the Slovakian health insurance scheme's economic features, along with their close link with the interests of its proper functioning, efficiency, and quality. In short, the competitive elements were not such as to 'call into question the social and solidarity-based nature of that scheme'.[12]

II. Legal context

According to Article 107(1) TFEU, '[…] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. In order for the State aid rules to apply, it is therefore mandatory for the beneficiaries to be 'undertakings',

[8] GC judgment of 5.02.2018, Case T-216/15 *Dôvera zdravotná poist'ovňa, a.s. v European Commission*, ECLI:EU:T:2018:64.

[9] T-216/15 *Dôvera*, para. 67.

[10] Ibidem, para. 69.

[11] CJ judgment of 11.06.2020, Joined Cases C-262/18 P and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.*, ECLI:EU:C:2020:450.

[12] C-262/18 P and C-271/18 P *Commission & Slovak Republic v Dôvera*, para. 44.

a functional concept that requires the interpreter to assess whether the entity is engaged in an economic activity. Section 2.3 of the Commission Notice on the notion of State aid[13] spells out the most typical characteristics of 'solidarity-based social security schemes that do not involve an economic activity',[14] while also listing the most common features of economic activities.[15]

III. The *Dôvera* judgment

In its judgment, the CJ properly addresses the ancillary nature of the competitive elements within the Slovak compulsory health insurance scheme and, above all, makes it clear that the qualification of an activity as economic or non-economic cannot depend on the entity's legal status nor on the for-profit character of other bodies operating in the context of the same scheme (that is to say, carrying out the same activity).[16]

To begin with the profit-aim of the entity, the CJ stressed that, besides being a non-essential feature for the purposes of the qualification as an undertaking, the use and distribution of profits was, in this particular case, strictly regulated by law, and 'intended to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it' so that 'the social and solidarity character that arises from the actual nature of the activities concerned' remained untouched.[17]

The CJ further explained why the existence of a certain degree of competition in the sector,[18] or even the presence of operators seeking to make a profit within it, were not such as to call into question the (non-)economic nature of the activity.[19] When doing so, it specifically addressed features such as i) the 'ability of the insurance bodies managing the Slovak compulsory health insurance scheme to seek to make a profit';[20] ii) the provision of additional free of charge services;[21] iii) 'the freedom of insured persons to choose their

[13] Commission Notice of 19.05.2016 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262/1).

[14] Ibidem, para. 20.

[15] Ibidem, para. 21.

[16] C-262/18 P and C-271/18 P *Commission & Slovak Republic v Dôvera*, paras. 39, 40, 49 and 50.

[17] Ibidem, para. 40.

[18] Ibidem, paras. 41–47.

[19] Ibidem, para. 49 and 50.

[20] Ibidem, para. 39.

[21] Ibidem, paras. 42–44.

health insurer and to switch once a year',[22] and, finally iv) the existence of a mechanism for the equalisation of costs and risks between the entities which are active within the scheme[23]. While the first three elements have been considered as not undermining the prevalence of solidarity, the fourth actually militated against the presence of a principle of capitalisation.

Given the prime role of the social and solidarity objectives underpinning the scheme (a relationship that the Court was able to clearly identify), a thorough analysis of the balance between *solidarity* and *capitalisation* features, was not conducted. After all, the former's predominance was clearly evident.

IV. Opinion of the Advocate General

As to the opinion of Advocate General Pikamäe,[24] it is important to note and touch upon an interesting question that the Court knew how to avoid, by intelligently pointing to the solidarity's predominance over the capitalisation features. The question relates to the scope of the judicial review of EC's decisions, with a particular focus on the assessment of an activity's nature.

According to the Slovak Republic, the analysis of the economic or non-economic nature of the compulsory health insurance activity entailed complex economic assessments which fell within a wide margin of discretion of the EC. Therefore, in its opinion, the General Court has gone beyond its power of judicial review when it analysed the nature of the health insurance system at stake.[25]

As regards this topic, the Advocate General (hereinafter: AG) recalled that the limits of the review carried out by the CJ in relation to the decisions of the European Commission are conditional upon the economic or technical complexity of the assessment performed by the latter.[26] Also, when determining whether a complex economic assessment is at stake, it emphasized that, while there is no clear cut definition of what a *complex economic assessment* is, one can, as a starting point, differentiate between assessments that relate to the concept of State aid and the ones with respect to the compatibility with the internal market.[27] And this is of the utmost importance, since, unlike

[22] Ibidem, para. 45.

[23] Ibidem, para. 46.

[24] Opinion of Advocate General Pikamäe of 19.12.2019, Joined Cases C-262/18 P and C-271/18 P, ECLI:EU:C:2019:1144.

[25] Ibidem, para. 27.

[26] Ibidem, para. 31.

[27] Ibidem, para. 33.

the latter subject, which necessarily involves the performance of complex economic assessments, State aid is a legal concept that needs to be determined in accordance with objective factors (while, of course, this does not mean that complex economic analyses are excluded in this case either).[28]

This being said, the AG then addressed the *market economy operator test*, stressing that given its rationale it could not be automatically applied to the analysis of whether an entity receiving support from public funds is an undertaking within the meaning of Article 107(1) TFEU.[29]

The AG then continued by emphasizing that, in order to establish whether an entity operating within a social security system is an undertaking, one needs to decide on the (non-)economic nature of the activity. While this decision revolves around specific traits of the national social security legal framework, such as whether the services provided depend on the amount of contributions,[30] it is neither economic, nor complex in nature, even when it requires the balancing of certain traits (which, to start with, can be determined without involving any economic analysis).[31]

V. Comment

The hybrid nature of social security schemes is becoming common ground among Member States. The use of private, for-profit forms to pursue public functions is normally associated with higher efficiency due to the flexibility of Private Law and profit incentives, while also contributing to a more economic approach, in accordance with principles of sound management. Nevertheless, however beneficial this option may be, it also represents a challenge for the exercise of qualifying the activity as economic or non-economic. Indeed, if one bears in mind that from this very qualification it is possible to reach an answer regarding *i)* the existence of an 'undertaking' and, consequently, *ii)* the applicability of competition rules, the need for a common framework and uniform assessment becomes clear.

In particular, it is said that 'social security has its own distinguishing criterion that differs from the general one according to which an economic activity is involved or not. Within the context of social security, the key criterion is solidarity' (Kreuschitz, Nehl, 2016, p. 77). And it is this concept of 'solidarity' that is used to distinguish between economic and non-economic

[28] Ibidem, paras. 34, 35.
[29] Ibidem, para. 44.
[30] Ibidem, para. 48.
[31] Ibidem, paras. 48, 49.

activities (Jones, Sufrin, Dunne, 2019, p. 585). It is important to stress that, even if the CJ sometimes refers to social and solidarity principles together, the solidarity principle is, undoubtedly, the center of gravity when conducting the analysis. As established in previous case law,[32] the presence of social objectives does not exclude, in itself, the possibility of qualifying an activity as an economic one.

However, while 'pensions and social security, health, defence, public order and education are generally considered social (as opposed to economic) services and thus again are not generally captured by the State aid rules […] over time these sectors have started to open to market participants [and] As market mechanisms become more established in these areas, an increasingly large number of services may become subject to the State aid rules' (Bacon QC, 2017, p. 8). Therefore, one has always to ask the following questions: is there an economic activity? And in the affirmative, are there 'overriding reasons of public interest' that justify 'upholding national measures which are necessary for maintaining economically non-viable activities' (Hatzopoulos, 2011, p. 28)? We are of the opinion that such analysis should and must be within the scope of the judicial review. Is it complex? Maybe. But it is a *complexity* that the Court must be entitled to address. Without any danger, as we will see.

Indeed, by virtue of constant case law of the Court of Justice, some criteria regarding the (non-)economic nature of the activity are already stabilized, so that, when it comes to evaluating hybrid social security systems, the key lies in balancing the economic and non-economic features of the activity, as indicated in section 3.2 of the Commission Notice on the notion of State aid. In this respect, even if the latter's aim is not to put forward new criteria of assessment, it nevertheless provides a more easily accessible common analysis framework for national courts by gathering and summarizing the conclusions of years of previous case law and practice.

In order to do achieve proper conclusions on the nature of the activities, the Commission and, ultimately, the courts, will have to conduct an objective assessment, considering i) the compulsory or optional membership or affiliation, both for the insurers and the insured; ii) the amount of contributions being determined by law or proportionate to the financial performance or the risk the insured person represents; iii) the grant of equal or different benefits, depending on the contributions paid by each person, or even iv) the existence of mechanisms to correct inequalities between health insurance bodies who insure high-risk individuals and others whose portfolio is composed of persons presenting lower risks (Kreuschitz, Nehl, 2016; Kloosterhuis, 2017). In such

[32] CJ judgment of 22.01.2002, Case C-218/00 Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), ECLI:EU:C:2002:36, para. 37.

an assessment, a weighing of all these characteristics, either derived from the principle of solidarity or closer to the principle of capitalisation, is necessary.

The CJ has not yet clarified how much competition will be needed as to allow a certain activity to be qualified as economic, and it is not clear whether it will do so in the future. Now, if we add the circumstance that separately giving weight to multiple indicators may 'create problems when, in real-life cases, the indicators point into different directions' (Kloosterhuis, 2017, p. 16), then the qualification task gets even more challenging and the uncertainty takes on considerable dimensions.

In this judgment, the CJ confirms that, when defining an 'undertaking' in the field of competition law, a functional approach, focused on the activity, rather than on the legal form of the entity, shall be adopted.

Following its ruling in case *AOK Bundesverband and Others*[33] (Nicolaides, 2020), the Court came to the conclusion that the presence of a certain degree of competition within a social security system is not such as to call into question the non-economic nature of the activity. In the *AOK* case, the amount of the contributions was mainly based on the insured person's income and the contribution rate was set by each sickness fund[34]. Consequently, the degree of competition allowed in relation to the German sickness funds was even stronger than the level of competition allowed in the *Dôvera* case.

Unlike in previous cases, however, a further difficulty arose from the fact that the Slovak entities under analysis had a 'for-profit' aim, as opposed to the German sickness funds, analysed in the judgment set out above.

This being said, the Court reached a very important conclusion regarding the nature of the activities and the qualification of entities operating within a social security sector. According to the CJ, notwithstanding, first, the existence of competition as to the quality and scope of the services being provided,[35] and secondly, the presence of for-profit operators in the same market,[36] the non-economic features of the activity shall prevail, when one reaches the conclusion that those competitive elements have been introduced as a 'means' to ensure the proper functioning of the social security system and thus, the attainment of social objectives.[37]

In particular, the Court makes it clear that 'it cannot be inferred from that case-law that a body involved in the management of a scheme which has

[33] CJ judgment of 16.03.2004, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others*, ECLI:EU:C:2004:150.

[34] Ibidem, para. 7

[35] C-262/18 P and C-271/18 P European Commission and Slovak Republic v Dôvera, paras. 41–47.

[36] Ibidem, paras. 49 and 50.

[37] Ibidem, paras. 42–44.

a social objective and applies the principle of solidarity under State supervision could be classified as an undertaking on the ground […] that other bodies operating in the context of the same scheme are actually seeking to make a profit'.[38]

And it also recalls that competition at the purchasing level is irrelevant for the qualification of the activity, since it is the former that depends on the subsequent use of the purchased items, that is, on the qualification given to the latter[39]. This relationship is nevertheless called into question by some voices (Winterstein, 1999). As stated by AG Fennelly in its Opinion in the case *Sodemare/Regione Lombardia*,[40] 'the relations of other persons, as providers of goods or services, with such systems of social provision can, none the less, be economic in character. Community law requires that such systems comply with Treaty rules in so far as they affect the economic activities of others in ways which are not essential to the achievement of their social objectives'.

VI. Final remarks

By resorting to a holistic approach, the Court seems to be concerned with the avoidance of conclusions or methods that assess ancillary competitive elements as dominant features of the system.

It is nevertheless legitimate to ask: would fiercer competition in terms of quality have changed the CJ's conclusion on the nature of the activity? Could the principle of proportionality be used to refuse the (non-)economic nature of the system, when the degree of competition is not deemed proportional with the purpose of sound management? (Lianos, Korah, Siciliani, 2019, p. 303). Indeed, while quality is a self-standing parameter of competition, the intensity of its 'role' in social security schemes remains unanswered.

These questions and doubts are not such as to override the ruling's importance to the clarification of whether, and under which terms and conditions, entities within the social security sector are to be covered by EU State aid rules. Indeed, despite the body of evolved case law on this matter, this judgment contributes to further clarify the importance that is to be given to a number of competitive parameters within a compulsory health insurance scheme.

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[38] C-262/18 P and C-271/18 P European Commission and Slovak Republic v Dôvera, para. 50.

[39] Ibidem, para. 48.

[40] Opinion of Advocate General Fennelly of 06.02.1997, Case C-70/95, ECLI:EU:C:1997:55, para. 30.

Despite the uncertainty, the fragilities, the criticism and the insufficiency (especially when looked at separately) of some of the criteria used by the Court in order to determine the nature of the activities in the sphere of social security, it is comprehensible that, instead of a rigid approach, a flexible one – which respects the organizational autonomy of Member States, adapting itself to the concrete circumstances of the case – is preferred.

Nevertheless, while a proper weighing of all factors at stake is key here, one should also, and always, have the scope and goals of competition law in mind, in order to avoid two types of errors. On the one hand, that 'true' non-economic activities are burdened with the duty to comply with competition law, when there is no risk at all for fair competition within the internal market. On the other, that actors in the 'social' sector, whose actions might have an impact on competition, are not exempted from the obligations laid down in the Treaties and in the soft law of the European Union.

One question still remains, however. Since measures in favor of companies operating under a solidarity principle, within the social security system, are not to be subject to the scrutiny of competition law rules, will this tempt private-owned companies, dissatisfied or even affected by discriminatory State measures, to leave the system, resulting in a less competitive environment?

It can be argued that, since the Slovak health insurance system comprises a Risk Equalisation scheme (which allows companies insuring high-risk individuals to receive funding from health insurance bodies with a portfolio composed of persons presenting lower risks), private insurance companies could in this case indirectly benefit from the financial aid granted to the two State-owned insurance companies. However, while this is defendable, one has to bear in mind that this risk equalisation scheme is not meant to ensure the attaining of profits, but, on the contrary, the survival of companies which are required to insure a high number of high-risk persons (it is a matter of equality). This is not an easy question. While it is true that companies favored by State subsidies and other protective measures will not be able to raise insurance contributions and influence the functioning of the system[41], distortive measures may actually allow companies that beneficiate from such *special treatment* to push other insurance companies out of the market. As a result, it is possible that a system 'designed to contribute to improved efficiency in the use of available resources and increase the quality of healthcare provision'[42] actually results in a worse outcome.

What are the solutions then? While these measures may not be caught by the provisions of EU competition law, due to the *non-economic* nature

[41] Which, according to the law, is built on the solidarity principle and subject to strict supervision by the State.

[42] The Commission Decision, para. 13.

of the activity carried out, they may still be addressed by constitutional rules and principles, in particular, the principle of equality (which is also an EU fundamental principle). Since it demands that equal treatment is given to equal situations, protective measures that are not objectively justified may be assessed by the competent authorities. After all, competition law does not have to address everything. It is a matter of knowing how to fill in the gaps.

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