

# THE NOTION OF STATE AID AND REGULATION IN THE EU: DRAWING THE SHAPE OF A MOVING TARGET

JUAN JORGE PIERNAS LÓPEZ

*Investigador del Instituto Universitario Europeo de Florencia  
Ph.D candidate at the EUI*

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**Resumen:** Este artículo trata sobre la noción de actividad económica en el marco de la legislación comunitaria sobre ayudas públicas. La noción de la actividad económica define el ámbito de aplicación de varias disposiciones del Tratado. En este sentido, las normas comunitarias de competencia, de libre prestación de servicios, el derecho de establecimiento y la libre circulación de trabajadores sólo se aplican en el ámbito de actividades económicas. Sin embargo, la jurisprudencia del Tribunal de Justicia de la Unión Europea no establece un único test para definir una actividad económica, sino varios. Este trabajo tiene por objeto proponer cuál es el test que debería aplicarse en el ámbito de las ayudas públicas a la luz de la particular naturaleza de esta disciplina, a caballo entre las normas de competencia y las de mercado interior. A tal efecto, el documento examina en primer lugar el concepto de actividad económica en relación con las normas de competencia y las disposiciones de libre circulación del Tratado. En segundo lugar, se analiza con más detalle la noción de la actividad económica en el ámbito de las ayudas estatales a la luz de la práctica de la Comisión Europea. Por último, se extraen algunas conclusiones de lo anterior y se propone una interpretación funcional, y no material, de la noción de actividad económica en ayudas de estado.

**Palabras clave:** Actividad económica, empresa, noción de ayudas de Estado, ayudas de Estado, Derecho de la Competencia.

**Abstract:** This paper deals with the notion of economic activity in European State aid law. The notion of economic activity defines the scope of application of several Treaty provisions. In this regard, the competition rules, the freedom to provide services, the right of establishment, and the free movement of workers only apply in the ambit of economic activities. However, there is not one but several tests in the case law of the Court of Justice of the European Union to define what an economic activity is. This paper aims to suggest which test should be applied to State aids in light of the particular nature of this area of EU law, between a competition and free movement logic. For that purpose, the paper first examines the notion of economic activity in relation to the competition and free movement provisions of the Treaty. Second, it analyzes in more detail the notion of economic activity in the field of State aid in light of the European Commission practice. Finally, the paper draws some conclusions from the above and proposes a functional, not material, interpretation of economic activity for State aid law.

**Key words:** Economic activity, undertaking, notion of state aids, state aids, Competition Law.

**Summary:** I. Introduction. II. The concept of economic activity in EU Law. 1. The different definitions of economic activity under EU law. A) From convergence to divergence: the definition for the purposes of internal market and competition rules. B) Criteria to distinguish economic and non – economic activities. a) Economic activities under the Internal Market rules. b) Economic activities under the competition rules. 2. Differences between the two set of criteria. III. Economic activities under the State aid rules. 1. Youth training centres managed by professional clubs. 2. Public fund raising for social Housing. 3. Subsidies to port authorities for carrying out public authority tasks. 4. Provision of infrastructural elements needed to ensure a good environment for social dwellings (e.g. parks and roads to access to social dwellings). 5. Education at College. 6. Employment of prisoners at correction houses. 7. Provision of hospital services. IV. Some conclusions.

## I. Introduction

1. My research would like to answer the following question: To what extent does Article 107, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) limit the discretion of Member States to regulate an economic activity. In other words, the main object of my research is to examine, on the basis of the Case Law of the Court of Justice of the European Union and the practice of the European Commission, the extent to which Article 107, paragraph 1 frames the regulatory powers of Member States in dealing with a given economic activity.

In this regard, and given that State aid is one of the Treaty rules limiting State intervention in the economy, together with the notion of “*aid*” enshrined in Article 107 (1) of the TFEU, other Community law concepts, such as undertaking or economic activity will have to be revisited, as they have been the subject of recent State aid cases.

2. The reason behind the choice of this topic lies in that legislators and policy makers, it is submitted, are confronted with a difficult question in deciding whether they can intervene in the economy through regulation, for example, by granting a licence, or by setting the handling fees of an airport, without incurring in a violation of the State aid rules. Similarly, policy makers and legislators face a difficult issue in deciding what kind of incentives they can introduce, from a State aid viewpoint, through regulation, and whether the answer to this depends on the basis of the area to be regulated, for example, if the area at stake has been harmonized at Community level.

3. In this context, although the notion of aid was laid down by the Rome Treaty, its scope remains unclear. Indeed, the notion of aid is nowadays the subject of a lively debate between the Commission and the European Union Courts, and even between the latter. By this token, it could be said that, to the eyes of a national legislator, the notion of aid might evoke the image of an accordion. The accordion of “*aid*” stretches and squeezes in different places as different elements of the notion of aid are applied.<sup>1</sup> By this token, any State aid stakeholder knows that the notion of aid has significantly stretched in relation to selectivity, distortion of competition or affectation of trade criteria, and squeezed in relation to the State resources criterion.

4. Under this framework, it should be noted at the outset that any ambiguity in relation to the notion of aid is regrettable given that the definition of a measure as State aid within the meaning of Article 107(1) TFEU has extremely important consequences.<sup>2</sup> In a nutshell, from a legal viewpoint, if a measure is held to be State aid, the Member State that has granted it may be required to abolish it, and to order its repayment. Moreover, from a *political* standpoint, the Member State will relinquish its power over the measure at stake to the European Commission, the single authority that can declare it compatible with the Common Market.<sup>3</sup> Therefore, an analysis of some of the most important issues concerning the notion of aid does not lack practical relevance.

5. However, before considering whether a particular measure meets the criteria laid down by Article 107(1) TFEU, we must establish whether the rules on State aid are in fact applicable. And this is the objective of this paper. For that purpose, this paper will follow a *bottom-up* approach, based on recent cases, as a policy maker would do. In this vein, the paper will first identify when a State regulator should start worrying about State aid rules, *i.e.*, when the State is undertaking an *economic activity* in the context of State aid.

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<sup>1</sup> I am paraphrasing here the famous wording used by the Appellate Body of the World Trade Organization (WTO) in relation to the concept of “*like product*”: “*The concept of Likeness is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied.*” See Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB, WTDS10AB/ and WTDS11/AB, adopted on 1 November 1996.

<sup>2</sup> K. BACON, “State Aids and General Measures”, *Yearbook of European Law*, 17, 1997, p. 269.

<sup>3</sup> *Ibid.*

6. The structure of this paper is therefore as follows: Part II examines the notion of economic activity in relation to the competition and free movement provisions of the Treaty. Part III analyzes in more detail the notion of economic activity in the State aid field. Finally, Part IV presents some conclusions that support a functional, as opposed to material, approach to the notion of economic activity for State aid purposes.

## II. The concept of economic activity in EU Law

7. As it is well known, for a national measure to be classified as State aid, four cumulative conditions have to be met.<sup>4</sup> Indeed, according to the Court of Justice, the classification as aid requires that all the conditions set out in Article 107(1) EC are fulfilled.<sup>5</sup> Having said that, “before considering whether those conditions are met, however, we must establish whether the rules on State aid are in fact applicable to the case at hand.”<sup>6</sup>

8. In this regard, the rules on State aid will be applicable only if the potential beneficiaries of the measure at issue are *undertakings* or, in light of the case law of the Court of Justice, if the beneficiaries are entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>7</sup> Indeed, “it is well settled that the Treaty rules on competition, of which the State aid rules form an integral part, are applicable only if the entity concerned is an undertaking.”<sup>8</sup>

9. Conversely, if the activity financed by an alleged State aid measure is *non-economic* in nature, then there would be no State aid simply because the Treaty rules would not apply. Indeed, the definition of given activity as *economic* is important for several Treaty provisions: “broadly speaking, if an activity is defined as economic this will have important consequences. The public entity carrying out the activity will be defined as a public undertaking; its behavior will be subject to Articles 81 and 82; the State, in its regulatory capacity, will have to maintain a neutral attitude towards the undertaking; subsidies will be considered to be State aid within Article 87, and the exclusive rights related to such activities will be subject to Articles 31 and 86.”<sup>9</sup>

10. The notion of economic activity is not only relevant for the purposes of the Treaty *competition* rules but also for other rules addressed to Member States. Indeed, the freedom to provide services, the right of establishment, and the State aid rules of the Treaty only apply in the ambit of economic activities.<sup>10</sup> In other words, the notion of economic activity defines the scope of application of several fundamental Treaty provisions.

<sup>4</sup> See, for example, Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27. In the Court’s words: “First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition. See also Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75.

<sup>5</sup> See, for instance, Case C-142/87, *Belgium v Commission*, ‘Tubemeuse’, [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99, *France v Commission* [2002] ECR I-4397, paragraph 68; and Case C-280/00, *AltmarkTrans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74.

<sup>6</sup> Case 237/04, *Enirisorse SpA v Sotacarbo SpA* Opinion, per Advocate General Poiares Maduro, [2006] ECR I – 2843, paragraph 22.

<sup>7</sup> See, inter alia, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, Case C-244/94 *Fédération Française des Sociétés d’Assurances and Others v Ministère de l’Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14, and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21. See, for example, in relation to the concepts of undertaking, economic activity and the reference to the established case law Commission decision N 355/2004, /2004 PPP project for Antwerp International Airport, OJ, Official C/176/2005, paragraphs 35 and 36.

<sup>8</sup> See Case 237/04, *Enirisorse SpA v Sotacarbo SpA*, Opinion Advocate General POIARES MADURO, [2006] ECR I – 2843, paragraph 23.

<sup>9</sup> J. L. BUENDÍA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford University Press, 2000, p. 43.

<sup>10</sup> See O. ODUDU, “Economic Activity as a Limit to Community Law”, in C. BARNARD and O. ODUDU (Eds.), *The outer limits of European Union Law*, Oxford and Portland, Oregon, Hart Publishing, 2009, p. 225 or 2003 Green Paper on Services of General Interest [COM(2003) 270], p. 43.

11. The notion of economic activity is, however, controversial. As BUENDÍA wrote: “*the Court’s attempts to lay down substantive criteria as regards the concept of economic activity have not produced particularly fortunate results.*”<sup>11</sup> Moreover, the notion of economic activity is today not univocal under EU law. Indeed, the Commission practice and the case law have evolved from a single notion of economic activity to, at least,<sup>12</sup> two differing definitions, namely, one for the single market rules, and another one for the Treaty competition rules.<sup>13</sup> Some have also suggested that the definition of economic activity relevant for competition law purposes should not apply to the State aid rules.<sup>14</sup>

The following sections will try to shed some light to the question of economic activity in the State aid context. To this end, the first part will briefly describe the abovementioned evolution of the definition of economic activity in the EU Law. The second part will attempt to extract the relevant criteria to identify economic activities both for the internal market and for competition law purposes. Finally, the main differences and similarities between the two approaches will be outlined.

## 1. The different definitions of economic activity under EU law

### A) From convergence to divergence: the definition for the purposes of internal market and competition rules

12. In the Meca-Medina case, the General Court advocated for a uniform notion of economic activity for the purposes of the free movement of workers, Article 45 TFEU (ex Article 39 EC) and the freedom to provide services, Article 56 TFEU (ex Article 49 EC), on the one hand, and of Articles 101 TFEU (ex Article 81 EC) and 102 TFEU (ex Article 82 EC) on the other. According to the Court:

[...]the principles extracted from the case-law, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition. The fact that purely sporting rules may have nothing to do with economic activity, with the result, according to the Court, that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC. Conversely, rules which, although adopted in the field of sport, are not purely sporting but concern the economic activity which sport may represent fall within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and are capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions[...].<sup>15</sup>

Advocate General LEGER upheld the findings of the General Court in his opinion to the appeal of that judgment.<sup>16</sup> The European Commission embraced a similar view in relation to the

<sup>11</sup> J. L. BUENDÍA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford University Press, 2000, p. 54.

<sup>12</sup> O. ODUDU has also shown that also secondary EU law provides for a different notion of economic activity. This is indeed the case with Sixth Directive on VAT, according to which a taxable person is “any person who independently carries out in any place an economic activity” (Article 4(1). Article 4(2) provides that “*The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.*” See also the Opinion of Advocate General KOKOTT in a case concerning the interpretation of this provision in relation to regulation in case C-284/04 T-Mobile Austria GmbH and Others v Republik Österreich [2007] ECR I-5189, paragraphs 47-62. See O. ODUDU, *op.cit.*, p. 227.

<sup>13</sup> See O. ODUDU, *op.cit.*, pp.226-228.

<sup>14</sup> See A. BARTOSCH, “Social Housing and European State Aid Control”, *European Competition Law Review* (2007),28, 2007, pp. 563-570, 566.

<sup>15</sup> See Case T-313/02 *David Meca-Medina and Igor Majcen v Commission* [2004] ECR II-3291, paragraph 42. See also O. ODUDU, *op.cit.*, p.226 and footnote 16.

<sup>16</sup> See Case 519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 per Advocate General Leger. By the same token, Advocate General VAN GERVEN, had also interpreted the concept of partitioning of the market for internal market purposes in light of case law on article 101 TFEU. See Opinion of Advocate General Van Gerven in Case C-145/88 B & Q [1989] ECR 3851, paragraph 22. Advocate General POIARES MADURO cites in the same vein the following publication K. MORTELMANS, “Towards convergence in the application of the rules on free movement and competition?”, *CMLRev.*, 2001, p. 613. See Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN), formerly Federación Nacional de Empresas, Instrumentación Científica, Médica, Técnica y Dental*, per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 51, footnote 54. The author of that publication analyzes the application by the Commission of internal

universal notion of economic activity in the Communication on Services of General Interest in Europe:

*“In general, internal market and competition rules do not apply to non-economic activities [...] This means in the first place that matters which are intrinsically prerogatives of the State (such as ensuring internal and external security, the administration of justice, the conduct of foreign relations and other exercises of official authority) are excluded from the application of competition and internal market rules. [...]”*<sup>17</sup>

Also in the academic sphere there seemed to be no question as to the equivalence of the notion of economic activity for competition and free movement purposes at that time.<sup>18</sup>In another context, Gyselen had submitted that an identical legality standard should be applied in relation to the analysis of a given measure under the competition and the free movement provisions. According to the author, if this was not the case, companies could be induced either to collude or to influence State authorities to regulate their activities in a way more in line with their interests.<sup>19</sup>The author noted, however, that there was less need for convergence between the State aid and the free movement rules because in the former field the Commission may adapt *“the proportionality principle because it operates a scale of aid intensities”*.<sup>20</sup>

**13.** However, in the appeal to the Meca Medina case, the Court of Justice made clear that the notion of economic activity for the purposes of the internal market rules is different to that applicable in the competition field. Indeed, although the Court initially recalled that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC,<sup>21</sup> giving thus the impression that the notion of economic activity provided for in that Article applies to the Treaty as a whole. Therefore, if a sporting activity takes the form of gainful employment or the provision of a service for remuneration, it falls under the former Articles 39 and Article 49 EC. However, the Court mentioned that the rules concerning questions which are of *purely sporting interest* fall foul of the Treaty provisions on free movement.

**14.** Importantly, the Court then held that this exception to the application of the fundamental freedoms could not be relied upon to exclude the whole of a sporting activity, *the person engaging in the activity governed by that rule or the body which has laid it down* from the scope of the Treaty.<sup>22</sup>The Court was thus drawing a fundamental distinction between the rule at stake (purely sporting) and the addressees and rest of people engaged in the activity governed by the rule at stake. This distinction (rule vs. addressee-regulator) had been proposed previously by some Advocate Generals who found the competition rules applicable to Sport related measures excluded from the free movement rules.<sup>23</sup>

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market criteria for the purposes of the competition rules. Similarly, as Mortelsman noted, the Commission has also interpreted in the past the competition rules, in particular Article 101 TFEU on the basis of the criteria laid down by the Court of Justice in the field of free movement. See K. MORTELMANS, “Towards convergence in the application of the rules on free movement and competition?”, *CMLRev.*, 2001, pp. 613-649.

<sup>17</sup> Communication from the Commission – Services of General Interest in Europe (2001/C 17/04), p. 28. See also O. ODUDU, *op.cit.*, p.226 and footnote 16.

<sup>18</sup> V. LOURI, “Undertaking as a Jurisdictional Element for the Application of EC Competition Law”, *Legal Issues of Economic Integration*, n. 29 (2), 2002, pp. 143-176, p. 157 in relation to Sport activities or footnote 109 in p. 164 in relation to universities.

<sup>19</sup> L. GYSELEN, “The emerging interface between competition policy and environmental policy in the EC” in CAMERON AND MAY (Eds.), *Trade and Environment*, London, 1994, p. 242-246. See also K. MORTELMANS, “Towards convergence in the application of the rules on free movement and competition?”, *CMLRev.*, 2001, p. 622.

<sup>20</sup> See also K. MORTELMANS, “Towards convergence in the application of the rules on free movement and competition?”, *CMLRev.*, 2001, p. 622 in his reference to L. GYSELEN, “The emerging interface between competition policy and environmental policy in the EC” in CAMERON AND MAY (Eds.), *Trade and Environment*, London, 1994, p. 245-246.

<sup>21</sup> See Case 519/04 P David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991, paragraph 22. See also Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4; Case 13/76 *Donà* [1976] ECR 1333, paragraph 12; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 32.

<sup>22</sup> See Case 519/04 P David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991, paragraphs 26-27.

<sup>23</sup> See Case C-191/97 *Deliège* [2000] ECR I-2549, per Advocate General COSMAS, paragraph 103 *et seq.*; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, per Advocate General ALBER, paragraph 101 *et seq.*

Consequently, the Court held that “*if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition*”.<sup>24</sup> However, “*where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.[...] Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave and Koch and Donà), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.*”<sup>25</sup>

In light of the above, the Court found that the General Court had made an error in law by considering that a measure may not fall under the Treaty competition rules if it has been declared as *non-economic* under the free movement provisions.<sup>26</sup>

**15.** The Court’s finding had been anticipated by Advocate General POIARES MADURO in his opinion in the FENIN case. According to the learned Advocate General, “*At first sight, it appears desirable to adopt the same solution in the field of the freedom to provide services and in that of freedom of competition, since those provisions of Community law seek to attain the common objective of the completion of the internal market. However, the scope of freedom of competition and that of the freedom to provide services are not identical. There is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law. As stated above, the Member States may withdraw certain activities from the field of competition if they organise them in such a way that the principle of solidarity is predominant, with the result that competition law does not apply. By contrast, the way in which an activity is organised at the national level has no bearing on the application of the principle of the freedom to provide services. Thus, although there is no doubt that the provision of health care free of charge is an economic activity for the purposes of Article 49 EC, it does not necessarily follow from that that the organisations which carry on that activity are subject to competition law.*”<sup>27</sup>

**16.** Thus, the fundamental prohibition of discrimination on the basis of nationality for internal market purposes applies even where competition rules do not. In this regard, it has been held that, for example, “*Bodies responsible for managing health insurance, as in Císal, are not undertakings for the purposes of competition law, but the rules governing them may none the less not prohibit the insurance of employees from other Member States without being inconsistent with the principle of the freedom of movement of workers.*”<sup>28</sup>

**17.** Having said that, the fact that the scope of competition and free movement rules is not identical does not necessarily mean that is completely different. Indeed, Advocate General Poiares Maduro, in a more recent opinion has used some of the criteria developed in the context of the notion of economic activity for the purposes of competition law to define the scope of application of Article 49 EC.<sup>29</sup>

<sup>24</sup> See Case 519/04 P David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991, paragraph 28.

<sup>25</sup> See Case 519/04 P David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991, paragraphs 29-31.

<sup>26</sup> Id. at paragraph 33.

<sup>27</sup> See Case C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN), formerly Federación Nacional de Empresas, Instrumentación Científica, Médica, Técnica y Dental, per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 51.

<sup>28</sup> See, for example, id. at footnote 55.

<sup>29</sup> See Case 281/06 Hans Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg [2007] ECR Page I-12231, per Advocate General Poiares Maduro, paragraph 11 and footnote 6. See also O. ODUDU, *op.cit.*, p.228. The criterion mentioned by the Advocate General was that there might be economic activities even if there is no aim to make a profit, both for the free movement and competition rules.

**18.** The European Commission has also recently abandoned the universal approach to the notion of economic activity.<sup>30</sup> Indeed, in a communication concerning Services of general interest, the Commission has clearly distinguished between the notion of economic activity under the competition and the free movement rules:

*“In the area of competition law, according to the Court of Justice, it is not the sector or the status of an entity carrying out a service (e.g. whether the body is a public undertaking, private undertaking, association of undertakings or part of the administration of the State), nor the way in which it is funded, which determines whether its activities are deemed economic or non-economic; it is the nature of the activity itself. [...] For a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration.”*<sup>31</sup>

Even more recently, the Court of Justice has found that an employers’ liability insurance association is not an undertaking under Articles 101 and 102 TFEU given that it fulfils an exclusively social function (solidarity). However, the Court held in the same case that Articles 56 and 57 TFEU (ex Articles 49 EC and 50 EC) were applicable to the law establishing compulsory affiliation to the employers’ liability insurance in question.<sup>32</sup>

**19.** In sum, *“the existence of two definitions of economic activity is clear, so that the limits of Community law are different under each provision, less clear is whether the differing limits are consciously developed, applied consistently, or rigorously adhered to.”*<sup>33</sup>

**20.** In this regard, the Commission has stated that the question of how to distinguish between economic and non-economic activities *“cannot be given a priori and requires a case-by-case analysis”*.<sup>34</sup> The same approach seems to be followed by the Competition Appeal Tribunal in the United Kingdom: *“We think that the better approach is, first, to examine [the entity at issue’s] activities in the particular factual circumstances of the present case to see whether, as a matter of the broad principles of European caselaw and the ordinary meaning of words, the relevant activities of [the same entity] can properly be characterised as “economic”.*”<sup>35</sup>

It may nevertheless be worth to analyze the *broad principles* identified by the Court of Justice to distinguish between economic and non-economic activities in both the competition and internal market fields. To this end, the next section will describe the criteria that have been proposed to distinguish between economic and non-economic activities, both for the purposes of the internal market and competition rules. Subsequently, both sets of criteria will be confronted with the recent practice of the European Commission on State aids in relation to the notion of economic activities. The goal remains to answer the following question: which criteria which set of criteria best fits the State aid discipline?

<sup>30</sup> Ibid.

<sup>31</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, section 2.1.

<sup>32</sup> See Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft*, not yet reported, paragraphs 44-59. Indeed, according to the Advocate General in that case, the German Government claimed that given that the insurance associations in question, were not undertakings, because of their exclusively social nature, Germany could not infringe, inter alia, the freedom to provide services by imposing compulsory affiliation to such social security bodies. In fact, given that the concept of undertaking is not present in Articles 56 or 57 TFEU, the argument underpinning this statement must have been that the association in question was not pursuing an economic activity. In any case, this example may suffice to show that the existence of different notions of economic activity within the Treaty is not that clear even for Member States. See Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft*, not yet reported, per Advocate General MAZÁK paragraph 67.

<sup>33</sup> See O. ODUDU, *op.cit.*, p.228.

<sup>34</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, p. 5.

<sup>35</sup> See Case 1006/2/1/01 *BetterCare Group Limited v Director of Fair Trading* [2002] CAT, paragraph 178.

## B) Criteria to distinguish economic and non-economic activities

### a) Economic activities under the Internal Market rules

21. According to the European Commission, “for a given service to qualify as an economic activity under the internal market rules (free movement of services and freedom of establishment), the essential characteristic of a service is that it must be provided for remuneration. The service does not, however, necessarily have to be paid by those benefiting from it. The economic nature of a service does not depend on the legal status of the service provider (such as a non-profit making body) or on the nature of service, but rather on the way a given activity is actually provided, organized and financed. In practice, apart from activities in relation to the exercise of public authority, to which internal market rules do not apply by virtue of Article 45 of the EC Treaty [Article 51 TFEU], it follows that the vast majority of services can be considered as “economic activities” within the meaning of EC Treaty rules on the internal market (Articles 43 [Article 49 TFEU] and 49 [Article 56 TFEU]).”<sup>36</sup>

22. Indeed, the remuneration or gainful employment has traditionally been the criterion determining whether a particular activity is economic under Articles 45 and 56 TFEU (ex Articles 39 and 49 EC). In this vein, it is well settled that “the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character: the activity must not be provided for nothing.”<sup>37</sup>

The Court has held in this regard that “According to the first paragraph of that provision, services are to be considered to be “services” within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital or persons,”<sup>38</sup> and that “According to Article 60 of the Treaty, services are deemed to be “services” within the meaning of the Treaty where they are normally provided for remuneration[...].”<sup>39</sup>

23. In relation to the notion of remuneration, the Court has emphasized that “The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.”<sup>40</sup>

In light of the above, the Court has recognized, for example, the practice of sport as an economic activity “[...]When such activity has the character of gainful employment or remunerated service it comes more particularly within the scope, according to the case, of articles 48 to 51 or 59 to 66 of the Treaty.”<sup>41</sup> Other examples include orthodontist services,<sup>42</sup> the provision of insurance,<sup>43</sup> advertising broad-

<sup>36</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, p. 5.

<sup>37</sup> See Case 281/06 *Hans Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg* [2007] ECR Page I-12231, per Advocate General POIARES MADURO, paragraph 12.

<sup>38</sup> Case C-159/90 *Grogan* [1991] ECR I-4685, paragraph 17. See also Case C-205/84 *Commission v Germany* [1986] ECR I 3755, paragraph 18. The Court has also held that “Where such a service is provided by a member of a profession and therefore, as required by Article 60 of the Treaty, is normally provided for remuneration, the principle of equal treatment laid down in Article 59 applies” See Case C-20/92 *Hubbard* [1993] ECR I-3777, paragraph 13.

<sup>39</sup> Joined Cases C-286/82 and 26/83 *Luisi & Carbone* [1984] ECR 377, paragraph 9.

<sup>40</sup> Case 263/86 *Humbel* [1988] ECR 5365, paragraph 17.

<sup>41</sup> See Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandse Wielren Unie et Federación Española Ciclismo*. ECR [1974] I-1405, paragraphs 4-5. See also Case C-196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 10, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 73.

<sup>42</sup> Cases C-158/96 *Kohll* [1998] ECR I-1931 paragraph 29. See for a large list of examples and references to the case law on services the document published by the European Commission: Guide to the case law of the European Court of Justice on Articles 49 et seq. EC treaty, Freedom to provide services, European Commission 1/1/2001. It may be visited online at [http://ec.europa.eu/internal\\_market/services/docs/infringements/art49\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art49_en.pdf). See similarly for the right of establishment the document published by the European Commission: Guide to the case law of the European Court of Justice on Articles 43 et seq. EC treaty, Freedom of establishment, European Commission 1/1/2001. It can be visited online at: [http://ec.europa.eu/internal\\_market/services/docs/infringements/art43\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art43_en.pdf).

<sup>43</sup> Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 22



cast for payment by a television broadcaster,<sup>44</sup> self-employed tourist guides,<sup>45</sup> tour company services,<sup>46</sup> building loans provided by banks,<sup>47</sup> the transmission of television signals,<sup>48</sup> lottery transactions,<sup>49</sup> termination of pregnancy (lawfully practiced),<sup>50</sup> medical activities.<sup>51</sup> The Court has also emphasized the importance of the imperative prohibition of discrimination across the internal market rules. In the Court's own words "Articles 7, 48, 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality [...] By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the community."<sup>52</sup>

**24.** The Court has also stated that the concepts of *economic activity* and *worker* define the scope of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively.<sup>53</sup> Related to this, the remuneration at issue does not need to be paid for by those for whom the service is performed.<sup>54</sup> The problems have arisen in situations where the remuneration is actually paid by the State.

In this regard, the Court considered, in *Humbel*, that a course taught under the national educational system did not fall under the Treaty provisions on services, *inter alia*, because "Even though the concept of remuneration is not expressly defined in Articles 59 et seq. of the EEC Treaty, its legal scope may be deduced from the provisions of the second paragraph of Article 60 of the Treaty, which states that "services" include in particular activities of an industrial or commercial character and the activities of craftsmen and the professions.[...] The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. [...] That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents."<sup>55</sup>

**25.** More recently, also in relation to educational services, the Court has restated the importance of the form of financing of the services at question in order to determine whether there is *remuneration* (hence economic activity) or not. Indeed, "by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas.[...] By contrast, the Court has held that courses provided by establishments financed essentially by private funds, particularly by pupils and their parents, constitute services within the meaning of Article 50 EC, the aim of such establishments being to offer a service

<sup>44</sup> Joined Cases C-34/95, 35/95 & 36/95 *De Agostini* [1997] ECR I-3843, paragraph 48

<sup>45</sup> Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 7

<sup>46</sup> Case C-198/89 *Tourist Guides Greece* [1991] ECR I-727, paragraph 6. See also Case C-180/89 *Tourist Guides Italy* [1991] ECR I-709, paragraph 6, and Case C-154/89 *Tourist Guides France* [1991] ECR I-659, paragraph 7.

<sup>47</sup> Case C-484/93 *Svensson & Gustavsson* [1995] ECR I-3955, paragraph 11

<sup>48</sup> Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 13

<sup>49</sup> Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 33

<sup>50</sup> Case C-159/90 *Grogan* [1991] ECR I-4685, paragraph 18

<sup>51</sup> Joined Cases 286/82 and 26/83 *Luisi and Carbone v. Ministero del Tesoro* (1984) ECR 377, paragraph 16

<sup>52</sup> See Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale*, Koninklijke Nederlandse Wielren Unie et Federación Española Ciclismo. ECR [1974] I-1405, paragraphs 16-28.

<sup>53</sup> See Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 13, or Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, [200] ECR I-02681, paragraph 42.

<sup>54</sup> See Case 352/85, *Bond van Adverteerders*, [1988] ECR 2085, paragraph 16.

<sup>55</sup> See Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel*. ECR [1988] I-05365 See also Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 17, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 26; Case C-355/00 *Freskot* [2003] ECR I-5263 paragraph 55; and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 23.

for remuneration.”<sup>56</sup>The source of financing of an educational institution becomes thus crucial for the qualification of an activity as economic.

Finally, it has been noted that although the *Humbel* case law has not been overruled, *the applicability of its reasoning has been restricted* by later case law, particularly in the field of cross-border health care.<sup>57</sup> Indeed the definition of remuneration laid down in *Humbel* “has been considerably watered down, though not completely abandoned” in the health care area.<sup>58</sup> By this token, the Court has considered hospital services as an economic activity, even if provided free of charge under a sickness-insurance scheme.<sup>59</sup> Similarly, the Court has also found the former Article 49 EC applicable to a situation in which the UK’s National Health Service was involved, although the Court did not clarify whether the services provided by the State-funded health service could be considered as “commercial”.<sup>60</sup>

**26.** In sum, under the existing case law, remuneration is what makes an activity economic for the purposes of the free movement provisions. In this regard, Craig and De Burca have stated that “*The upshot of the Court’s ruling is that Articles 49-50 apply to any service, however essential a public service it may be, which is “provided for remuneration, and the line between publicly and privately remunerated services remains uncertain”*<sup>61</sup>. O. ODUDU considers, however, that remuneration is only the second element of economic activity for internal market purposes, the first being the existence of demand or supply of services<sup>62</sup>. He grounds this finding on the *Jany* case, where the Court held that a service exists in those instances when “*the provider satisfies a request by the beneficiary [...] without producing or transferring material goods*”<sup>63</sup>. O. ODUDU adds that the examples listed in the former Article 50 EC (activities of commercial character, of craftsmen ...) go in the same direction and also points to the case law establishing that the demand of service is also an economic activity.<sup>64</sup>

## b) Economic activities under the competition rules

**27.** Contrary to the ECSC and the EURATOM Treaties,<sup>65</sup> the EEC Treaty did not provide for an authentic definition of “undertaking”. Therefore, it has been for the Court of Justice to define this crucial notion, which explains its functional character.

**28.** In this light, according to well settled case-law, the Community law concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is

<sup>56</sup> See Case 381/05, *Commission v Germany* [2007] ECR I-6957, paragraphs 58-59.

<sup>57</sup> P. CRAIG AND G. DE BURCA, *EU LAW, Text, Cases and Materials*, Fourth Edition, 2008, p. 820.

<sup>58</sup> V. HATZOPOULOS, “The ECJ Case Law on Cross-Border Aspects of Health Services”, Briefing note requested by the European Parliament’s committee on Internal Market and Consumer Protection (IP/A/IMCO/FWC/2006-167/C3/SC1).

<sup>59</sup> See cases C-157/99 *Geraets-Smits v Stichting Ziekenfonds, Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraphs 54-58; C-385/99 *Muller – Fuaré* [2003] ECR I-4509, paragraphs 37-44.

<sup>60</sup> See P. CRAIG AND G. DE BURCA, *op.cit.*, p. 822 and Case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325m paragraphs 89-91.

<sup>61</sup> P. CRAIG AND G. DE BURCA, *op.cit.*, p. 823.

<sup>62</sup> See O. ODUDU, *op.cit.*, p.229.

<sup>63</sup> *Ibid.*, and Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris Van Justitie* [2001] ECR I-8615, paragraph 71.

<sup>64</sup> *Ibid.*, and Joined Cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero Del Tesoro* [1984] ECR 377, paragraph 10 and Case C-350/96 *Clean-Car Autoservice* [1998] ECR I-2521, paragraphs 19–25. In relation to this last point, and by contrast to the case law developed in the competition law area, the Court has effectively stated that: “*By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a member state other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the state in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of article 60, which permits the person providing the service to pursue his activity temporarily in the member state where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.*” See Joined Cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero Del Tesoro* [1984] ECR 377, paragraph 10.

<sup>65</sup> See article 80 of the ECSC Treaty (See also Case No COMP/M.2481 -BALLI / KLOCKNER (see ECSC.1359)) and Article 196 of the EURATOM Treaty.

financed.<sup>66</sup> Also in light of established case law, any activity consisting in offering of goods and services on a given market is an *economic activity*.<sup>67</sup> Therefore, an activity should be considered as economic if it may be performed, or has been performed, by private undertakings.<sup>68</sup>

Indeed, as the Commission has held “*any activity consisting in offering goods and/or services on a given market is an economic activity. In this context, the fact that the activity concerned may be qualified as “social” is not relevant.*”<sup>69</sup> The Commission’s paper further lists a number of activities considered economic in nature, including medical services. This last finding is based on the case law of the Court of Justice mentioned *supra* concerning the fundamental freedoms.<sup>70</sup> In light of the above considerations it has been held 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*”.<sup>71</sup>

**29.** However, it is well known that certain services that might be performed by private operators have been considered as *non-economic* by the Court of Justice for competition law purposes. The paradigm of this exception would be the “*compulsory social security systems*” which are based on the existence (to a greater or lesser degree) of solidarity among insured persons, *i.e.*, meaning that the perceptions are not proportional to the contributions of each member.<sup>72</sup> However, *compulsory social security systems* are not the only exception that can be found in the Community case law. The European Courts have considered as *non-economic* the following activities: air traffic control and supervision,<sup>73</sup> anti-pollution surveillance,<sup>74</sup> administrative airport supervisory activities,<sup>75</sup> tax collection on behalf of the State,<sup>76</sup> and anti-doping campaigns which do not pursue an economic objective.<sup>77</sup>

**30.** In this regard, it is more interesting to identify the criteria followed by the Court of Justice to conclude that some activities are or not economic in nature than the actual list of non-economic activities. BUENDIA has noted that the Court of Justice has used, together with the solidarity principle

<sup>66</sup> See, *inter alia*, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, Case C-244/94 *Fédération Française des Sociétés d’Assurances and Others v Ministère de l’Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 14, and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21.

<sup>67</sup> See, for instance, Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75; and Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 22.

<sup>68</sup> See, for example, C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 20 or Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929, paragraph 124.

<sup>69</sup> Commission Staff Working Document: Frequently asked questions in relation with Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, and of the Community Framework for State aid in the form of public service compensation; Accompanying document to the Communication on “*Services of general interest, including social services of general interest: a new European commitment*” {COM(2007) 725 final} {SEC(2007) 1514} {SEC(2007) 1515}. Brussels, 20/11/2007 SEC(2007) 1516 final, section 2.2.

<sup>70</sup> *Ibid.* See for the case law mentioned in the paper: Cases C-157/99, *Smits*, 2001, ECR I-5473, para 53, 286/82 and 26/83 *Luisi and Carbone*, 1984, ECR 377 paragraph 16; C-159/90, *Society for the Protection of Unborn Children Ireland*, 1999, ECR I-4685, paragraph 18, C-368/98 *Abdon Vanbraekel*, 2001, ECR I-5363, para 43, T-167/04, *Asklepios Kliniken GmbH*, [2007], paragraphs 49-55.

<sup>71</sup> See A. WINTERSTEIN, “Nayling the Jellyfish: Social security and Competition Law”, *European Competition Law Review*, 1999, p.325. Quoted by V. LOURI, “Undertaking as a Jurisdictional Element for the Application of EC Competition Law”, *Legal Issues of Economic Integration*, n. 29 (2), 2002, pp. 143-176, p. 147.

<sup>72</sup> See Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 17-19; C-67/96 *Albany* [1999] ECR I-5751, paragraphs 77-87, Joined cases C-115 to 117/97 *Brentjens* [1999] ECR I-6025, 77-87; C-219/97 *Drijvende* [1999] ECR I-6121, paragraphs 67-77; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 67-77; Case C-218/00 *Cisal* [2002] ECR I-691, paragraphs 31-42; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraphs 45-66, and Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft*, not yet reported, paragraphs 44-59.

<sup>73</sup> See Cases C-346/92, *SAT Fluggesellschaft / Eurocontrol*, ECR [1994] I-43, paragraph 30, Case T-155/04, *SELEX Sistemi Integrati SpA v Commission*, ECR [2006] II-04797, paragraphs 56/62 and Case C- 113/07 P, *SELEX Sistemi Integrati SpA v Commission*, not yet reported, paragraph 85.

<sup>74</sup> See Case C-343/95, *Cali & Figli / Servizi Ecologici Porto di Genova*, ECR [1997] I-1547, paragraph 22.

<sup>75</sup> See Case T-128/98, *Aéroports de Paris / Commission*, ECR [2000] II-3929, paragraph 112.

<sup>76</sup> See Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, ECR [2003] Page I-08875, paragraph 35. See also A.-L. CALVO CARAVACA, *Derecho Antitrust Europeo*, t. I (*Parte General*), Colex, Madrid 2009, p. 181.

<sup>77</sup> *Ibid* and Case T-313/02 *David Meca-Medina and Igor Majcen v Commission* [2004] ECR II-3291, paragraph 44.

mentioned supra,<sup>78</sup> “*less fortunate*” criteria to distinguish between economic and non-economic activities such as the exercise of public prerogatives,<sup>79</sup> the fact that the activity is subject to State control,<sup>80</sup> or “*the pursuit of objectives of general interest*”.<sup>81</sup> He concludes, nonetheless, that “*the underlying logic is nothing more than that contained in Höfner: in principle - subject to the above exceptions- any activity that may be fulfilled by a private undertaking has to be considered to be “economic” in nature.*”<sup>82</sup>

**31.** Similarly, according to A.-L. CALVO CARAVACA, the concept of economic activity laid down by the Case law of the European Courts is quite consistent and clear: any activity consisting in offering of goods and services on a given market is an economic activity.<sup>83</sup> Indeed, for this author, what differs from case to case is the process followed by the Courts to qualify an activity as economic. Thus, sometimes they operate by exclusion, *i.e.*, the activities linked to the exercise of public prerogatives or those exclusively social in nature are non-economic, others they operate by comparison with activities carried out by the private sector.<sup>84</sup>

Examples of *non-economic* activities identified through a process of exclusion would be those that by their nature, their aim, and the rules, to which they are subject, are carried out by public authorities. In this regard, also according to Mestmäcker/Schweitzer, the analysis of whether an activity is non-economic must be based on an “*overall assessment*.”<sup>85</sup> Examples of this process of exclusion would be compulsory social security systems or the anti-doping campaigns which do not pursue an economic objective but rather have been put in place to primarily enforce the spirit of fair play.<sup>86</sup>

**32.** Second, together with the above mentioned activities, also by exclusion, the Court has identified non-economic activities linked to the exercise of public prerogatives,<sup>87</sup> these would be: air traffic control and supervision,<sup>88</sup> anti-pollution surveillance,<sup>89</sup> administrative airport supervisory activities,<sup>90</sup> or tax collection on behalf of the State.<sup>91</sup> More generally, it has been said that “*all cases which involve the exercise of official authority for the purpose of regulating the market and not with a view to participating in it fall outside the scope of competition law.*”<sup>92</sup>

**33.** More recently, the Commission has distinguished between two types of non-economic activities, namely, (i) non economic activities related to the exercise of State prerogatives, and (ii)

<sup>78</sup> J. L. BUENDÍA SIERRA, “*An analysis of Article 86(2) EC*”, Part IV, in Sanchez Rydelski (Ed.) ‘*The EU State aid regime*’ London: Cameron May, 2006, p. 548.

<sup>79</sup> See Case C-364/92, SAT Fluggesellschaft / Eurocontrol, ECR [1994] I-43, paragraphs 24-30

<sup>80</sup> See Case C-218/00 Císal [2002] ECR I-691, paragraphs 31-42

<sup>81</sup> See Case C-343/95, Calì & Figli / Servizi Ecologici Porto di Genova, ECR [1997] I-1547, paragraphs 22-23.

<sup>82</sup> J. L. BUENDÍA SIERRA, “*An analysis of Article 86(2) EC*”, Part IV, in Sanchez Rydelski (Ed.) ‘*The EU State aid regime*’ London: Cameron May, 2006, p. 548.

<sup>83</sup> A.-L. CALVO CARAVACA, *Derecho Antitrust Europeo*, t. I (*Parte General*), Colex, Madrid 2009, p. 180.

<sup>84</sup> *Ibid.*

<sup>85</sup> E.J. MESTMÄCKER/ H. SCHWEITZER, “*Wettbewerbsrecht*”, ULRICH IMMENGA AND ERNST-JOACHIM MESTMÄCKER (Ed.), 4th edition, Munich 2007, Article 86, paragraph 18. This reference is quoted by Advocate General TRSTENJAK in her recent opinion in Case C- 113/07 P, SELEX Sistemi Integrati SpA v Commission, not yet reported, paragraph 64 where she argued that the Court of First Instance failed to assess the relevant factors from a global perspective.

<sup>86</sup> *Ibid.* See also Case C-218/00 Císal [2002] ECR I-691, paragraphs 31-42; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband and Others [2004] ECR I-2493, paragraphs 45-66, and Case C-350/07 Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft, not yet reported, paragraphs 44-59 for compulsory social systems, and for the lack of economic nature of the anti-doping rules/campaigns see Case T-313/02 David Meca-Medina and Igor Majcen v Commission [2004] ECR II-3291, paragraph 44.

<sup>87</sup> See Case C-346/92, SAT Fluggesellschaft / Eurocontrol, ECR [1994] I-43, paragraphs 24-30

<sup>88</sup> See Cases C-346/92, SAT Fluggesellschaft / Eurocontrol, ECR [1994] I-43, paragraph 30, Case T-155/04, SELEX Sistemi Integrati SpA v Commission, ECR [2006] II-04797, paragraphs 56/62 and Case C- 113/07 P, SELEX Sistemi Integrati SpA v Commission, not yet reported, paragraph 85.

<sup>89</sup> See Case C-343/95, Calì & Figli / Servizi Ecologici Porto di Genova, ECR [1997] I-1547, paragraph 22.

<sup>90</sup> See Case T-128/98, *Aéroports de Paris / Commission*, ECR [2000] II-3929, paragraph 112.

<sup>91</sup> See Case C-207/01, *Altair Chimica SpA v ENEL Distribuzione SpA*, ECR [2003] Page I-08875, paragraph 35. See also A.-L. CALVO CARAVACA, *Derecho Antitrust Europeo*, t. I (*Parte General*), Colex, Madrid 2009, p. 181.

<sup>92</sup> See Case C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN), formerly Federación Nacional de Empresas, Instrumentación Científica, Médica, Técnica y Dental, per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 15 and Case T-313/02 Meca-Medina and Majcen v Commission [2004] ECR II-3291, paragraph 41.

certain activities of a purely social nature.<sup>93</sup> The first group includes activities linked to the exercise of State prerogatives by the State itself or by authorities functioning within the limits of their public authority.

**34.** In this regard, the Commission does not give a definition of “*State prerogatives*”. The Commission does however provide a list of non-economic activities pertaining to this category:<sup>94</sup> (i) Activities related to the army or the police, (ii) The maintenance and improvement of air navigation safety, security, air traffic control, customs, maritime traffic control and safety, (iii) Anti-pollution surveillance in maritime areas, (iv) Standardisation activities as well as related research and development activities, (v) The organization, financing and enforcement of correctional measures in order to ensure the enforcement of the penal system, (vi) The financing and the supervision of the construction of railway infrastructure,<sup>95</sup> and (vii) The closing down of coal mines and the management of assets, as well as the provision of funds for the work of rehabilitation and supervision of sites and for the eradication of the consequences of mining activity.

**35.** In relation to (vi) *supra*, according to the practice of the European Commission, the construction of a transport infrastructure by public authorities does not constitute an economic activity, provided that it is open to all potential users on equal and non-discriminatory terms.<sup>96</sup> However, “*Where the construction of transport infrastructure is carried out by a private company, the Commission has decided in the past that this operation constitutes an economic activity that may give rise to State aid issues.*”<sup>97</sup> Therefore, the finding of whether a given activity is or not economic is seemingly made dependent on whether a public or private operator is carrying out the construction at stake (and not on the analysis of the activity itself).<sup>98</sup> This seems, at least *a priori*, at odds with the principle of neutrality enshrined in Article 345 TFEU.

**36.** In fact, previous decisions of the Commission seem also to contrast with the development of the Commission practice laid down in the referred communication. For example, the Commission concerning the construction of the Airport of Brussels where the Commission held, applying the comparative criterion, that “*The airways authority is a Belgian public body entrusted by the State with two public-service functions to be performed in the public interest and according to commercial principles: (i) the construction, development, maintenance and exploitation of Brussels National Airport and as-*

<sup>93</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, section 2.4.

<sup>94</sup> *Ibid.*

<sup>95</sup> See in this regard Commission Decision of 31.08.2006 in case N 478/2004, State guarantee for capital borrowings by Coràs Iompair Eirann (CIÉ) for infrastructure investment, OJ C 207, paragraphs 25-27.

<sup>96</sup> See in this regard Commission decision N 284/2005 Irish Broadband, point 34, decision of 8 March 2006; C 42/2001 Terra Mítica SA, point 64; N 355/2004 PPP Antwerp Airport, point 34; N 550/2001 Partenariat public privé pour la construction d’installations de chargement et de déchargement, point 24; N 649/2001 Freight Facilities Grant, point 45; N 356/2002 Network Rail, point 70; N 511/1995 Jaguar Cars Ltd. See for the soft law, 1994 Guidelines on State aid in the aviation sector, point 12; 1998 White book on infrastructure charges (COM (1998) 466 final of 22 July 1998, paragraph 43; 2001 Communication on improving the quality of European ports (COM (2001) final of 13 February 2001, p. 11. See also reply of the Commission to written question No 28 of Mr. Dehousse of 10 April 1967, OJ No 118, 20. 6. 1967, p. 2311/67. See also J. Battista and J.J. Piernas, “The respect of State aid rules in Public Private Partnerships” in EU Competition Law, Volume IV State Aid, Book one, Part 2, Chapter 3, Claeys & Casteels 2008, pp. 509-549.

<sup>97</sup> See in this regard Commission Decision of 31.08.2006 in case N 478/2004, State guarantee for capital borrowings by Coràs Iompair Eirann (CIÉ) for infrastructure investment, OJ C 207, paragraph 27. See also Commission decision C 42//2001 Terra Mítica SA, point 64; N 550/2001 Partenariat public privé pour la construction d’installations de chargement et de déchargement, point 24; see also the “Guidelines for the financing of regional airports”, OJ C 312/1, 9.12.2005, p. 1, point 30 and following.

<sup>98</sup> Indeed, in the Commission Decision of 31.08.2006 in case N 478/2004, State guarantee for capital borrowings by Coràs Iompair Eirann (CIÉ) for infrastructure investment, OJ C 207, paragraph 28, the Commission held that “*Therefore, it is first necessary to establish whether CIE and Iarnrod Eirann are to be considered as a public authority, insofar as their involvement in the construction of railway infrastructure is concerned. The Commission firstly notes that the CIE and Iarnrod Eirann have the task to control that the infrastructure investment decisions of the Irish government are carried out as planned. In order to carry out the construction of the infrastructure, they rely in the vast majority of cases on outside contractors, which are chosen through a tender procedure according to EC public procurement law.*”

*sociated infrastructures, and (ii) ensuring the safety of air transport within Belgian airspace. In this respect, it carries on an economic activity, at least as far as the activities at point (i) are concerned, which might be carried on, at least in principle, by a private enterprise for profit.*<sup>99</sup>

**37.** With regard to the second category of activities excluded by the Commission from the competition rules, *i.e.*, those having a purely social nature, as with the first group, the Commission does not define what is meant by “*purely social nature*”. Instead, the followings activities are held to fall under this category: (i) The management of compulsory insurance schemes pursuing an exclusively social objective, functioning under the principle of solidarity, and (ii) The provision of public education financed as a general rule by the public budget and carrying out a State task in the social, cultural and educational fields towards the population.<sup>100</sup>In relation to the latter group, the Commission refers to the case law on cross-border health services (free movement) and to two State aid decisions related to publicly financed education which also refer to that free movement case law.<sup>101</sup>

**38.** Proceeding by comparison, however, the Court of Justice has enumerated a number of economic activities. This criterion was enunciated in *Höfner*, where the Court held that “*employment procurement has not always been, and is not necessarily, carried out by public entities*”.<sup>102</sup>Subsequently the Court has made reference to it in other cases such as in *Ambulanz Glöckner*, where the Court held that health organisations which provided services on the market for emergency and ambulance services were to be considered as undertakings, because “*such activities have not always been, and are not necessarily, carried on by such organisations or by public authorities*”.<sup>103</sup>

**39.** In relation to the comparative criterion, as Advocate General Jacobs has noted, this technique has the “*virtue*” of extending the concept of economic activity to include any activity capable of being carried on by a profit-making organisation.<sup>104</sup>This risk has also been eloquently mentioned by Advocate General Poiares Maduro: “*That comparative criterion would, literally applied, enable any activity to be included within the scope of competition law. Almost all activities are capable of being carried on by private operators. Thus, there is nothing in theory to prevent the defence of a State being contracted out, and there have been examples of this in the past. Accordingly, in its subsequent judgments, the Court elaborated on that concept by linking it to participation in a market.*”<sup>105</sup>

**40.** Advocate General POIARES MADURO also notes that the Court of Justice has followed another criterion, together with that of exclusion and comparison, to distinguish between economic and non eco-

<sup>99</sup> See Commission Decision of 28 June 1995 relating to a proceeding pursuant to Article 90 (3) of the Treaty, OJ L 21 , P. 0008 – 0014. See also V. LOURI, “Undertaking as a Jurisdictional Element for the Application of EC Competition Law”, *Legal Issues of Economic Integration*, n. 29 (2), 2002, pp. 143-176, p. 163.

<sup>100</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, section 2.4.

<sup>101</sup> *Ibid.* And Cases 263/86, Humbel, [1988], ECR 5365, paragraph 18, C-318/05 Commission/Germany, [2007], paragraphs 74 -75, ECR 2007 Page I-06957, and Commission Decision of 28.11.2001 in case N 118/00, Public grants to professional sports clubs, OJ C 333/6, and Commission decision of 30.11.2006 in case NN54/2006, Prerov Logistics College, OJ C 291/18.

<sup>102</sup> See Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 22.

<sup>103</sup> See Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 20.

<sup>104</sup> See, Opinions of Advocate General JACOBS in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 67 and in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, paragraph 27.

<sup>105</sup> See Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria* (FENIN), per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 12. See also in this regard, as referred by Advocate General POIARES MADURO in his opinion (footnote 12) J.Y. CHÉROT, ‘Le droit communautaire de la concurrence fonde-t-il un ordre concurrentiel?’ in *L’ordre concurrentiel: mélanges en l’honneur d’A. Pirovano*, 2003, criticizes that comparative method and states that ‘not only can every activity in theory be carried out by private enterprise, but also, experience shows that every activity has at one time or another in history been carried out by private enterprise’ p. 569. See also L. IDOT, ‘La notion d’entreprise en droit de la concurrence, révélateur de l’ordre concurrentiel’ in the same work: ‘[i]f such a definition is adopted, everything may become an “economic activity” at some point’ p. 528.

conomic activities. This criterion is “*that of participation in a market or the carrying on of an activity in a market context.*”<sup>106</sup> Indeed, the settled case law of the Court of Justice shows that the actual (as opposed to potential or even legally prohibited) offering of goods in a market is what ultimately constitutes an economic activity.

In this sense, the learned Advocate General adds that “*It is not the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions. Those conditions are distinguished by conduct which is undertaken with the objective of capitalisation, which is incompatible with the principle of solidarity. That allows it to be determined whether a market exists or not, even if the legislation in force prevents genuine competition emerging on that market. By contrast, where the State allows partial competition to arise, the activity in question necessarily implies participation in a market.*”<sup>107</sup>

This is the context in which it must be understood the sometimes referred to as the criterion based on the capacity to commit infringements of competition law, as the basis for categorising an entity as an undertaking.<sup>108</sup>

**41.** Finally, according to O. ODUDU, the concept of economic activity in the field of competition law has the following two elements: (i) there must be an offer (not only demand in light of FENIN) of goods or services to the market; and (ii) there must be the potential to make profit from the offer of goods or services without State intervention.<sup>109</sup>

## 2. Differences between the two set of criteria

**42.** According to O. ODUDU the application of the competition and not the free movement criteria is apparent in two situations, namely, in relation to (i) public goods, and (ii) solidarity.<sup>110</sup>

**43.** With regard to the first category, *i.e.*, public goods, in the *Diego Cali* judgment, the Court considered that a private entity, SEPG, entrusted with anti-pollution tasks in the Port of Genoa-Multedo, was not an “undertaking”. The Court essentially held that the tasks entrusted to SEPG were in the public interest and formed part of the essential functions of the State.<sup>111</sup> The service provided by SEPG was against remuneration. Thus, the free movement provisions, in particular, the freedom to provide services would have applied. According to O. ODUDU, in a system like the one laid down by the Port of Genoa authorities, given that it was not possible to exclude any user from the benefits of the provision of the service (thus because it was a public good and there was no potential to make a profit), the competition rules could not apply.<sup>112</sup> We wonder whether this criterion would hold, particularly in the State aid field, in view of the large number of services that are provided on a non-profit basis, with (almost) non-excludability and non-rivalry (*e.g.* traditional public broadcasting). The providers of these services are usually undertakings under the Treaty which receive compensation from the State, usually justified under Article 107 (2) and (3), or Article 106(2) TFEU.

<sup>106</sup> See Case C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN), per Advocate General Poiares Maduro, [2006] ECR I – 6295, paragraph 13.

<sup>107</sup> Ibid. See for previous Case law Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 37, Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 3: “*it is not contested that the Amministrazione autonoma dei monopoli di stato exercises an economic activity inasmuch as it offers goods and services on the market in the manufactured tobacco sector.*” See also Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75, and C-475/99 *Ambulanz Glockner* [2001] ECR I-8089, paragraph 19. See also Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 47, and Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297, paragraph 79.

<sup>108</sup> Ibid., paragraph 14 and Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21, according to which “*the mere fact that the CCMSA is a nonprofit making body does not deprive the activity which it carries on of its economic character, since ... that activity may give rise to conduct which the competition rules are intended to penalise.*” See also the Opinion of Advocate General JACOBS in Case C-218/00 *Cisal* [2002] ECR I-691, at paragraph 71: “*the underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent.*”

<sup>109</sup> See O. ODUDU, *op. cit.* pages 230-232.

<sup>110</sup> See O. ODUDU, *op. cit.* Pages 232-235

<sup>111</sup> See Case C-343/95, *Cali & Figli / Servizi Ecologici Porto di Genova*, ECR [1997] I-1547, paragraph 22.

<sup>112</sup> See O. ODUDU, *op. cit.* page 233.

44. With regard to the second category, *i.e.*, solidarity, free movement rules apply to situations that have been excluded from the application of the competition rules such as, for example, the system in place in the *Poucet and Pistre* case. In this case, the self-employed were obliged to make payments to regional mutual funds, and the moneys received by these funds were ultimately managed by the Sickness and Maternity Insurance Fund. In the free movement context, the regional mutual funds at stake would have been held as engaged in an economic activity, given that there was remuneration, however, as we know, the Court held that there was no economic activity for competition law purposes.<sup>113</sup> Solidarity seems, indeed, to be the main difference between the two set of criteria.

45. Indeed, in the field of competition, services or products are usually *offered* against remuneration. Therefore, most of the activities held as economic in the competition arena would also be economic in the free movement context. For example, the services listed in the former Article 50 EC (Article 57 TFEU), *i.e.*, activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions would also be economic activities for competition law purposes.

46. Moreover, both in the free movement and in the competition case law, acts of official authority, or State prerogatives, have been excluded from the Treaty. In this regard, as Advocate General TESAURO recalled in the Eurocontrol case:<sup>114</sup> “*The pursuit of an activity that involves the exercise of official powers is, on the other hand, incompatible with that classification [entities that pursue an economic activity capable of being carried on, at least in principle, by a private undertaking with a view to profit], with the result that a body acting as a public authority is not subject to the Treaty rules on competition. In that connection it must be observed that, whilst the Court has preferred not to define that concept in abstract terms, the judgments that refer to it, in the various areas of Community law in which that concept is relevant,*<sup>115</sup> *follow the path marked out by Advocate General Mayras in his Opinion in the Reyners case, according to whom “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”.*”

47. By contrast, some authors have, however, held that the solidarity principle developed in the competition field apply equally to the free movement area. Indeed, according to Hatzopoulos, “*In Freskot [a case where the Court analyzed the concept of economic activity for free movement and State aid purposes] the Court has made clear that the very same criteria [developed by the Court of Justice in Poucet and Pistre] help determine the scope of application not only of the competition rules, but also of Article 49 EC.*”<sup>116</sup> In this regard, it is true that the Court, in line with Advocate General Stix-Hackl, referred to the social objective pursued by the insurance system at stake.<sup>117</sup> However, the Court did so in the context of the eventual justification (not qualification) of the measure.<sup>118</sup> For the qualification of the measure as an economic activity for the purposes of the free movement rules the Court focused on the existence and nature of the “*consideration*” for the service at stake.<sup>119</sup>

<sup>113</sup> See, for example, C-158/96 Kohll [1998] ECR I-1931.

<sup>114</sup> See Case C 364/92, SAT Fluggesellschaft mbH v Eurocontrol. [1994] ECR Page I-00043, per Advocate General TESAURO, paragraph 9.

<sup>115</sup> The Advocate General referred explicitly to “*for example, on the right of establishment, the judgment in Case 2/74 Reyners v Belgian State [1974] ECR 631; on freedom of movement for workers, the judgments in Case 149/79 Commission v Belgium [1980] ECR 3881; Case 149/79 Commission v Belgium [1982] ECR 1845; Case 307/84 Commission v France [1986] ECR 1725; on the subject of VAT, the judgment in Joined Cases 231/87 and 129/88 Ufficio distrettuale delle imposte dirette di Fiorenzuola d’Arda [1989] ECR 3233.*” Case C 364/92, SAT Fluggesellschaft mbH v Eurocontrol. [1994] ECR Page I-00043, per Advocate General TESAURO, paragraph 9, footnote 11.

<sup>116</sup> V. HATZOPOULOS, “The ECJ Case Law on Cross-Border Aspects of Health Services”, Briefing note requested by the European Parliament’s committee on Internal Market and Consumer Protection (IP/A/IMCO/FWC/2006-167/C3/SC1), page 4.

<sup>117</sup> Case C-355/00 *Freskot* [2003] ECR I-5263 paragraphs 66-68.

<sup>118</sup> *Id.* See in this regard paragraph 65 (previous to those mentioned *supra*): “*Therefore, it is necessary to examine whether such a restriction of the freedom to provide services can be justified under Community law.*”

<sup>119</sup> *Id.* at 55-56: “*The Court has already held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the*



**48.** Others have however contested the solidarity principle in the Court's case law as an unjustified exception to the functional approach even within the ambit of competition law.<sup>120</sup> Indeed, it has been held that, by upholding the solidarity exception to the application of the Treaty competition rules, the Court has confused jurisdiction (qualification) and justification.<sup>121</sup>

**49.** It has been argued that the different approaches to economic activity under EU law reflect "an internal process of Community competence allocation", or "the outcome of a deliberation over which mutually exclusive Treaty provision ought to apply to a particular measure, rather than whether Community law applies or national autonomy remains unconstrained."<sup>122</sup> In other words, some Treaty provisions apply to some measures whereas other Treaty provisions apply to other measures.<sup>123</sup>

**50.** It has also been argued that, together with the internal allocation of competence, the different approaches to economic activity under EU law may be explained by reference to the objectives pursued by the different Treaty provisions.<sup>124</sup> By this token, the free movement of workers, establishment and services provisions can be described as "rights conferring" whereas the competition rules may be described as "obligation-imposing."<sup>125</sup> In this regard, the argument to the contrary could also be made, i.e., competition rules confer rights to undertakings and free movement rules impose obligations on Member States. In this vein, O'KEEFFE AND BAVASSO have held that "If it is true that the Treaty rules in both competition law and free movement aimed to achieve a common objective, the former provided for an endo-integrated and positive set of rules and principles whilst the free movement rules provide a negative rule, a prohibition of restrictions. [...] [Free movement provisions] are negative in character and instrumental in nature: on the one hand they provide no "substantive" test of legality but prohibit restrictions caused by national rules; on the other, they are instrumental and vital for the achievement of the internal market."<sup>126</sup>

**51.** In any event, the question arises in relation to State aid; how should the State aid rules be categorized? Are they, for example, *rights conferring* or *obligation-imposing*? Does the above discussion have any impact in the qualification of activities as non-economic in the State aid field? This is the subject of study of the next section.

### III. Economic activities under the State aid rules

**52.** According to established case law, for State aid purposes, the concepts of undertaking and of economic activity are those laid down by the Court of Justice in the field of competition law.<sup>127</sup> The practice

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*service* (see Case 263/86 Humbel and Edel [1988] ECR 5365, paragraph 17, and Case C-109/92 Wirth [1993] ECR I-6447, paragraph 15). [...] *In the present case, it is clear that the payment of the contribution by the Greek farmers does not constitute economic consideration for the benefits provided by ELGA under the compulsory insurance scheme.*"

<sup>120</sup> V. LOURI, "Undertaking as a Jurisdictional Element for the Application of EC Competition Law", *Legal Issues of Economic Integration*, n. 29 (2), 2002, pp. 143-176, p. 173.

<sup>121</sup> V. LOURI, "Undertaking as a Jurisdictional Element for the Application of EC Competition Law", *Legal Issues of Economic Integration*, n. 29 (2), 2002, pp. 143-176, p. 170.

<sup>122</sup> See O. ODUDU, *op. cit.*, at page 237.

<sup>123</sup> O. ODUDU gives the following example: "Whilst the State's purchasing activities are not subject to scrutiny under Articles 81 and 82 EC, they remain subject to scrutiny, under Article 49 EC and the public procurement rules." See O. ODUDU, *op. cit.*, pages 237

<sup>124</sup> See O. ODUDU, *op. cit.*, page 237

<sup>125</sup> *Ibid.*

<sup>126</sup> D. O'KEEFFE and A.F. BAVASSO, "Four freedoms, one market and national competence: In search of a dividing line", in *Liber Amicorum in Honour of Lord Slynn of Hadley, Judicial Review in European Union Law*, D. O'KEEFFE and A.F. BAVASSO (eds.) The Hague, 2000, pp. 544-545. See also K. MORTELMANS, "Towards convergence in the application of the rules on free movement and competition?", *CMLRev.*, 2001, p. 621

<sup>127</sup> See Case 172/03 Heiser v Finanzamt Innsbruck, [2005] ECR I-1627, paragraph 26, Case 237/04, Enirisorse SpA v Sotacarbo SpA, [2006] ECR I – 2843, paragraphs 26-29, Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze, [2006] ECR I-289, paragraphs 107-109, or Case T-196/04, Ryanair Ltd v Commission [2008] ECR Page II-03643, paragraph 87. See also C. QUIGLEY, *European State Aid Law and Policy, Second Edition*, Hart Publishing, Oxford-Portland Oregon

of the European Commission also follows this approach. According to the Commission, “*The State aid rules of the Treaty apply to undertakings. According to case-law an undertaking is an entity which is carrying out an economic activity. In assessing whether an activity is to be considered ‘economic’, it should be recalled that, according to settled case-law: “the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and that any activity consisting in offering goods and services on a given market is an economic activity”*”.<sup>128</sup>

**53.** The Commission has added that “*for an activity offering goods or services to be considered as not economic one should be able to exclude the existence of a market for comparable goods or services.*”<sup>129</sup> Therefore, the comparative criterion, together with “*that of participation in a market or the carrying on of an activity in a market context*”<sup>130</sup> seems to be behind the Commission policy in the State aid field. The Commission has also used the exclusion (or State prerogatives) criterion in a number of cases. What follows is an overview of the Commission’s recent practice concerning the notion of undertaking/economic activity in this area of EU Law.

### 1. Youth training centres managed by professional clubs

**54.** In 2001, the Commission found that grants of up to € 2.3 million per beneficiary (professional football, basket, rugby or volley clubs) for a non-limited period of time did not amount to State aid under Article 107(1) TFEU, given that the provision of sport training to young people pursued a general interest and was treated under national law as part of the national education (“*enseignement*”/Schooling) Hence it was “*hors du champ de la concurrence*”.<sup>131</sup>

Consequently, even though the “*beneficiaries*” of the measure at issue, professional clubs, were fully-fledged private operators, and thus in principle undertakings, they were found not to be engaged in an economic activity while providing sport training to young people.

### 2. Public fund raising for social Housing

**55.** In 2001, 2004, and 2005, the European Commission has found that the Irish Housing Finance Agency (HFA), a public law regulated company whose main activity is to raise funds on the capital market, which are then advanced to local authorities to be used by them for public service purposes, namely the funding of the statutory social housing obligations of local authorities is not an “*undertaking*”.<sup>132</sup> The Commission considers the HFA as an extension of the public authorities, “*which fulfils practically “in house” activities on the state’s own account and the guarantee granted by the State for its fundraising is to be considered as a transfer within the State not coming under the competition rules.*”<sup>133</sup> In other words, HFA was held to be an intra-governmental funding agency/special credit institution.<sup>134</sup> By contrast, the

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2009, p. 33 or K. VAN DE CASTEELE AND M. HOCINE, “*Favouring certain undertakings or the production of certain goods*”: *Selectivity*, in *EU Competition Law*, Volume IV *State Aid*, Book one, Part 2, Chapter 3, Claeys & Casteels 2008, pp. 247-251.

<sup>128</sup> See Commission Decision of April 6, 2005, N 244/03, United Kingdom, Credit union development support, OJ C/323/2005, paragraph 41.

<sup>129</sup> *Ibid.*

<sup>130</sup> See Case C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN), per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 13.

<sup>131</sup> Commission decision of 25.04.2001, N 118/2000, France – Aide aux clubs sportifs professionnels, OJ C 333, 28.11.2001, p.6. See also K. VAN DE CASTEELE AND M. HOCINE, “*Favouring certain undertakings or the production of certain goods*”: *Selectivity*, in *EU Competition Law*, Volume IV *State Aid*, Book one, Part 2, Chapter 3, Claeys & Casteels 2008, pp. 249-250.

<sup>132</sup> Commission decision of 03.07.2001, N 209/2001, Guarantee for borrowings of the Housing Finance Agency, OJ C/067/2002. See also Commission decision of 30.06.2004, Guarantee in favour of the Housing Finance Agency (HFA), OJ C/131/2005, and Commission decision of 7.12.05, N 395/2005 Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency, OJ C/77/2007, paragraph 31.

<sup>133</sup> Commission decision of 03.07.2001, N 209/2001, Guarantee for borrowings of the Housing Finance Agency, OJ C/067/2002, section 3.

<sup>134</sup> Commission decision of 30.06.2004, Guarantee in favour of the Housing Finance Agency (HFA), OJ C/131/2005, paragraph 29.

Commission considered the municipalities as undertakings present in the housing market.<sup>135</sup>

56. Therefore, the Commission held that the provision of funds to municipalities and voluntary housing bodies for housing at cheaper rents; provision of general mortgage funds, affordable housing schemes aiming at providing low-cost housing, rental subsidy schemes and grant schemes for elderly and disabled persons, as well as socially disadvantaged households were economic activities.<sup>136</sup>

### 3. Subsidies to port authorities for carrying out public authority tasks

57. In 2002, the Commission held that the carry out of “*public authority tasks*” related to the improvement of transport fluidity, maritime safety and environmental protection,<sup>137</sup> was not an economic activity. Consequently the port authorities benefitting from the public support could not be held as undertakings within the meaning of the Treaty.<sup>138</sup>

58. The Commission noted that rules on State aid do not apply to activities, which regardless of their form, constitute the exercise of public authority or are not economic in nature. This finding was based on the traditional case law according to which the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature, in the latter case, by offering goods and services on the market.<sup>139</sup> Interestingly, the Commission added that this finding (that State aids do not apply) holds particularly true in situations where the public intervention takes place in the public interest and is devoid of a commercial character.<sup>140</sup> The judgment quoted by the Commission to corroborate that finding says, however, the opposite. In the Court’s words:

*“The third question asks in substance whether or not the redistribution of charges and benefits between importers of paper cardboard and pulp, on the one hand, and of national producers and consumers of these goods, on the other, as well as the ENCC’S intervention within the framework of this redistribution, infringe the rules on competition laid down in articles 85 and 86 of the Treaty.*

*Apart from the rules on competition applicable to undertakings, including articles 85 and 86, to which the reference was made by the national court, the Treaty includes various provisions relating to infringements of the normal functioning of the competition system by actions on the part of the states . this in particular is the purpose of article 90 to the extent to which it lays down a particular system in favour of undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, of articles 92 to 94, on the system of public aid, of articles 101 and 102 on distortions resulting from provisions of public law capable of distorting competitive conditions on the common market, as well as article 37 on state monopolies of a commercial character .*

<sup>135</sup> Commission decision of 03.07.2001, N 209/2001, Guarantee for borrowings of the Housing Finance Agency, OJ C/067/2002, section 3.

<sup>136</sup> Commission Decision of 28.05.2005, N 89/2004, Guarantee in favour of the Housing Financing Agency, Social housing schemes funded by the HFA, OJ C 131.

<sup>137</sup> The subsidized activities included: (i) coordination of different modes of transport: (ii) Vessel traffic management (ensure the application of the rules of the port, police rules on water bodies, ensuring the continued availability of pilots and tugs, coordinate departures and arrivals of ships by availability of platforms and planning of locks, stop in coordination meetings arrival times imposed control the draft of vessels, affect channels of radio, ensuring the administrative processing of all movements ships), (iii) management of places to dock under the powers of port officers (iv) improving traffic flow at the locks under the prerogatives of port officers (v) administrative management of hazardous materials, (vi) surveillance des quais, (vii) in case of pollution, estimate damages, identify the responsible party and, if necessary, institute court proceedings, (viii) take into account the protection of the environment in operations such as the collection of abandoned objects, ice-breaking or the extinction of fire.

<sup>138</sup> Commission decision of 16.10.2002, N 438 / 2002 - Subventions aux régies portuaires pour l’exécution de missions relevant de la puissance publique, OJ C/284/2002.

<sup>139</sup> See Case C-118/85, Commission of the European Communities v Italian Republic, [1987] I 2599, paragraph 7.

<sup>140</sup> Commission decision of 16.10.2002, N 438 / 2002 - Subventions aux régies portuaires pour l’exécution de missions relevant de la puissance publique, OJ C/284/2002. See paragraph 12 of the decision: “*Les règles en matière d’aides d’État ne s’appliquent pas aux activités qui, indépendamment de leur forme, relèvent de l’exercice de l’autorité publique ou ne présentent pas un caractère économique, notamment lorsqu’elles sont menées dans l’intérêt public et qui sont dépourvues de tout caractère commercial.*”

*The activities of an institution of a public nature, even if autonomous, fall under the provisions referred to and not under articles 85 and 86, even if its interventions take place in the public interest and are devoid of a commercial character.*

*It is a matter for the individual and the national courts to take the appropriate measures in so far as the interventions of the state or of its decentralized agencies might infringe such rules as might be directly invoked in legal proceedings. It is, moreover, for the Commission to see to it that the relevant provisions of the treaty are respected by the authorities of the member States.*" (emphasis added)

**59.** Indeed, it seems clear that the judgment advocates for the application of the State aid rules (not the competition rules) in case of an intervention in the public interest and devoid of commercial character. This same interpretation has been given by Advocate General MISCHO.<sup>141</sup> In any event, the Commission operated by exclusion, referring to the nature, the aim, and the rules to which the activity at stake was subject (Eurocontrol criteria<sup>142</sup>), and also to the Cali "criterion", *i.e.*, that there might be tasks in the public interest which form part of the essential functions of the State.<sup>143</sup>

**60.** The criteria employed by the Commission to conclude that the tasks mentioned before were public prerogatives of the State were the following: (i) the tasks entrusted to the port authorities were commonly performed in other Member States by captaincies belonging to the public administration, (ii) they were provided for in laws or regulations, (iii) the harbourmasters could not receive instructions from the direction of Port Authorities in their exercise. Furthermore, (iv) the activities carried out by the port authorities were not provided for in the port services liberalization package, and the same tasks did not give rise to any recipe of any kind on the part of port users nor to any likely revenue (no direct remuneration, no profit). These missions, the Commission concluded, fell within the public prerogatives of the State.<sup>144</sup>

**61.** The Commission also added that the finding that the activities at stake may not be held as economic in nature also means that they could not be in principle justified ex Article 106(2) TFEU, as this article "presupposes the existence of an undertaking"<sup>145</sup>. We have touched upon this point *supra* while referring to the likely inadequacy of the "public good" criteria, at least for State aid purposes. This is also the case because public goods, at least some of them, evolve over time (and may allegedly disappear) as, *inter alia*, technology progresses.<sup>146</sup>

#### **4. Provision of infrastructural elements needed to ensure a good environment for social dwellings (e.g. parks and roads to access to social dwellings)**

**62.** In the 2005 decision concerning the HFA, the Commission considered that the provision of cheap guaranteed funding by the HFA to local authorities for the purposes of their infrastructure activities, ancillary to social housing, did not fall under the State aid rules in the case of the provision of

<sup>141</sup> See Case C-118/85, *Commission of the European Communities v Italian Republic*, [1987] I 2599, per Advocate General MISCHO.

<sup>142</sup> See Case C-364/92, *SAT Fluggesellschaft / Eurocontrol*, [1994] ECR I-43, paragraph 30.

<sup>143</sup> See also Case C-343/95, *Cali & Figli / Servizi Ecologici Porto di Genova*, ECR [1997] I-1547, paragraph 22.

<sup>144</sup> See Commission decision of 16.10.2002, N 438 / 2002 - Subventions aux régies portuaires pour l'exécution de missions relevant de la puissance publique, OJ C/284/2002, paragraphs 12-16.

<sup>145</sup> See also in this regard Opinion of Advocate General MISCHO in Case C-118/85, *Commission of the European Communities v Italian Republic*, [1987] I 2599. In addition, as the Court of Justice has also clarified, in order for Article 106 (2) TFEU to apply the general economic interest offered by the activity under analysis must exhibit special characteristics as compared with the general economic interest of other economic activities and that the application of the rules of the Treaty, in particular those relating to competition and freedom of movement would be such as to obstruct the performance of such a task. See Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, [1991] ECR Page I-058, paragraph 27.

<sup>146</sup> See, in this regard, the example given by H.-H. HOPPE "changes in the technology can change the character of a given good. For example, with the development of cable TV a good that was formerly (seemingly) public has become private. See H.-H. HOPPE, "Fallacies of the public goods theory and the production of security", *The Journal of Libertarian Studies*, Vol IX, No.1 (Winter) 1989, pp. 28-46, p. 29. The author is indeed quite critical as regards public good theory: "In spite of its many followers, the whole public goods theory is faulty, flashy reasoning, ridden with internal inconsistencies, nonsequiturs, appealing to and playing on popular prejudices and assumed beliefs, but with no scientific merit whatsoever." Id. at 27.

infrastructural elements needed to ensure a good environment for social dwellings (e.g. parks and roads to access to social dwellings).

**63.** This “cheap” and “guaranteed” funding for “undertakings” (local authorities) should, in principle, fall under the State aid rules according to the traditional notion of economic advantage for State aid purposes. However, the Commission found that the provision of elements such as parks and roads to access social houses is usually considered a public responsibility. Moreover, the Commission noted that most elements included in the scheme at issue were not economically viable and, so the Commission argued, they would not be provided by the market. The Commission also noted that some of the elements were public goods (e.g. street lighting).<sup>147</sup>

**64.** Finally, the Commission distinguished between the “social” elements above mentioned (street lighting, parks and roads etc.) and other infrastructural elements that “could be run for an economic activity”, such as the places of recreation for which State aids rules would in principle apply. The main reason underlying this distinction seems to be that the use of elements pertaining to the latter group (e.g. recreational places) could in theory be subject to a charge or granted as an exclusive right, or directly managed for profit by the local authorities (which were also considered undertakings as mentioned *supra*).<sup>148</sup>

**65.** One could wonder whether the lack of economic viability is not precisely the reason why Article 107 provides for exceptions concerning social, cultural, or regional measures. By the same token, this lack of economic viability seems also to be behind the concept of “market failure”, usually referred in the context of the compatibility analysis carried out by the European Commission, particularly after the publication of the State Aid Action Plan (SAAP).<sup>149</sup>

## 5. Education at College

**66.** In 2006 the Commission found as *non-economic* the activities of a College that run a bachelor program for the graduate of high schools in the field transport logistics, service logistics and information management. The Czech authorities notified the grant at stake, of circa EUR 230.000, “for the sake of legal certainty” arguing that the measure did not amount to State aid given that there was no advantage, no affectation of trade and competition, and also because the alleged beneficiary was a non-profit organization.<sup>150</sup> The Commission’s final decision held that Article 107(1) TFEU did not apply and, in any event, that there was no distortion of competition.<sup>151</sup>

**67.** To reach that conclusion, the Commission quoted both the competition (*Höfner*) and the free movement case law (*Humbel*), although – as discussed previously – the Commission has recognized that these cases refer (at least after *Meca Medina*) to differing concepts of economic activity. Indeed, the Commission first quoted the traditional definition of undertaking under *Höfner*, citing *Cisal* in relation to the definition of economic activity. However, in relation to the activity at stake in this case, national education, the Commission referred to the *Humbel* case law, according to which, as mentioned *supra*, the State, in establishing and maintaining the national education system, is not seeking to engage in gainful activity but is fulfilling its duty towards its own population in the social, cultural and educational field.<sup>152</sup>

<sup>147</sup> Commission decision of 7.12.05, N 395/2005 Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency, OJ C/77/2007, paragraph 34.

<sup>148</sup> Commission decision of 7.12.05, N 395/2005 Loan Guarantee for social infrastructure schemes funded by the Housing Finance Agency, OJ C/77/2007, paragraphs 34-36.

<sup>149</sup> See State aid action plan - Less and better targeted state aid : a roadmap for state aid reform 2005-2009 (Consultation document) {SEC(2005) 795} /\* COM/2005/0107 final \*/.

<sup>150</sup> Commission decision of 08.11.2006, NN 54/2006, Aides à l’université de Prerov, OJ C/291/2006, paragraph 11.

<sup>151</sup> Commission decision of 08.11.2006, NN 54/2006, Aides à l’université de Prerov, OJ C/291/2006, paragraphs 14-21.

<sup>152</sup> Commission decision of 08.11.2006, NN 54/2006, Aides à l’université de Prerov, OJ C/291/2006, paragraphs 15 and Case 27/09/1988 in case C263/86, *Humble and Edel*, E.C.R. 1988, p.5365, paragraphs 9-10. and 15-18.

The Commission added that, in *Humbel* the Court also stated that “*courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty, properly construed*”.<sup>153</sup> Therefore, given that the College in question was a tertiary technical education establishment under the national education system, the Commission held that the College acted under the national education system and was hence not engaged in an economic activity.<sup>154</sup> Furthermore, the decision also noted that the College could not pursue any activity distinct from its central activity, *i.e.*, education and scientific research, development and other creative activities in the approved study program and operation of the university on the basis of the state approval and a the permit of the Ministry of Education.<sup>155</sup> The central activity seems, however, quite broad.

Finally, the Commission noted that the aim of the College was not to offer a service for remuneration (the criterion for economic activity under free movement law). The Commission cited again free movement case law, in this case the *Wirth* case to reinforce its finding.<sup>156</sup> In light of all these considerations, the Commission held that the College was not engaged in an economic activity and could not be thus considered as an undertaking.

**68.** One could wonder whether the Commission would have reached the same result applying the criteria laid down by the Court of Justice in the competition field to distinguish between economic and non-economic activities. Indeed, applying the pure comparative criterion, *i.e.*, whether the technical education provided by the College has not always been, and is not necessarily carried on, by this kind of organization or by public authorities,<sup>157</sup> the answer would have probably been that such an activity could be, and probably has been, provided by the private sector. Secondly, in relation to the second criterion identified by Advocate General POIARES MADURO, “*that of participation in a market or the carrying on of an activity in a market context*”,<sup>158</sup> it could also be argued that there is a market for such an activity or, in other words, that one *should [probably not] be able to exclude the existence of a market for comparable goods or services*.<sup>159</sup> In the same vein, O. ODUDU has noted that “*there is nothing in the nature of the activity of education that means profit cannot be made, so since under the competition law approach there is the potential to profit from education the activity is economic, whether state or privately funded*”.<sup>160</sup>

**69.** Finally, the non-profit character of the College should not be relevant in light of *Höfner*, and also in light of the case law developed in the State aid field. Indeed, the Court has stated in this area of EU law that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.<sup>161</sup>

## 6. Employment of prisoners at correction houses

**70.** Also in 2006 the Commission regarded employment of prisoners at correction houses in Lithuania as a non-economic activity. The measure at stake consisted in the partial compensation of the wage costs of incarcerated people. According to the relevant national law, the employment of inmates “*serve the main goal of teaching a prisoner to achieve his aims in life by employing lawful ways and means*”.<sup>162</sup> The Commission noted that the correction houses were part of the Lithuanian penal system,

<sup>153</sup> Case C263/86, *Humble and Edel*, E.C.R. 1988, p.5365, paragraphs 15-18.

<sup>154</sup> Commission decision of 08.11.2006, NN 54/2006, *Aides à l’université de Prerov*, OJ C/291/2006, paragraphs 15.

<sup>155</sup> Commission decision of 08.11.2006, NN 54/2006, *Aides à l’université de Prerov*, OJ C/291/2006, paragraphs 15.

<sup>156</sup> *Id.* at 16 and case C- 109/92, *Wirth / Landeshauptstadt Hannover*, ECR 1993, I-6447.

<sup>157</sup> See Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 20.

<sup>158</sup> See Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN)*, per Advocate General POIARES MADURO, [2006] ECR I – 6295, paragraph 13.

<sup>159</sup> See, for example, Commission Decision of April 6, 2005, N 244/03, United Kingdom, Credit union development support, OJ C/323/2005.

<sup>160</sup> See O. ODUDU, *op.cit.*, p.236.

<sup>161</sup> See, for example, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 122 and 123

<sup>162</sup> Commission decision of 19.07.2006, N 140/2006, Lithuania – Allotment of Subsidies to the State Enterprises at the Cor-

a State prerogative. The Commission also took into account that, pursuant to the Lithuanian laws, the employment of prisoners by the State enterprises could not be separated from the activities of the correction houses. Therefore, and regard given to the specific nature, the social aim, and the particular rules to which the state enterprises at the correction houses were subject (Eurocontrol criteria<sup>163</sup>), the Commission considered that the notified measure did not fall under the scope of the State aid rules.

71. It should also be noticed that the Commission took into account the jurisprudence of the Court of Justice in relation to the concept of economic activity, “*in another context*”, namely, in the context of the free movement of workers to further justify that inmates were not usual employees, and therefore, that their employment should not held as an economic activity. Indeed, the Commission the Court’s case law stating that work (of drug-addict people in that case) “*cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.*”<sup>164</sup>

## 7. Provision of hospital services.

72. More recently, in October 2009, and pursuant to a complaint, the Commission adopted a decision concerning the financing of hospital services provided by public hospitals in the Brussels Region. Before entering into the evaluation of the criteria laid down by Article 107(1) TFEU, the Commission analyzed whether the public hospitals at stake could be considered as undertakings under that Treaty article and, in light of *Höfner*, whether they were engaged in an economic activity. The Commission noted, in this regard, that the notion of undertaking had originally developed in the competition field, and subsequently in the State aid field.<sup>165</sup>

73. The Commission then stated that, according to its practice and to the case law of the European courts, there were three types of activities: (i) purely social non economic activities, (ii) purely economic, and (iii) socially-oriented activities which are nevertheless of an economic nature (*activités à vocation sociale présentant néanmoins une nature économique*).<sup>166</sup> The measures at stake in this case belonged, according to the Commission, to the third category.

74. It may be worth mentioned that the Commission has distinguish the non-economic activities differently in at least two instances. Indeed, in 2006 the Commission divided the categories of activities differently: “*The European Court of Justice and the Court of First Instance have at several occasions held that there are three distinct categories of activities which are financed by the State: activities of public authority, economic activities, and non-economic activities. Only economic activities are subject to European competition law, whereas activities of public authority and non-economic activities are excluded from its scope.*”<sup>167</sup> (emphasis added) More recently, in 2007, the Commission distinguished the categories of non-economic activities in two, namely, (i) non economic activities related to the exercise of State prerogatives, and (ii) certain activities of a purely social nature, although a third one, “(pure) economic activities” is of course still valid.<sup>168</sup>

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rection Houses, OJ C 244, 11.10.2006, p.12, section 2.5.2.

<sup>163</sup> See Case C-364/92, *SAT Fluggesellschaft / Eurocontrol*, [1994] ECR I-43, paragraph 30.

<sup>164</sup> Commission decision of 19.07.2006, N 140/2006, Lithuania – Allotment of Subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006, p.12, and Case C-344/87 I. *Betray v Staatssecretaris van Justitie*, ECR 1989, I- 01621, paragraph 17. See also K. VAN DE CASTEELE AND M. HOCINE, “*Favouring certain undertakings or the production of certain goods*”: *Selectivity*, in *EU Competition Law*, Volume IV *State Aid*, Book one, Part 2, Chapter 3, Claeys & Casteels 2008, p. 250.

<sup>165</sup> Commission decision of 28.10.2009, NN 54 / 2009 - Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique, OJ C/74/2010, footnote 109.

<sup>166</sup> Id. at paragraph 108.

<sup>167</sup> Report from the Commission to the Council and the European Parliament on transport security and its financing, Brussels, 1.8.2006, COM(2006) 431 final., p. 3.2.2.

<sup>168</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commit-

**75.** In any event, and having categorised the activity at stake as a socially-oriented activity which is nevertheless of an economic nature, the Commission used the comparative criterion (*Ambulance Locker*) to ground this (economic but social or social but economic) preliminary finding. The Commission then cited case law stating that hospital services were considered as economic activities. The case law cited by the Commission was, however, based on the freedom to provide services provisions of the Treaty (*Smits épouse Greets et Peer booms et seq.*),<sup>169</sup> with the exception of the *Asclepius* case where, in relation to the applicant's *locus stand* (a German private company specialized in hospital management), the General Court held that "in the present case, the applicant manages 39 private hospitals located throughout the Federal Republic of Germany. It is therefore in competition with some of the public sector hospitals benefiting from the aid."<sup>170</sup> The Commission then recalled that in the referred jurisprudence (*Smits*) the Court of Justice considered hospital services as an economic activity even if provided free of charge under a sickness-insurance scheme.<sup>171</sup>

**76.** In relation to the existence of solidarity (and hence in relation to the possibility of excluding the activity from the Treaty rules on this basis), the Commission distinguished between the activities of managing a national health system, which would have a non-economic nature according to the *FENIN* case, and the hospital treatment services, which would have such economic nature.<sup>172</sup>

**77.** After reaching the conclusion that hospital services should be considered as economic activities in this case, the Commission moved on to analyze the non-hospital activities carried on by the Belgian public hospitals under scrutiny. Those activities included socio-physical, socio-administrative or psychosocial support to patients and their relatives.

**78.** The Commission first recalled the *Freskot* case law, in its free movement part (not the State aid one) according to which, merely because a given entity pursues a social objective under the provisions of national law, this does not mean that the entity at stake does not pursue an economic activity.<sup>173</sup> The Commission then conceded that there was no specific remuneration paid by patients for these non-hospital services. In this regard, it should be recalled that remuneration is precisely the main criterion to find a given activity as economic under the free movement rules. Nevertheless, particularly in the field of cross-border health, the Court has been satisfied if a third party pays for the treatment (triangular relationship).<sup>174</sup> However, if the third party paying the treatment is the State under the national health system, the case law on free movement is not clear as to the commercial nature of the those health State-funded services.<sup>175</sup>

**79.** However, the Commission at this point used the second criterion usually employed in the competition field "that of participation in a market or the carrying on of an activity in a market context."<sup>176</sup> Or, in the Commission words: "[that]for an activity offering goods or services to be considered as not economic one

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tee and the Committee of the Regions. Accompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, section 2.4. The activities pertaining to each of the two categories have been detailed in section II.A.2.b *supra*.

<sup>169</sup> Commission decision of 28.10.2009, NN 54 / 2009 - Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique, OJ C/74/2010, paragraph 108.

<sup>170</sup> See case T-167/04, *Asklepios Kliniken*, [2007] ECR II- 2379, paragraph 51.

<sup>171</sup> See cases C-157/99 *Geraets-Smits v Stichting Ziekenfonds, Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraphs 54-58; See also in the same vein C-385/99 *Muller – Fuaré* [2003] ECR I-4509, paragraphs 37-44.

<sup>172</sup> Commission decision of 28.10.2009, NN 54 / 2009 - Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique, OJ C/74/2010, paragraph 110.

<sup>173</sup> Case C-355/00 *Freskot* [2003] ECR I-5263 paragraph 55;

<sup>174</sup> See cases C-157/99 *Geraets-Smits v Stichting Ziekenfonds, Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraphs 54-58; C-385/99 *Muller – Fuaré* [2003] ECR I-4509, paragraphs 37-44.

<sup>175</sup> See above section on economic activity under free movement rules and Case C-372/04 *Watts v. Bedford Primary Care Trust* [2006] ECR I-4325 paragraphs 89-91.

<sup>176</sup> See Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN)*, [2006] ECR I – 6295, paragraph 13.



*should be able to exclude the existence of a market for comparable goods or services.*"<sup>177</sup> Consequently, the Commission held that, although the comparative criterion seemed to apply, the Commission disregarded it.<sup>178</sup>

Finally, in relation to the solidarity elements put forward by the Belgian authorities, the Commission distinguished between the management of the social system, which would be excluded from the competition rules, and the provision of hospital services, an economic activity.<sup>179</sup>

**80.** To sum up, the hospital services under analysis were considered as economic activities and, consequently, the public hospital were held as undertakings for the purposes of State aid law.

#### IV. Some conclusions

**81.** In light of the foregoing considerations, the following conclusions can be drawn.

**82.** First, it is not controversial that the notion of undertaking laid down in *Höfner* applies to the State aid field. Similarly, for State aid purposes, at least as a starting point, economic activity is any activity consisting in offering goods and services within a given market.<sup>180</sup> Therefore, as in free movement and competition, most activities will be considered economic in the State aid field.

**83.** Second, it is not controversial either that the activities of "official authority", also referred to in the case law as activities in the public interest, or constituting prerogatives of the State, are excluded from the application of the Treaty rules concerning free movement, competition and State aid rules.

**84.** Third, in light of the above considerations, the scope of the *grey area* may be broadly limited to those activities that the European Commission has defined as having a purely social nature.<sup>181</sup> Those are (i) The management of compulsory insurance schemes pursuing an exclusively social objective, functioning under the principle of solidarity, and (ii) The provision of public education financed as a general rule by the public budget and carrying out a State task in the social, cultural and educational fields towards the population.<sup>182</sup>

**85.** Fourth, in this context, some differences can be outlined between free movement, competition and State aid rules. First, the scope of application of the free movement rules is in principle broader than that of the competition rules in the health services area because the solidarity exception (developed in

<sup>177</sup> See Commission Decision of April 6, 2005, N 244/03, United Kingdom, Credit union development support, OJ C/323/2005.

<sup>178</sup> Commission decision of 28.10.2009, NN 54 / 2009 - Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique, OJ C/74/2010, paragraph 111: "Le fait qu'il n'y ait pas de rémunération spécifique de la part des patients pour les services en cause n'est pas de nature à exclure la nature économique de ces activités. Toutefois, bien que l'existence d'un marché concurrentiel sur lequel ces activités pourraient être éventuellement offertes, qui est un critère essentiel de l'appréciation de la nature économique d'une activité, ne puisse être totalement exclue dans le cas d'espèce, cela semble peu vraisemblable eu regard au contexte réglementaire encadrant la provision de ces services en Belgique."

<sup>179</sup> See Commission decision of 28.10.2009, NN 54 / 2009 - Association bruxelloise des institutions des soins de santé privées asbl (ABISSP) vs. Belgique, OJ C/74/2010, paragraph 110 "la Commission considère qu'il y a lieu à différencier entre l'activité de gestion du système national de santé, exercée par des organismes publics mettant en oeuvre à cet effet des prérogatives d'autorité publique, de l'activité de prestation de soins hospitaliers, qui présente un caractère économique, même si son coût est partiellement ou totalement pris en charge par les pouvoirs publics. En effet, concernant les éléments de solidarité présents dans le cas d'espèce, on note que, bien qu'ils soient essentiels à la fourniture des soins de santé, les hôpitaux privés prestent le même type d'activité hospitalière, même si pas totalement identiques; dès lors les éléments de solidarité invoqués par les autorités de l'Etat membre ne sauraient altérer le caractère économique de l'activité"

<sup>180</sup> See, for instance, Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 75; and Case C-49/07 MOTOE [2008] ECR I-0000, paragraph 22.

<sup>181</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment Brussels, 20.11.2007 COM(2007) 725 final, section 2.4.

<sup>182</sup> Ibid.

the competition case law) does not apply. Second, the scope of application of the competition rules is in principle broader than that of the free movement rules in the educational field, because the mode of financing of this service is, according to the *Höfner* case law, irrelevant. However, for free movement purposes, the *Humbel* case law remains good law and, therefore, the mode of financing is crucial, *i.e.*, if the service is funded by the *public purse* it will not be held as economic, conversely, if the same service is privately funded, *by pupils or their parents*, it will be considered as economic in nature.

**86.** Fifth, the outcome of the State aids decisions discussed in this paper is closer to the free movement notion of economic activity than to the competition one. Indeed, the Commission has considered hospital (health care) services as economic, regardless of the elements of solidarity put forward by the Belgian authorities in that case. By contrast, the Commission has considered educational services, either offered by professional clubs, or by a logistics college, as non-economic.

**87.** In this regard, it is arguably positive that there is some coherence between the notion of economic activity in, for example, education and health care services across the Treaty. It is perhaps less positive the way in which the Commission makes reference to one or another set of criteria. Indeed, the reference to one notion of economic activity or another may have an impact in the outcome of the Commission's analysis, and, in this sense, the absence of any guidance as to which criteria the Commission will apply is unsatisfactory.

**88.** The question could be whether the particularities of the State aid rules deserve an autonomous notion of economic activity, distinct both from the competition and the free movement ones. Some have already advocated for this solution. Indeed, Bartosch has claimed that the notion of economic activity for State aids should be distinct from the one used in the competition field.<sup>183</sup> In his view, the distinction made by Advocate General Poiares Maduro between the role of the State operating on a market offering goods and services (economic activity), and that of the State pursuing political goals, such as solidarity in the health system (non economic) should not apply to State aid. He argues, essentially that, in the State aid area, the Court has held on numerous occasions that Article 107(1) TFEU does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects.<sup>184</sup> Bartosch thus concludes that *"principles of solidarity are never capable of rendering the state aid rules inapplicable. Member States therefore cannot shelter behind the pretext of solidarity in order to render the Community's subsidy control mechanism ineffective."*<sup>185</sup>

**89.** Some more arguments could be made in the same vein. First, the lack of any role for aims in the definition of State aid is coherent with the extensive notion of aid laid down ever since the *Steenkolenmijnen* case.<sup>186</sup> Second, the object of State aid control is, as it is clear from the preparatory works leading to the Rome Treaties and the Spaak Report, to essentially help achieve the internal market. Therefore, a broad notion of aid enabling the Commission to evaluate whether a given measure is contrary to the internal market is probably more coherent with that role. Third, by the same token, the Treaties have laid down a system of control of aids which is two-fold (i) (a very large notion of) in principle incompatible aid, and (ii) a large margin of maneuver in the hands of the Commission to decide whether

<sup>183</sup> See A. BARTOSCH, "Social Housing and European State Aid Control", *European Competition Law Review*, 28, 2007, pp. 563-570.

<sup>184</sup> See Commission decision of 28.10.2009, C45/2007 (ex NN51/2007, ex CP9/2007), not yet published, paragraph 87. See also Case C-56/93, *Belgium v Commission* [1996] ECR I-723, paragraph 79; Case C-241/94, *France v Commission*, [1996] ECR I-4551, paragraph 20; Case C-75/97, *Belgium v Commission*, [1999] ECR I-3671, paragraph 25; or Case C-409/00, *Spain v Commission*, [2003] ECR I-10901, paragraph 46.

<sup>185</sup> See A. BARTOSCH, *op.cit.*, p. 566.

<sup>186</sup> See Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*. [1961] ECR 1, 19. In the Court's words: "A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect."

in principle incompatible State measures should be declared (by the Commission only) compatible with the internal market. In this regard, the Court of Justice has recently suggested that aims and goals are to be analyzed (by the Commission) in the context of article 107(3) TFEU.<sup>187</sup>

**90.** However, one can still wonder whether there is some merit in the solidarity exception to the functional approach laid down by the Court of Justice in the competition field, also for State aid purposes, and as opposed to free movement case law. An argument might be that, although the two sets of rules, free movement and competition, ultimately seek the achievement of the internal market, the means they apply to reach that goal are quite different. The free movement rules focus on the interdiction of discrimination on the basis of nationality. Consequently, their aim is to restrict State intervention going against that fundamental prohibition. These rules do so essentially by means of enlarging the range of eligible (saved/protected) people that fall under those measures (workers, providers and recipient of services etc.) By this token, the Court has held that the concepts of *economic activity* [in the free movement area] (and of *worker*) define the scope of one of the fundamental freedoms guaranteed by the Treaty and, as such, they *may not be interpreted restrictively*.<sup>188</sup>

**91.** In a similar vein, it has been held that “*unlike competition rules, in the free movement provisions, the circulation of the activity or of products is the value protected by the set of rules. It is true that both sets ultimately relate to the attainment of a Common Market but in the case of the free movement provisions, the freedom of circulation is the very means to achieve the objective*”.<sup>189</sup>

**92.** Conversely, the competition rules aim at ensuring the so-called level playing field between undertakings (including States participating in the market), thus, ensuring, *inter alia*, that no firm endangers this level playing field by behaving unlawfully in the marketplace. In this regard, as the Court has held “*It is important to bear in mind the context in which those two provisions of the Treaty are situated. Article 85 of the Treaty belongs to the rules on competition which are addressed to undertakings and associations of undertakings and which are intended to maintain effective competition in the Common Market. As the Court has held in previous judgments, that provision only comes into consideration with regard to agreements, decisions or practices restricting competition which appreciably affect intra-community trade[...] Article 30, on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement.*”<sup>190</sup> However, if there is no such marketplace, either nation-wise or Europe-wise (Common Market), because, for example, no private entity provides the same service (with the same conditions in the same nation or elsewhere), it does not make much sense to apply the competition rules. In other words, there is no such competition to be *maintained* (or protected).

**93.** Similarly, the State aid rules were conceived in the Spaak Report as complementary to the other competition rules, *i.e.*, “*Les règles de concurrence qui imposeront aux Etats viendront ainsi pour une large part faciliter ou même suppléer l’application des règles de concurrence aux entreprises.*” They also aim at ensuring that Member States do not counter the effects pursued by the enlarged market (mainly large scale production, greater competition, better and cheaper products, and elimination of inefficient enterprises) through artificial measures favoring some, yet not all, undertakings in the marketplace, thus distorting the level playing field.

**94.** Therefore, in a *market* situation where solidarity predominates, that is, a situation that

<sup>187</sup> Case C-487/06 P, *British Aggregates Association v Commission*, [2008] ECR I-10505, para. 92.

<sup>188</sup> See Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 13, or Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* ECR [2000] I-02681, paragraph 42.

<sup>189</sup> D. O’KEEFE and A.F. BAVASSO, “Four freedoms, one market and national competence: In search of a dividing line”, in *Liber Amicorum in Honour of Lord Slynn of Hadley, Judicial Review in European Union Law*, D. O’KEEFE and A.F. BAVASSO (eds.) The Hague, 2000, p. 554. See also K. MORTELMANS, “Towards convergence in the application of the rules on free movement and competition?”, *CMLRev.*, 2001, p. 621

<sup>190</sup> See for the different addresses; for example, Joined cases 177 and 178/82, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*, [1984] ECR Page 01797, paragraphs 11-12.

presents some, or all, of the following characteristics “a) a social objective pursued, b) compulsory nature of the scheme, c) contributions paid being related to the income of the insured person, not to the nature of the risk covered, d) benefits accruing to insured persons not being directly linked to contributions paid by them, e) benefits and contributions being determined under the control or the supervision of the state, f) strong overall state control, g) the fact that funds collected are not capitalized and/or invested, but merely redistributed among participants in the scheme, i) cross-subsidization between different schemes and j) the nonexistence of competitive schemes offered by private operators”<sup>191</sup>there is no such level playing field to be preserved.

**95.** Having said that, it is submitted that the approach followed by the Commission as regard the notion of economic activity in State aids is improper. Not only for the reasons above referred (interchangeable criteria, unpredictable outcome) but also because the Commission, although it usually refers to the functional approach laid down by *Höfner* as the starting point, it seems to be departing from it, and moving towards a “material” approach, that is, an approach based on the subject matter of the decision at stake (health, services, sport) rather than on the nature of the particular transaction object of the decision, and the entity that is going to benefit from public support.

**96.** In this context, it may be worth recalling that in the *Ferlini* case one of the issues was whether hospitals were undertakings for the purposes of competition law, and whether a group of hospitals constituted an association of undertakings within the meaning of Article 101 TFEU. Unfortunately, the Court did not deal with that question in the judgment,<sup>192</sup> However, Advocate General COSMAS treated this issue and his approach, it is submitted, was quite sound.

Advocate General COSMAS first held that there was no doubt that, in their relations with persons *not affiliated to the national social security scheme*, hospitals, *regardless of their public or private character*, constituted undertakings within the meaning of the provision in question. Both the particular hospitals, and the group of hospitals (the CHL) were thus engaged in economic activities to the extent that they were providing services for payment (to not affiliated). The Advocate General did not refer in this point to the free movement concept of remuneration (payment) but rather to the competition law concept of economic activity (offering goods or services in a market).

The Advocate General then looked at the eventual applicability of the solidarity exception in the sense of the Poucet and Pistre case law. In this regard, since *inter alia* the patients in this case were persons not affiliated to the national social security scheme, there was no room for the application of the national solidarity principle.

More importantly, the learned Advocate General noted that, as the Court has held, “in competition law, the term “undertaking” must be understood as designating an economic unit for the purpose of the subject-matter of the agreement”. In other words, in each case, the term ‘undertaking’ must be understood in a functional sense, having regard to the activity which is connected to the subject-matter of the specific agreement between undertakings, the decision by associations of undertakings or the concerted practice.”<sup>193</sup> Therefore, in that case, the functional approach to the question militated “in favour of the view that the relationship between hospitals and persons not affiliated to the national social security scheme was a private-sector economic relationship and, even with respect to public hospitals, defeats any suggestion of the exercise of public authority privileges, or of serving the public interest or protecting public health.”<sup>194</sup>

**97.** The *Ferlini* case was not mentioned in the 2009 Belgian hospital decision. However, it is submitted that this approach should be used in the State aid field. In this vein, for example in relation to

<sup>191</sup> V. HATZOPOULOS, “The ECJ Case Law on Cross-Border Aspects of Health Services”, Briefing note requested by the European Parliament’s committee on Internal Market and Consumer Protection (IP/A/IMCO/FWC/2006-167/C3/SC1), page 4.

<sup>192</sup> See Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR Page I-08081, paragraph 61.

<sup>193</sup> See Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR I-08081, per Advocate General COSMAS, paragraph 114.

<sup>194</sup> See Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR I-08081, per Advocate General COSMAS, paragraph 114.

educational services, instead of referring to the criteria developed in the free movement field (such as the form of financing a given activity, which according to *Höfner* is in principle irrelevant), the emphasis should be placed in the actual activity which is connected, in this case, to the public financing: Is it typically provided by the private sector? Is there competition between colleges, or educational institutions in general?

**98.** Indeed, and to conclude, applying the criteria laid down by the Court of Justice, and previously by Advocate Generals COSMAS and ALBER, in *Meca Medina*, the exception to the application of the fundamental freedoms could not be relied upon to exclude the whole of a given activity, and particularly, *the person engaging in the activity governed by that rule or the body which has laid it down* from the scope of the Treaty.<sup>195</sup> Thus, the point is that the functional approach laid down by the Court of Justice in the competition field would demand the analysis of the particular situation of both the activity being subsidized and the beneficiary of the public support (*e.g.* does it pursue any other activity in the market? Is it profit or non-profit?), irrespective of the qualification of the activity at stake under the free movement provisions.

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<sup>195</sup> See Case 519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, paragraphs 26-27.