New Case Law Brings Light to Whether EU Rules on Public Procurement Apply to Tax-Funded Welfare Services

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1. Introduction

Welfare services[1] constitute a large part of the domestic service market in welfare states such as Sweden. Furthermore, the legal qualification of these services brings with itself far-reaching consequences.[2] It is decisive to the fundamental question where the demarcation line between EU supremacy and Member State self-determination shall be drawn. In his previous article, the author argues that solidarity-based, such as tax-funded, welfare services shall be categorised as "non-economic services of general interest" (NESGI) and as such the EU public procurement rules should not apply to them.[3] This argumentation is based inter alia on Recital 6 in EU Directive 2014/24/EU (the Directive)[4] stating that NESGI "should not fall within the scope of this Directive". The analysis is also based on case law such as *Humbel*,[5] *Commission v Germany*[6] and *Private Barnehager*.[7]

In Sweden, the view that tax-funded welfare services are excluded from the application of the EU public procurement law is dismissed by lawyers and rejected by the Supreme Administrative Court of Sweden in the *Alingsås* case (elaborated in more detail below).[8]

However, it is submitted that the new development in the CJEU jurisprudence in *Congregación*[9] and *Dôvera*[10] as well as the EFTA Court's judgment in *Hradbraut*,[11] further support the thesis of tax-funded welfare services being excluded from the application of the EU public procurement law.

According to the author the new case law confirms the relevance of the *Humbel* criteria (below) to whether welfare services are "economic" or "non-economic". The author also argues, based on observations of the CJEU in *Congregación* and *Dôvera*, that the public or private status of the provider is irrelevant to this classification. Based on the same judgments, it is also submitted that the existence of competition and private providers with profit motives does not necessarily affect the "non-economic" nature of welfare

[1] Social security, health and public education—depicted as "core welfare services" by Damjanovic and De Witte in "Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty", EUI Working Paper, No.2008/34.

[2] The legal standing of welfare services in the EU law (including EU rules on public procurement) is elaborated in numerous studies like Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Health Care and EU Law* (The Hague, 2011) and Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Social Services of General Interest in the EU* (The Hague, 2013).

[3] Mathias Sylvan, "Do EU rules on public procurement apply to tax-funded welfare services?" (2016) 6 P.P.L.R. 253–272.

[4] Directive 2014/24/EC of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[5] *Humbel* (C-263/86) [1988] E.C.R 0-5365; [1989] ECLI:EU:C:1988:451.

[6] *Commission v Germany* (C-318/05) [2007] ECLI:EU:C:2007:495.

[7] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008).

[8] The judgment of the Swedish Supreme Administrative Court 2020-03-11, in case no.3165-19.

[9] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496.

[10] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450.

[11] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19).

services. Finally, according to the author, *Hradbraut* is evidence that tax-funded education, and probably also other tax-funded welfare services, is not covered by EU rules on public procurement.

2. The Humbel criteria

In the previous article the author argues that the way welfare services are financed is decisive for their "economic" or "non-economic" nature.[12] It is further argued that tax-funded welfare services do not meet the definition of "services" in art.57 of the TFEU, according to which "services shall be considered to be 'services' within the meaning of the Treatises where they are normally provided for remuneration". It is submitted that tax-funded welfare services are not provided for remuneration. They are provided "free of charge", as the CJEU puts it in *Watts*.[13]

The central ruling invoked in support of this statement is *Humbel*[14] in which the CJEU establishes the *Humbel* criteria, i.e. that "courses provided under the national system", are not "services" since:

(1) the purpose of the system is not "to engage in gainful activity" but to fulfil the duties of the state "towards its own population in the social, cultural and educational fields", and
(2) the system is generally "funded from the public purse and not by pupils or their parents".

The CJEU notes that the "non-economic" nature is "not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make certain contribution to the operating expenses of the system".[15]

There is a widespread opinion that any activity that can be performed by a private entity for-profit constitutes an "economic activity".[16] This opinion is inter alia expressed by the Advocate General in the opinion in *AOK Bundesverband*[17] (implicitly dismissed by the CJEU in the ruling[18]). In the previous article the author challenges this opinion. According to the author the existence of competition and private for-profit actors does not make welfare services "economic" services inasmuch as they are provided within a national welfare system and funded, mainly or entirely, by public means. It is also argued that the criteria, established in *Humbel*, why publicly funded education does not constitute "services" in the meaning of art.57 of the TFEU, are valid also for other publicly funded welfare services such as healthcare and elderly care. In the previous article case law like *Watts*[19] and *FENIN*[20] is cited in support for the view that the *Humbel* criteria are not restricted merely to education.

The analysis assumes that concepts in EU law like "economic activity" are unitary and have the same content under both internal market (including public procurement) and competition law. Thus, CJEU case law regarding EU law on competition and state aid is believed to be relevant also to the understanding of concepts like "services" and NESGI in the Directive.

3. Can NESGI be provided by private entities in competition?

A fundamental question is whether the private status of the provider affects the "economic" nature of the activity. To put it in other words, can a NESGI be provided also by private entities in competition? In the previous article the author argues that the answer shall be affirmative. Case law like *Poucet*[21] and *Cisal*[22]

[12] In the previous article this opinion is referred to as the *financing doctrine*.
[13] Mathias Sylvan, "Do EU rules on public procurement apply to tax-funded welfare services?" (2016) 6 P.P.L.R. 260.
[14] *Humbel* (C-263/86) [1988] E.C.R 0-5365; [1989] ECLI:EU:C:1988:451.
[15] *Humbel* (C-263/86) [1988] E.C.R 0-5365; [1989] ECLI:EU:C:1988:451 at [18]–[19].
[16] In the previous article this opinion is referred to as the market doctrine.
[17] *AOK Bundesverband* (C-264/01, C-306/01, C-354/01 and C-355/01) [2004] ECLI:EU:C:2003:304, Opinion at [27].
[18] Mathias Sylvan, "Do EU rules on public procurement apply to tax-funded welfare services?" (2016) 6 P.P.L.R. 264.
[19] *Watts* (C-372/04) [2006] ECLI:EU:C:2006:325.
[20] *FENIN* (C-205/03 P) [2006] ECLI:EU:C:2006:453.
[21] *Poucet* (C-159/91 and C-161/91) [1993] ECLI:EU:C:1993:63.
[22] *Cisal* (C-218/00) [2002] ECLI:EU:C:2002:36.

is cited in in support of the argument that the existence of private for-profit providers does not affect the "non-economic" nature of welfare services which are provided within a solidarity-based insurance system. Moreover, the judgment of the EFTA Court in the case *Private Barnehager* is invoked as evidence that the "non-economic" nature is not affected by the fact that there are both public and private entities competing within the system.[23]

3.1 Private Barnehager

According to art.6 of the Agreement on the European Economic Area (EEA Agreement):

> "the provisions of [the Agreement], in so far as they are identical in substance to the corresponding rules of the Treaty establishing the European economic Community … shall in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities …"

EU law, including EU rules on public procurement, is also applicable to the EFTA states of Norway, Iceland and Liechtenstein.[24] Although cases concerning EU law that emerge within the EFTA states are tried, not by the CJEU but by the EFTA Court, the relevant rules are the same and are interpreted in a unitary manner.[25]

The central question in *Private Barnehager* (E-5/07) at the EFTA Court[26] is whether the municipal kindergartens in Norway, while providing childcare essentially funded by the public purse, are performing an "economic activity" and consequently are "undertakings" under EU rules on state aid. In Norway, municipal and private kindergartens are both subsidised by public grants.[27] The private kindergartens enjoy a considerable market share. At the time, out of a total amount of 235,000 children, 108,000 attended a private kindergarten.[28]

According to the applicant, the association of private kindergartens *Private Barnehagers Landsforbund*, citing *Höfner*,[29] the municipalities are engaged in "economic activity", since they provide "services" on a given market which could, at least in principle, be carried out by private actors for-profit.[30]

However, the EFTA Court dismisses this market-oriented interpretation, since it "would basically bring any activity of the State not consisting in an exercise of public authority under the notion of economic activity".[31]

According to the EFTA Court the point of departure must be the principles established in *Humbel*:

> "In this respect, the reasoning of the ECJ in Humbel, which concerned the notion of 'service' within the meaning of the fundamental freedoms, can be transposed to a State aid case such as the one at hand."[32]

The EFTA Court observes that in Norway childcare to about 80 per cent is financed by the public budget and consequently does not constitute "services" in the meaning of the Treaty. According to the EFTA Court the municipal kindergartens are not providing "services" and are consequently not engaged in an "economic activity".[33]

[23] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008).
[24] In the Directive this is clarified by the remark "Text with EEA relevance".
[25] Halvard Haukeland Fredriksen, *Hvem avgjor tolkningen av EOS-avtalen?, Tidskrift for Rettsvitenskap*, vol.123, 2/2010.
[26] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008).
[27] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [4].
[28] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [1].
[29] *Höfner* (C-41/90) [1991] ECLI:EU:C:1991:161.
[30] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [68].
[31] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [80].
[32] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [80].
[33] *Private Barnehagers Landsforbund v EFTA Surveillance Authority* (E-5/07) (21 February 2008) at [81]–[84].

Private Barnehager substantiates the view that the existence of private operators acting in competition with the municipal preschools does not affect the "non-economic" nature of a welfare system that is essentially funded by public means. In addition, *Private Barnehager* indicates the close connection between the concept "services" within the EU rules on the freedom of establishment and the freedom to provide services (in which EU rules on public procurement are included),[34] and the concept "economic activity" within EU rules on competition and state aid.

The conclusion that can be drawn from *Private Barnehager* is that the municipal kindergartens are not "undertakings" although they are operating in a competitive system that also includes private operators. However, it could be challenged that the EFTA Court only relates to whether the municipal kindergartens are engaged in "economic activity". The question whether this also applies to the private kindergartens is not answered in *Private Barnehager*. Yet, in the case *Congregación*, the entity in question is a private actor.

3.2 Congregación

In *Congregación*—the judgement delivered the 27 of June 2017 by the Grand Chamber of the CJEU—the entity providing tax-funded education is a religious association, in other words a non-public, albeit not a profit-making, entity.

The question referred by the Spanish court is whether the Catholic Church's tax-exemption, for the renovation of a freestanding building used by the school of the Congregación as a hall, constitutes unlawful state aid.

The fact that the activities have a religious purpose does not exclude EU rules on competition or state aid per se. As the Advocate General notes the special standing of religious associations expressed in art.17 of the TFEU does not exempt the Church's activities from the application of EU law.[35] The essential question is therefore whether the hall is used for "economic activities".

3.2.1 The public or private status is irrelevant to whether an entity is an "undertaking"

The CJEU notes that the concept of "undertaking" covers any entity engaged in "economic activity", "regardless of its legal status and the way in which it is financed".[36] The meaning of this remark, repeatedly made in CJEU case law,[37] is somewhat elusive. What exactly is the meaning of "regardless of its legal status and the way in which it is financed"? In *Congregación*, the CJEU provides further guidelines stating that the public or private status of the entity performing the activity is irrelevant:

> "It follows that the public or private status of the entity engaged in the activity in question has no bearing on the question as to whether or not that entity is an 'undertaking'."[38]

The essential factor for the classification of an entity as an "undertaking" is not the public or private status of that entity but the nature of the activity performed by the entity. The courses provided by the Congregación that are financed entirely or mainly by public funds is perceived by the CJEU to be "non-economic".[39] The CJEU bases this assessment on the same criteria established in *Humbel*. According to the CJEU, since the state, in establishing and maintaining a system of public education, is fulfilling its social, cultural and educational obligations towards its population[40] and, since the educational activities

[34] Directive 2014/24/EC of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, recital 1.
[35] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:135, Opinion at [32].
[36] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [41].
[37] See the case law cited in Bendik T. Eckbo, *Concept of Undertakings* (King's College, University of London, 2012), p.14, note 64.
[38] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [42].
[39] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [50].
[40] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [50].

performed by the Congregación "is financed in full by public funds", these activities cannot be classified as "economic activities".[41] Thus, the *Humbel* criteria apply equally regardless of whether the entity engaged in the activity is public or private.

The Advocate General notes that "there is a certain degree of competition" among public and private schools "as a result of the choice available to pupils and parents"[42]. However, the existence of competition does not affect the evaluation of the CJEU. Thus, neither the private status of the provider nor the existence of competition within the Spanish education sector alter the "non-economic" character of the publicly funded educational activities performed by the Congregación.

In *Congregación* the CJEU clarifies that one and the same entity can perform both "economic" and "non-economic" activities.[43] The courses provided by the Congregación within the Spanish system of public education financed by public funds are not "economic activities". On the other hand, other activities, such as early-years teaching, extracurricular activities and post-compulsory education are financed by private contributions and consequently are "economic".[44]

There is an ongoing debate whether concepts like "economic activity" are unitary.[45] According to the author, the unitary approach, supported by the remark of the EFTA Court in *Private Barnehager* (above), is also substantiated by the references given in *Congregación*. With references to case law regarding freedom of establishment and the freedom to provide services like *Humbel*, *Schwarz*[46] and *Commission v Germany*[47] the CJEU establishes that national education funded by public means is not an "economic activity".

In CJEU case law, remuneration from a third party can also be remuneration in the meaning of art.57 of the TFEU. According to the CJEU in *Bond van Adverteeders*,[48] the meaning of "normally provided for remuneration" in art.57 of the TFEU also covers "remuneration" that is paid by another person than the one enjoying the services. In the previous article it is assumed that public funding is not "remuneration" from a third party in the meaning of case law like *Bond van Adverteeders*. By *Congregación* and the case law cited therein this assumption is confirmed. Funding from a third party must consist in *private* funding to be "remuneration" in the meaning of art.57 of the TFEU[49].

3.2.2 The private entity is "integrated" into a non-economic system by a contractual arrangement

Does the existence of a contractual arrangement between a contracting authority and a private entity affect the "economic" nature of the activity? The question is certainly relevant as far as EU rules on public procurement are concerned since these rules presuppose the existence of a public contract.[50] An answer is undoubtedly provided in *Hradbraut*,[51] below.

However, already in *Congregación* an answer can be discerned. There is in fact a contractual arrangement between the Autonomous Community of Madrid and the Congregación, stipulating that the latter should provide education in return for payment.[52] However, the effect of this contractual arrangement is not that

[41] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [55]–[56].
[42] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [47].
[43] Also observed by Bendik T. Eckbo, *Concept of Undertakings* (King's College, University of London, 2012), p.8.
[44] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [47]–[50] and at [57]–[59].
[45] Vassilis Hatzopoulos, "The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts", *Research Paper in Law No.6/2011*, pp.4–5.
[46] *Schwartz and Gootjes-Schwarz* (C-76/05) [2007] ECLI:EU:C:2007:492.
[47] *Commission v Germany* (C-318/05) [2007] ECLI:EU:C:2007:495.
[48] *Bond van Adverteeders* (C-352/85) [1988] ECLI:EU:C:1988:196.
[49] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [48]–[49].
[50] Directive 2014/24/EC of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC art.1(2).
[51] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020).
[52] *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [47]–[50] and [55].

the tax-funded education thereby is transformed into an "economic activity". In fact, the contractual arrangement has the opposite effect, since it integrates the education provided by the Congregación into a publicly funded and accordingly "non-economic" educational system organised by the state[53].

In *Congregación* the CJEU establishes that a private entity like a religious organisation can be engaged in a "non-economic" activity. Whether the same applies also to a private profit-seeking actor is not resolved in Congregación, but in a later case, *Dôvera*.[54] Before examining *Dôvera*, the Swedish case of *Alingsås* will be mentioned.

4. The Alingsås case

The Swedish welfare systems are clearly solidarity-based since welfare services are to a great extent offered on a basis of universal cover and tax-funding. An example of this coverage might be elderly care that is the object of the *Alingsås* case.

However, for a long time, the Swedish Public procurement legislation applied almost as harsh rules regarding tax-funded welfare services as to commercial services (formerly, part A services) over the thresholds.[55] In the present Swedish Public Procurement Act this has changed somewhat regarding social and other specific services,[56] but mainly for contracts under the threshold of €750 000. The notion that tax-funded welfare services are "non-economic" and as such EU rules on public procurement should not apply to them has only recently been raised and, almost unanimously, dismissed by Swedish lawyers.

Although the Swedish welfare systems allow private, also private for-profit, providers, their activities are strictly regulated and subject to the supervision of the state. Benefits and user-fees are regulated by law. Private providers are required to obtain a permission to provide elderly care as well as many other welfare services.[57]

In 2010 the municipality of Alingsås entrusted the management of an elderly housing to the non-profit Christian foundation Bräcke diakoni. The contract was awarded after a competitive procedure according to the Swedish Public Procurement Act. As the contract expired the parties agreed to renew it without a competitive procedure. The Swedish Competition Authority challenged the municipality's contract award without a competitive procedure as violating the Swedish Public Procurement Act as well as the EU public procurement rules.[58]

According to the Swedish Competition Authority the contract constitutes a public service contract and the object of the contract is an (economic) "service" as elderly care is provided on a market in which private entities manage about 20 per cent of the elderly housings. The Swedish Competition Authority also argues that the fact that the municipality had signed a contract with the private operator, the tax-funded elderly care is transformed into an (economic) "service".

On the other hand, the municipality argues that the essentially tax-funded elderly care is a "non-economic" service and as such is it not covered by the rules on public procurement. According to the municipality the existence of competition does not make the essentially tax-funded elderly care an (economic) "service". Invoking recital 6 of the Directive, the municipality claims that mainly tax-funded elderly care should be excluded from the application of the Swedish Public Procurement Act. The

[53] See *Congregación* (C-74/16) [2017] ECLI:EU:C:2017:496 at [55].

[54] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450.

[55] This was not changed until 1 January 2019 when some amendments mainly regarding procurement of welfare services under the €750,000 threshold came into force.

[56] On "social and other specific services", see Directive 2014/24/EC art.74 and Annex XIV.

[57] In *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [44] the CJEU notes that supplementary services that are provided on a free-of-charge basis does not "in any way call into question the social and solidarity-based nature of that scheme".

[58] The Swedish Supreme Administrative Court, case no.3165-19.

municipality refers to the *Humbel* criteria and case law like *FENIN*, *AOK Bundesverband*, *Private Barnehager* and, as the case proceeds, *Congregación*, Kirschstein[59] and the opinion in *Dôvera*.[60]

The efforts of the municipality are not successful. According to all the instances elderly care is a "service" that is covered by the public procurement rules. In its findings the Supreme Administrative Court notes that the municipality according to the law is responsible for the provision of elderly care and that the municipality has a "direct economic interest" in the services provided by the private entity. Thus, the agreement constitutes a "service contract" in the meaning of the Public Procurement Act. Consequently, the municipality is found guilty of breaching the Public Procurement Act.

The argument of the municipality, that the *object* of the contract is not a "service" but a NESGI, is also dismissed by the Supreme Administrative Court since "there is in Sweden a market for this kind of services". The request of the municipality for a preliminary ruling is rejected since "the correct interpretation of EU law regarding the question raised in the case is so obvious as to leave no scope for any reasonable doubt".

5. Dôvera

According to the author, the view of the Swedish Supreme Administrative Court that the existence of "a market" is decisive for the "economic" nature of tax-funded elderly care is challenged by the findings of the CJEU in the *Dôvera* case,[61] the judgment delivered only three months later on 11 June 2020 by the Grand Chamber. The *Dôvera* case regards the application of state aid rules on healthcare in Slovakia.[62]

It is submitted that the *Humbel* criteria apply equally to the essentially tax-funded social services and healthcare as to tax-funded education. The CJEU has repeatedly observed that EU law does not, in principle, detract from the powers of the Member States to organise their social security systems. This remark is given in judgments regarding different legal matters such as public procurement,[63] competition[64] and state aid.[65]

The view that NESGI, in the context of public procurement, is not restricted to merely education is also supported by provisions in the Directive. In recital 6, it is recalled that the Member States are free to organise the provision of welfare services, called "compulsory social services" either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. A detailed catalogue of these services is given in Annex XIV to the Directive in which a wide range of welfare services, including education, healthcare and elderly care, is enumerated.

The joined *Dôvera* cases (C-262/18 P and C-271/18 P) regards the Slovak health insurance system. There is an ongoing debate to what extent healthcare is an exclusive national matter.[66]Article 168(7) of the TFEU clearly indicates the application of the principle of subsidiarity in the field of health services.[67]

However, healthcare is organised in different ways in the Member States. There are two models: the predominantly tax-funded healthcare prevailing in the Nordic countries and the Continental model where

[59] *Kirschstein* (C-393/17) [2019] ECLI:EU:C:2019:563.
[60] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2019:1144, Opinion.
[61] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450.
[62] In *Hradbraut* the EFTA Court is making references to *Dôvera* indicating that this judgment has relevance also to the applicability of EU rules on public procurement.
[63] See *Sodemare* (70/95) [1997] ECLI:EU:C:1997:301 and *Spezzino* (C-113/13) [2014].
[64] See *Poucet and Pistre* (C-159/91 and C-161/91) [1993] ECLI:EU:C:1993:63 and *AOK Bundesverband* (C-264/01, C-305/01, C-354/01 and C-355/01) [2004] ECLI:EU:C:2004:150.
[65] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450.
[66] See, e.g. Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Health Care and EU Law* (The Hague, 2011).
[67] Ulla Neergard, "EU Health Care Law in a Constitutional Light: Distribution of Competences, Notions of 'Solidarity', and 'Social Europe'", in Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Health Care and EU Law* (The Hague, 2011), p.24.

healthcare is organised in social security schemes.[68] The Slovak health insurance system belongs to the Continental model.

The two models can both be applying the principle of solidarity, i.e. healthcare is provided according to needs, not the ability to pay. According to CJEU case law like *AOK Bundesverband*,[69] healthcare organised according to the Continental model applies the principle of solidarity, and as such shall be considered "non-economic", if it entails elements like compulsory affiliation, benefits and contributions fixed by law in proportion to the income and not the risk and supervision by the state.

In case the social security scheme is a pluralistic scheme in which more than one insurance body operates there is usually a mechanism for the equalisation of costs and risks through which entities that are in surplus contribute to the financing of those with structural financial difficulties.[70] According to the CJEU in *AOK Bundesverband*, this mechanism of equalisation supports the solidarity-based character of the scheme.[71]

In other words, many compulsory social security schemes according to the Continental model can be "non-economic" if they apply principles of solidarity like those characterising a tax-funded welfare system. This is not altered by the existence of competition as long as the elements of competition do not call into question the principle of solidarity underpinning the scheme. In *AOK Bundesverband*, the CJEU observes that the "non-economic" character is not affected by the fact that the sickness funds, when setting contribution rate, are able to engage in some competition with one another to attract members.[72]

However, there are also examples where the system examined is deemed to be "economic". Throughout the years, there have been several cases where the monopoly or oligopoly of healthcare funds is challenged for being in breach with EU competition law.[73]

In cases like *Poucet*,[74]*Cisal*[75] and *Albany*,[76] the CJEU examines whether the scheme is applying the principle of solidarity in a sufficient manner. If the scheme is based on optional affiliation and operating according to the principle of capitalisation, where there is a direct link between the amount of the contributions paid by each insured person and the benefits provided to that insured person, the scheme does not sufficiently apply the principle of solidarity and consequently constitute "economic activity".[77]

In Slovakia the insurance health scheme contains three actors: the state-owned SZP (a merging of the two state insurance bodies VsZP and SZP in January, 2010) and the two privately owned insurance bodies, Dôvera zdravotná poist´ ovna (Dôvera) and Union zdravotná poist´ ovna (Union). Due to an amendment in Slovak legislation the insurance bodies were obliged to adopt the legal status of a profit seeking joint stock company. In 2013 the market share of SZP was 64.09 per cent, Dôvera was 27.49 per cent and the market share of Union, 7.85 per cent of the persons insured.[78]

In several measures between 2006 and 2010 the Slovak state transferred funds to the state-owned insurance bodies. Dôvera and Union filed a complaint since they regarded these transfers to be unlawful state-aid.

[68] Tamara K. Harvey, "If Only it Were So Simple: Public Health Services and EU Law", in Marise Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford, 2011), pp.179–250 speaks of the social insurance "Bismarckian" model and the taxation-based "Beveridgean" model; see also Wolf Sauter, "The Impact of EU Competition Law on National Healthcare Systems", Tillburg Law School Legal Studies Research Paper Series, No.12/2012, p.6.

[69] *AOK Bundesverband* (C-264/01, C-305/01, C-354/01 and C-355/01) [2004] ECLI:EU:C:2004:150.

[70] Wolf Sauter, "The Impact of EU competition law on national healthcare systems" (2013) 4 *European Law Review* 462.

[71] *AOK Bundesverband* (C-264/01, C-305/01, C-354/01 and C-355/01) [2004] ECLI:EU:C:2004:150 at [36].

[72] *AOK Bundesverband* (C-264/01, C-305/01, C-354/01 and C-355/01) [2004] ECLI:EU:C:2004:150 at [56].

[73] See, e.g. *Poucet* (C-159/91) and *Pistre* (C-160/91) [1993] ECLI:EU:C:1993:63 at [3] and *Cisal* (C-218/00) [2002] ECLI:EU:C:2002:36 at [13].

[74] *Poucet* (C-159/91) and *Pistre* (C-160/91) [1993] ECLI:EU:C:1993:63.

[75] *Cisal* (C-218/00) [2002] ECLI:EU:C:2002:36.

[76] *Albany* (C-67/96) [1999] ECLI:EU:C:1999:430.

[77] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [35] and the case law cited. The degree of solidarity in compulsory insurance schemes is discussed in Catherine Barnard, "EU Citizenship and the Principle of Solidarity" in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Oxford and Portland, Oregon, 2005), pp.157–180.

[78] Commission Decision 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a. s. (SZP) and Všeobecná zdravotná poisťovňa, a. s. (VZP), (19).

Since state-aid presupposes that the beneficiary is an "undertaking", i.e. an entity engaged in "economic activity", the fundamental question in *Dôvera* is therefore whether the state-owned insurance bodies are engaged in "economic activity" and to what extent the fact that the scheme includes both competition and private for-profit actors is relevant to the answer.

Important elements that distinguish the joined *Dôvera* cases (C-262/18 P and C-271/18 P) from earlier case-law is that the Slovak scheme includes both competition and private for-profit operators. The private operators are not, like in *AOK Bundesverband* or in *AG2R*,[79] non-profit organisations. Neither are they religious bodies like in *Congregación*. Both Dôvera and Union are privately owned profit seeking joint stock companies.

Thus, in *Dôvera* the relevance of competition and for-profit is brought to its head. To the General Court these elements are conclusive. Since the Slovak health insurance companies are "freely able to seek and make profit" it is clear to the General Court that they are "pursuing financial gains and, consequently, their activities" fall "within the economic sphere".[80] Moreover, the "existence of a certain amount of competition as to the quality and scope of services" reinforces the scheme's "economical" nature.[81]

The privately-owned insurance bodies in the system are consequently perceived by the General Court to be engaged in "economic activity" and to be "undertakings" under EU competition law despite the elements of solidarity also characterising the scheme. According to the General Court the same also applies to the state-owned insurance bodies since they are competing with for-profit competitors and therefore "by 'contagion' would have to be considered to be undertakings".[82]

5.1 An overall assessment is needed to determine whether an activity is "economic"

However, the judgment of the General Court is annulled by the CJEU. According to the CJEU, the General Court attributes the elements of profit-making and competition "undue significance" and takes "insufficient account" to the social, solidarity and regulatory features of the scheme.[83] The findings of the General Court are therefore "vitiated by errors of law".[84]

The CJEU notes that EU law does not, in principle, detract from the powers of the Member States to organise their social security systems.[85] However, the way they choose to organise the system has implications for its "economic" or "non-economic" nature. According to the CJEU the social, solidarity and regulatory features of the Slovak health scheme outweigh the effect of the elements of profit-making and competition.

The conclusion that can be drawn from *Dôvera* and the case law cited in *Dôvera*[86] is that the answer to the question whether healthcare is an "economic activity", widely discussed by academics,[87] is very much depended on the way healthcare is organised and financed in the case examined. Accordingly, it is not possible to give a generalised answer to the question whether healthcare is "economic" or "mon-economic". In the *BUPA* case,[88] regarding a private insurance health system operating alongside a tax-funded system in Ireland, the private system is perceived to be "economic" after an overall assessment considering the special elements of the scheme.[89]

[79] *AG2R* (C-437/09) [2011] ECLI:EU:C:2011:112.
[80] *Dôvera* (T-216/15) [2018] ECLI:EU:T:2018:64 at [64].
[81] *Dôvera* (T-216/15) [2018] ECLI:EU:T:2018:64 at [65].
[82] *Dôvera* (T-216/15) [2018] ECLI:EU:T:2018:64 at [69].
[83] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [38].
[84] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [51].
[85] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [30].
[86] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [30].
[87] See, e.g. Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Health Care and EU Law* (The Hague, 2011).
[88] *BUPA* (T-289/03) [2008] ECLI:EU:C:2008:29.
[89] About the *BUPA* case, see Sybe A. de Vries, "BUPA; A Healthy Case, in the Light of a Changing Constitutional Setting I Europe?", in Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Health Care and EU Law* (The Hague, 2011), pp.295–317.

In *Dôvera* the same overall assessment of the elements characterising the Slovak system results in the reverse conclusion due to the special traits of that scheme. Important elements to this assessment are (1) that affiliation of the insured persons is compulsory, (2) contributions are fixed by law in proportion to their income, (3) the benefits set by law are identical for all,[90] and (4) the existence of state control over the activities of the entities in the system.[91]

According to the CJEU, profit-seeking joint stock companies' existence does not affect the "non-economic" nature of the system since the ability to distribute profits is subjected to requirements intended to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it.[92]

The fact that two out of three operators are privately owned is equally of no relevance. In *Congregación* the CJEU clarifies that the public or private status of an entity is irrelevant to the question whether this entity is engaged in "economic activity". In accordance with these findings the CJEU notes in *Dôvera* that the classification of an entity as an "undertaking" is not depending on "the legal status of the entity concerned but on all of the elements characterising its activity".[93]

Neither does the existence of "a certain amount of competition" call into question the social and solidarity-based nature of the scheme since the health insurance bodies can only compete in terms of quality and scope of the services offered, but not in terms of price.[94]

Thus, in *Dôvera* two elements were decisive for the non-economic nature of the Slovak health scheme: (1) the scheme was applying the principle of solidarity; and (2) the bodies organising the scheme were subject to state supervision.[95]

According to the author, the overall assessment of the CJEU in *Dôvera* causes doubt to the compatibility with EU law of the *Alingsås* judgment. The traits that are decisive for the "non-economic" character of the Slovak health insurance system apply also to the Swedish system for elderly care. In Sweden elderly care is strictly regulated by law. Private actors need to obtain a permit issued by the Health and Social Care Inspectorate (IVO) that is also supervising their activities.[96] Foremost, the essentially tax-funded elderly care in Sweden is solidarity-based since the needs, not the ability to pay, determine the access to tax-funded elderly care. It is correct, as the Swedish Supreme Administrative Court observes, that there is competition between the operators of elderly care. However, just like in *Dôvera*, the existence of competition does not affect the principle of solidarity underpinning the system.

5.1.1 The private profit-seeking joint stock-companies are not "undertakings"

As noted above, the public or private status of an entity has no bearing to whether the entity is engaged in "economic activity". In Dôvera the CJEU concludes that:

> "the ability of the insurance *bodies* [authors emphasis] managing the Slovak compulsory health insurance scheme to seek to make profit … does not mean that they can be classified as 'undertakings' under EU competition law."[97]

[90] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [32].
[91] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [10].
[92] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [40].
[93] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [39].
[94] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [41]–[42]. The conclusion made by Tamara K. Harvey, "If Only it Were So Simple: Public Health Services and EU Law", in Marise Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford, 2011), pp.188 and 194 that EU competition law will in principle apply if the Member State chooses to bring market elements into healthcare should be modified.
[95] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [31].
[96] When IVO is considering a permit application an assessment is made of the activity and the organisation, that is whether the care can be run with good quality and safety and whether the owners are well suited.
[97] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [39].

Using a plural definite form, the CJEU includes all the scheme's operators, including the private operators. It is an established fact that non-profit entities can engage in "economic activity" and, in this respect, constitute "undertakings"[98]. The findings of the CJEU in *Dôvera* demonstrate that also the reverse applies. A profit-seeking joint stock company owned by private capital is not engaged in economic activity and consequently is not an "undertaking" to the extent that entity is active in a solidarity-based health system under state supervision.

Dôvera challenges the view that solidarity-based welfare services provided by private for-profit entities in competition is an indisputably "economic activity".[99] As noted above, it also challenges the findings of the Swedish Supreme Administrative Court that the existence of competition implies that essentially tax-funded elderly care is "economic" in nature.

6. Does the existence of a public contract imply that EU rules on public procurement come into play?

Humbel concerns EU rules on freedom of establishment and freedom to provide services. *Congregación* and *Dôvera* both concern the application of EU rules on state aid. However, the question this article seeks to answer is whether EU rules on *public procurement* apply to tax-funded welfare services. Up to now there is no judgment from the CJEU that relates to this question in a clear-cut manner.

The prevalent view among academics seems to be that EU rules on public procurement apply also to "non-economic" activities.[100] According to Hatzopoulos, EU rules on public procurement apply when a contracting authority awards a contract to a non-state actor also when the object of the contract is also a "non-economic" activity.[101] To the Swedish Supreme Administrative Court the existence of a public contract is decisive for the application of EU rules on public procurement.

According to the author, this view is indirectly challenged already by the CJEU findings in *Congregación* (above). Moreover, it is challenged in a more direct way by the findings of the EFTA-Court in *Hradbraut*.

6.1 Hradbraut

Although there is still no judgment by the CJEU that directly answers whether EU rules on public procurement apply to entirely or mainly tax-funded welfare services,[102] the EFTA Court delivered a judgment on 10 December 2020 regarding the applicability of EU rules on public procurement to mainly tax-funded upper secondary education.[103] The case is brought to the EFTA Court by the Icelandic Public Procurement Complains Committee following an application from the privately-owned secondary school Hradbraut ehf.

In Iceland, education is by law a guaranteed right to all citizens. Article 76(2) of the Icelandic Constitution reads:

[98] See, e.g. Manuela Consito, "The organisation of social services in the European Welfare market", Turin, 1 April 2011, p.5. [AQ: what type of publication is this?

[99] See, e.g. Wolf Sauter, *Public Services in EU Law* (Cambridge, 2015), pp.121 and 123.

[100] See, e.g. Dragana Damjanovic and Bruno De Witte, "Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty", EUI Working Paper LAW No.2008/34, p.29; Erik Kloosterhuis, "Defining non-economic activities in Competition law" (2017) 13(1) *European Competition Journal* 18–19 and Tamara K. Harvey, "If Only it Were So Simple: Public Health Services and EU Law", in Marise Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford, 2011).

[101] Vassilis Hatzopoulos, "The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts", College of Europe, Research Paper in Law, 06/2011. According to the author this is clearly contradicted already by the clarification in recital 6 of the Directive (above).

[102] There are two pending Spanish cases at the CJEU regarding the question whether EU rules on public procurement apply to social services (*ASADE* (C-436/20) and *ASADE* (C-676/20)). The referral does not set out in detail how the social services in question are financed. According to the written observations submitted by the Kingdom of Norway the EU rules on public procurement do not apply "if the provision of services to the person takes place as an integral part of a national system where the State is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population based on a principle of solidarity, and where that system is, as a general rule, primarily funded from the public purse".

[103] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020).

"The right of general education and suitable training shall by law be guaranteed to all".[104]

Upper secondary education is regulated in more detail in the Upper Secondary Education Act.[105] According to art.12 of this Act the Minister may grant accreditation to provide instruction at the upper secondary level to private schools that operate as non-profit organisations, as companies limited by shares or of other recognised legal forms. To attain accreditation, the school must meet several requirements such as study programme descriptions, teaching and learning arrangements and academic staff qualification standards.

However, the accreditation only serves as a confirmation that the school is operated in compliance with the law's provisions; it does not entail an automatic right to public financing.[106]

For a private school to receive public funding, a contract must be concluded between the Ministry of Education and the school.[107] In 2012 and 2013 the Ministry signed three separate contracts with (1) the Commercial College, a private institution and subject to Act No.33/1999 on Private Institutions that Engage in Commercial Activities; (2) the Technical College, which is a private limited liability company owned by Fisheries Iceland, the Federation of Icelandic Industries and the Reykjavik Craftsmen's Association; and (3) Borgarfjörður College, a limited liability company whose majority shareholder is the municipality of Borgarbyggð. The contracts lasted with extensions until 31 December 2019.[108]

According to the contracts, the private colleges are obliged to provide educational services following the law.[109] In exchange the private colleges are to receive a contribution that the Icelandic Parliament determines in each year's budget legislation. The amount of public funding is between 78 and 95 per cent of the colleges' total income.[110]

A fourth private college, Hradbraut ehf, does not receive a contract with the state although Hradbraut ehf is accredited to provide upper secondary educational services.[111] As a result of this alleged discrimination, Hradbraut ehf files a complaint to the Icelandic Complaints Committee claiming that the contracts should have been tendered out under the Icelandic Public Procurement Act.

The Complaints Committee refers four questions to the EFTA Court of which the EFTA Court only finds it necessary to answer two:

> "Is a contract into which a ministry enters with an entity that is licensed to operate as an upper secondary school, by which the entity in question undertakes to provide pupils and teachers with services and facilities that are customary at the upper secondary level, and in which allowance is made for financial contributions [shall be] considered to be … a public service contract in the sense of Directive 2014/24/EU (cf. in particular, Article 2(9))?
>
> Is it of significance … whether consideration for the services in question is determined in budget legislation from the Icelandic Parliament or in accordance with a decision by a minister on the basis of applicable domestic law and rules?"

In the written observation submitted by the Commission, it is asserted that the contracts in question are not contracts "for pecuniary interest" since the consideration is not sufficiently specified and therefore the contracts in question are not "public service contracts" in the meaning of point (5) and point (9) of art.2(1) of the Directive.[112]

[104] Article 76(2) of the Constitution of the Republic of Iceland No.33/19444 (Stjórnarskrá lýðveldisins Íslands No.33/1944).
[105] Act No.92/2008 on Upper Secondary Education (lög no.92/2008 um framhaldsskóla).
[106] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [9].
[107] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [14].
[108] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [17]–[18].
[109] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [19].
[110] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [20]–[21].
[111] Written observations of Hradbraut ehf to EFT Court, 21 June 2020.
[112] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [64] and [75]. See also Observations of the Commission 20 March 2020 in Case E-13/19.

6.2 Mainly tax-funded upper secondary education does not meet the Humbel criteria

However, the EFTA Court approaches the questions of the Complaints Committee from a different angle. According to the EFTA Court a contract in the meaning of point (5) of art.2(1) must have as its object the execution of works, the supplies of products or the provision of services. Since upper secondary education is clearly not works or products, the contract must have as its object the provision of services.

The EFTA Court observes that there is no definition of "services" peculiar to the Directive. The reason for the absence of a definition of "services" specific to the rules on public procurement is that the Directive is designed to implement the provisions relating to the freedom of establishment and the freedom to provide services of the EEA Agreement. Accordingly, the contracts must have as their object the provisions of "services", which according to art.37 of the EEA Agreement (the wording the same as in art.57 of the TFEU) are "services" normally provided for remuneration.

Citing the *Humbel* criteria, the EFTA Court notes that "the essential characteristic of remuneration" is absent in the case of education provided under a national education system where (1) the state is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields; and (2) the system is, as a rule, funded from the public purse and not by the pupils or their parents.[113] The EFTA Court further observes that the nature of the activity is not affected by the fact that pupils or their parents must pay teaching or enrolment fees that only constituted a minor contribution to the national education system's operating expenses.[114]

The EFTA Court subsequently observes that the three separate contracts between the Ministry and the private colleges stipulates that education shall be provided following Icelandic law, including the Upper Secondary Act and art.76(2) of Iceland's constitution. Moreover, the educational activity is predominately funded by the public purse.[115]

Under these circumstances the EFTA Court concludes that provision of upper secondary education provided under a national education system "cannot be regarded as a 'service' for the purpose of Article 37 EEA".[116] Accordingly, the contracts in question do not constitute "public services contracts" within the meaning of point (9) of art.2(1) of the Directive.[117]

Regarding the other question the EFTA Court observes that it is of no "significance whether that public funding is determined in an act of parliament or a decision of a minister adopted on the basis of domestic law and rules".[118]

According to the EFTA Court, the contracts concluded between the Icelandic state and three colleges do not fall within the scope of the Directive. The judgment confirms the assumption that the existence of a public contract does not per se imply that EU rules on public procurement come into play. For these rules to apply the object of the contract must also fall within the scope of the Directive. Since the object of the contracts in question are welfare services that meet the *Humbel* criteria they shall not be considered to be "services" and accordingly they are not covered by the Directive. The findings of the EFTA Court challenge the view that the nature of the contracts object is irrelevant to whether EU rules on public procurement apply.[119] Moreover, they support the assumption in the previous article that tax-funded welfare services are not covered by the Directive, at least as far as essentially tax-funded education is concerned.

In *Hradbraut*, the EFTA Court does not examine whether the contracts in question meet the other criteria constituting a "public service contract", i.e. whether the contracts are contracts for pecuniary

[113] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [92].
[114] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [93].
[115] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [94]; *Humbel* (C-263/86) [1988] E.C.R. 0-5365; [1989] ECLI:EU:C:1988:451 at [19].
[116] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [96].
[117] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [97].
[118] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [92].
[119] Erik Kloosterhuis, "Defining non-economic activities in Competition law" (2017) 13(1) *European Competition Journal* 18–19.

interest concluded in writing between one or more economic operators and one or more contracting authorities.[120] A reasonable explanation is that such an examination would be superfluous. Since the contract's object is not (economic) "services" the contracts fall outside the Directive's scope irrespective of whether the contracts meet the other criteria of a "public service contract" or not.

7. Conclusions

According to art.1(2) of the Directive the application of its provisions requires the acquisition by means of a public contract of either works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities. Since entirely or mainly tax-funded welfare services are not works or supplies, they must meet the definition of "services" in the treatises for the Directive to apply. The author argues that welfare services that satisfy the *Humbel* criteria do not meet this definition.

While no CJEU judgment as yet give a direct answer to the question whether EU rules on public procurement apply to tax-funded welfare services, there is a new judgment from the EFTA Court that answers this question regarding mainly tax-funded upper secondary education.

Despite an increasing presence of private actors providing welfare services, case law like *Private Barnhehager*, *Congregación* and *Hradbraut* maintain the relevance of the *Humbel* criteria for the demarcation line between EU supremacy and Member State self-determination. Moreover, *Hradbraut* confirms the relevance of the *Humbel* criteria also regarding EU rules on public procurement, at least as far as mainly tax-funded education is concerned.

In the *Alingsås* case the applicant, the Swedish Competition Authority, argues that CJEU and EFTA Court case law regarding competition and state aid has no relevance to the understanding of the concept NESGI within the rules on public procurement, since different perspectives and objectives inspire these respective sets of rules. *Hradbraut*, in which the EFTA Court makes references to *Private Barnehager* and *Congregación*[121] (both cases concerning state aid), challenges the view that EU rules on public procurement and state aid share no common denominator.

A persistent question is whether the outcome of *Hradbraut* would have been the same had it concerned the provision of other tax-funded welfare services, for example tax-funded elderly care? To put it bluntly, is *Hradbraut* evidence that errors of law vitiate the findings of the Swedish Supreme Administrative Court in the *Alingsås* case?

According to the author there are reasons to believe that the answer would be affirmative. The right of the Member States to organise their systems for social security and health care without the interference of EU law is emphasised in the treatises.[122] Moreover, the CJEU has repeatedly observed that EU law does not, in principle, detract from the powers of the Member States to organise their social security systems. Case law like *FENIN*, *Dôvera*, *Sodemare*[123] and *Spezzino*[124] indicates that the *Humbel* criteria apply equally to health services and social services. Although these activities are not automatically "non-economic", they could very well be due to an overall assessment that includes the way the activity is financed and regulated.[125]

The right of the Member States to organise their social security systems is also highlighted in the Directive.[126] As noted above, in recital 6 of the Directive, it is recalled that the Member States are free to

[120] Directive 2014/24/EC of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, point (9) of art.2(1).
[121] *Hradbraut ehf v Ministry of Education, Science and Culture* (E-13/19) (10 December 2020) at [91] and [95].
[122] Treaty on the Functioning of the European Union arts 153.4 and 168.7.
[123] *Sodemare* (70/95) [1997] ECLI:EU:C:1997:301.
[124] *Spezzino* (C-113/13) [2014] ECLI:EU:C:2014:2440.
[125] *Dôvera* (C-262/18 P and C-271/18 P) [2020] ECLI:EU:C:2020:450 at [30]–[31].
[126] Article 1.5.

organise the provision of welfare services, called "compulsory social services" either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. Accordingly, there are reasons to believe that tax-funded healthcare and elderly care should be treated no differently to tax-funded education as far as EU rules on public procurement are concerned.

In the last five years since the author's previous article, the CJEU and the EFTA Court produced additional relevant case law. Although more clarifying case law is needed, *Congregación*, *Dôvera* and *Hradbraut* all provide important pieces to this elusive jigsaw puzzle.[127]

[127] In the doctrine the role of NESGI in EU law is often underestimated, see for instance Wolf Sauter, *Public Services in EU Law* (Cambridge, 2015), p.228 and Ulla Neergaard, "The Concept of SSGI and the Asymmetries Between Free Movement and Competition Law", in Neergaard, Szyszczak, van de Gronden and Krajewski (eds), *Social Services of General Interest in the EU* (The Hague, 2013), pp.209 and 212.