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Solidarity and the Market in the Area of Insurance Schemes

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Abstract

The text provides a detailed analysis of the significance and role of the principle of solidarity in compulsory and supplementary insurance schemes. The analysis is focused on solidarity as the benchmark when deciding on the applicability or non-applicability of the rules on effective competition on the market in the EU. The principle of solidarity is closely linked to the objectives of social policy, which demand special treatment in the intense market arena. The selected interpretations of the Court of Justice of the EU carry great importance, considering the discretion of Member States in the area of social policy. The text provides an elaboration and final remarks concerning the principle of solidarity which is able to shelter (more or less) the provision of insurance services in the EU.

KEY WORDS:

EU, solidarity, insurance schemes, general interest, competition

Introduction

Solidarity carries great significance in the European Union (EU). It forms part of the elementary values of the EU.[1] Also, solidarity has been placed among the main aims of the EU, considering that the obligations of the EU and the Member States[2] have been directed towards the promotion of solidarity among generations. Furthermore, the economic and territorial cohesion among the Member States is enriched by the promotion of solidarity within the EU.[3]

Solidarity is also incorporated into the EU's acting on the international scene, while the solidarity clause presents the main factor in the expectations set before the EU and its Member States in the case of natural or man-made disasters, or terrorist attack.[4]

According to the literature, solidarity has more than a symbolic character. In that regard, it has been considered that solidarity has a normative connotation. Actually, solidarity can be used as the adjudicatory benchmark (Micklitz 2011: 98). Solidarity will be observed in the following analysis exactly in this role – as being the relevant benchmark for making decisions on the applicability of the rules on effective competition in the area of insurance schemes.

The principle of solidarity is present in the area of insurance schemes. These schemes provide insurance services on the market under various conditions. Sometimes they can be characterized by the element of compulsory affiliation, under the umbrella of the incorporation of the principle of solidarity and the protection of general interests of the users. In this case, the rules on effective competition on the market can be applicable to a limited extent. Also, in such cases the insurance schemes can be exempted from the applicability of the rules on effective

1 Through Article 2 of the Treaty on the European Union (hereinafter: TEU).

2 Solidarity is the main characteristic of the judicial cooperation of the various Member States in civil and criminal matters.

3 Article 3 of the TEU.

4 Article 222 of the Treaty on the Functioning of the European Union (hereinafter: TFEU).

competition on the market.[5] The principle of solidarity and the orientation of the activity towards the fulfilment of social goals determine to a great extent the applicability of the relevant rules. Actually, the nature of the activity of the entity which pursues the insurance scheme is relevant for determining the applicability of the rules. However, there are various elements which can be taken into consideration while making such judgements. Also, it is interesting to observe the reluctance of the Court of Justice of the EU when searching for the assurance of the presence of the principle of solidarity in the activity in question, in order to confirm that the derogations can be applied. The Court of Justice of the EU considers the social aims and the interests of users as being very significant. However, it is necessary to have a convincing assurance in order for the relevant rules to be determined as being not applicable, or being applicable to a certain extent.

Having all this in mind, the text aims to analyse the relevance of the principle of solidarity (as being closely related to the social aims of the activity in insurance schemes) in the insurance activities. Actually, the analysis will encompass the examples of the activities where the existence of the complete absence of the economic nature of the insurance scheme's activity is determined. Also, the text will analyse the cases where the activity can be determined as being economic, but the rules on the effective competition on the market are applicable to a limited extent.

Considering the relevance of the role of the principle of solidarity in such categorizations, this text will analyse solidarity in that regard. The relevant literature implies that solidarity indeed can be used as the adjudicatory benchmark. The text is focused exactly on this specific particularity of the principle of solidarity in the selected case law of the Court of Justice of the EU. The analysis aims to show what is significant for the applicability or non-applicability of the rules on effective competition on the market when it comes to the principle of solidarity in the interpretations of the Court of Justice of the EU. Also, the analysis will point out the relevant issues which may arise because of the lack of legal certainty in that regard.

5 The general notion of the rules of effective competition on the market will be used. However, it can be pointed out that such a notion would (most probably) imply the rules on prohibited agreements between entrepreneurs, as well as rules on the protection of the abuse of the dominant position on the market.

The principle of solidarity in the interpretations of the Court of Justice of the EU

The Court of Justice of the EU has provided important guidelines while interpreting the applicability of competition rules concerning compulsory insurance funds (for various sectors). How important the principle of solidarity is as well as how important the social aims of the relevant activity can be are questions which need to be analysed in order to provide the relevant assessments on the possibilities of reserving certain insurance funds for chosen providers only. Furthermore, the role of social policy objectives and the nature of the activity are in the focus of relevant assessments when deciding on the compliance of compulsory membership and exclusive rights of providers of insurance with EU Law.

An example can be found in the case *Poucet and Pistre* on one side and obligatory insurance funds (managing the sickness and maternity insurance schemes for self-employed persons) on the other.[6] In this case, the dispute arose on the compliance of the principle of compulsory affiliation to a social security scheme with EU Law, considering that such a compulsory nature restricts the free choice of users to turn towards other private insurers which offer their services on the market.

The Court of Justice of the EU clearly supported the discretion of the EU Member States to organize their social security systems. Furthermore, it was clearly determined that an insurance scheme which provides compulsory social protection, under the principle of solidarity, and is applicable to all self-employed persons in non-agricultural occupations (for sickness and maternity insurance cover) and craft occupations (for old-age insurance cover), needs to be considered as one pursuing a social objective. The important fact was that the insurance is provided to all persons (in the named categories of self-employed and craft occupations). The differences in financial status or in health condition were of no relevance in that regard. However, it needs to be pointed out that contributions were proportional to income, while persons receiving invalidity pensions or having very limited financial resources were exempted from payment

6 Case C-159/91 and C160/91 *Poucet and Pistre* [1993] ECR I-637.

of contributions. Also, persons who stopped being insured were entitled to receive the benefits for a year after the termination of their coverage (and this was made free of charge).

The principle of solidarity can actually be recognized in the element of redistribution of income between bad and good risks[7] as far as the health condition of the insured persons is concerned. Furthermore, as far as the pension system (old-age pension system) is concerned, such a distribution can be recognized in the fact that the active labour force is actually financing the pensions of retired workers.

The significant element of the scheme was also the fact that there was a certain reallocation of resources. Actually, there was a spill over from the social security schemes with financial resources to those with difficulties in their financial resources. Clearly, the social character of the activity contributed to the determination that such spilling over in finances cannot be regarded as being contrary to market rules. On the contrary, it was observed as the indicator of solidarity between the various schemes and their users.

It can be said that these characteristics have highlighted the characterization of the relevant insurance schemes. The activity was determined as being non-economic, while the whole operation of the insurance schemes was set aside from the competitive market arena. Compulsory affiliation was necessary for the application of the principle of solidarity. In case of the introduction of optional affiliation, the realization of the principle of solidarity would be undermined. Furthermore, compulsory affiliation was necessary for the maintenance of financial equilibrium within the relevant schemes. In other words, the absence of the compulsory nature of the scheme could result in the systematic outflow of the good risks to other private insurers operating on the market. In such a case, the financial resources of the relevant insurance funds would be decreased, so the principle of solidarity could not be respected, while the social aims of the scheme would not be attained.

Contrary to such interpretations, in the case *Fédération Française des*

7 For the purposes of further clarification, the bad risks were actually the older people or people with worse health conditions. On the other hand, the good risks were related to the younger, healthier people.

Sociétés d'Assurance and Others (hereinafter: *FFSA and Others*)[8] the Court of Justice of the EU determined that the entity which operates an insurance scheme aimed at supplementing the basic compulsory pension scheme, and is led by the principle of capitalization[9], needs to be considered as an undertaking pursuing economic activity when it comes to determining the applicability of the rules on effective market competition. The limited incorporation of the principle of solidarity in the activity of the FFSA was established. This was evident because of the contributions which were not linked to the insured risks. Also, there was a possibility to be exempted from payment of contributions in case of illness, as well as of the temporary suspension of payment of contributions because of the economic situation of the holding. Furthermore, the contributions paid were at disposal in the case of premature death of the insured member.

However, the limited application of the principle of solidarity, next to the non-profit character of the entity or orientation of the activity towards the fulfilment of social aims were not enough to exclude the FFSA from effective competition on the market. In other words, the Court of Justice of the EU concluded that the named indicators were not enough to characterize the activity of the FFSA as a non-economic one. In that regard, the rules on effective competition were applicable to the FFSA and its activity.

If the case *FFSA and Others* is compared with the case *Poucet and Pistre,* the relevant differences can be seen. For example, the non-profit nature of the activity, as well as the presence of the principle of solidarity and of social aims, were taken into consideration as the main arguments in favour of the exempting of the relevant funds from the economic market spheres in case *Poucet and Pistre*. On the contrary, in the case *FFSA and Others* the Court of Justice of the EU was considering how present the principle of solidarity actually is in the activities of the various entities. For that reason it is necessary to observe the position of the principle of solidarity in the activities of the FFSA, in comparison with the activities in case *Poucet and Pistre*. In that regard, it can be pointed out that the Court of Justice of the EU took into account certain facts which confirm the presence of the

8 Case C-244/94 *FFSA and Others* [1995] ECR I-4013.

9 It can be said that the principle of capitalization means benefits which depend greatly on the financial results of the business. The applicability of the principle of capitalization usually refers to the existence of an undertaking in the particular case.

principle of solidarity in the activity of the FFSA. The contributions were not linked to the insured risks. So, for example, in case of premature death of a member, the contributions paid were at disposal. Also, in case of illness of an insured member, there existed the possibility of exemption from payment of contributions. The economic situation of the holding was relevant too, considering it was able to influence (and suspend) the payment of contributions. All these elements were a manifestation of the principle of solidarity. However, in the case *Poucet and Pistre*, it needs to be said that the contributions were proportional to the income of the insured persons, while there was also the exemption of one whole category of persons (recipients of invalidity pensions and retired members with limited resources) from the obligation of payment of contributions. Furthermore, as it has been explained before, the termination of the coverage did not mean the absolute termination of receiving benefits.[10] Also, the redistribution of financial resources was considered to be the greatest sign of solidarity. Furthermore, although the principle of solidarity was present in the activity of FFSA, it was not essential for its activity. In other words, the extent of the application of the principle of solidarity in this case was actually limited, if compared to the case *Poucet and Pistre*.

Further relevant examples can be found in the case *Albany International BV v. Stichting Bedrijfspensioenfonds Textielieindustrie* (hereinafter: *Albany*).[11] In this case, the dispute was based on Albany's refusal to pay the contributions to the Textile Industry Trade Fund (hereinafter: TIT Fund). The TIT Fund was a sectoral pension fund and was marked by the characteristic of compulsory affiliation. Albany considered that the paid pension amounts were not adequate for its workers, so it opted to pay contributions to another supplementary pension fund.[12] Considering the fact that the supplementary pension fund was chosen, Albany requested exemption from compulsory affiliation to the TIT Fund. These are the basic facts of the case.

However, for this analysis it is actually more important to elaborate on the approach of the Court of Justice of the EU while determining the

10 The benefits were available for one year after the person's coverage with the scheme was over.

11 Case C-67/96 *Albany* [1999] ECR I-5751.

12 The main goal was to provide retired workers with a proper amount of pension, which would correspond to 70% of their salary.

applicability of the relevant rules on effective market competition. Actually, the Court of Justice of the EU was analysing the compliance of the decision[13] on setting up the pension fund as a single fund (responsible for the management of the supplementary pension schemes) and making the affiliation to that fund compulsory, with the provisions which prohibit all agreements which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[14] In that regard, it is very important to point out that the Court of Justice of the EU underlined that the social policy objectives find their place when determining the applicability of the competition rules on prohibited agreements. In other words, it is expressly stated by the judgement in the Albany case, that such agreements made between the employers and workers are targeted at the realization of social policy objectives. The fulfilment and realization of social policy objectives would be undermined in case those agreements would be bound by the rules on prohibited agreements. The exact purpose and characteristics of such agreements (including the way of their negotiations) confirm that the presence of the social element can exclude the relevant agreements from the scope of application of the competition rules. These agreements have been created within a social dialogue, and they support social policy objectives, which is sufficient to exclude them from the applicability of competition rules.

The Court of Justice of the EU has concluded that the compulsory nature of the TIT Fund presents the express provision of the regulatory authorities of the state in the social sphere. So, the creation of a fund which provides a supplementary pension scheme and is marked by compulsory affiliation of its users is in compliance with EU Law.

The Court of Justice of the EU pointed out that compulsory affiliation of workers to the Fund can be described in light of fulfilling its social function. Such an interpretation has found its basis within the argument that the statutory pension (considering the minimum amount of wages) was very low, so the supplementary pension schemes can help in making the relevant amounts more appropriate to the workers. However, the main point was the fact that the sectoral pension fund was based on the principle of solidarity. The Court of Justice of the EU described the

13 The decision resulted from the collective agreement.

14 The prohibited agreements are regulated by Article 101 of the TFEU.

concept of solidarity through the existence of the schemes which accept all workers without prior medical examinations, as well as through the entitlement to benefits despite the incapacity for work or employer's insolvency. Furthermore, it is important to point out that in the focus of the arguments in favour of the applicability of the principle of solidarity was the fact that the contributions did not result from risks, nor were they connected to final rights.

The case *Pavlov and Others*[15] can also offer relevant interpretations in relation to the indicators of the principle of solidarity in insurance schemes. This case concerns the second-pillar pension fund which provided pensions for medical specialists (as members of the profession). The pension scheme was set up in two parts. The first one included old-age pensions known as basic pensions, without the indexation of benefits reflecting increases in income. The members of the profession were free to choose the insurer.[16] However, the second part of the scheme was funded by contributions calculated on an actuarial basis (except for survivor's benefits which were funded by fixed average contributions).

The most important part of the case was the interpretation of the Court of Justice of the EU concerning the solidarity principle. In that regard, it was concluded that the contributions were not linked to insured risks, while the members of the medical profession were accepted to the scheme without prior medical examination. Next to all the other elements which were indicators of solidarity, these elements were sufficient for the scheme to be viewed in light of encompassing the principle of solidarity to a certain extent. The presence of the principle of solidarity was very relevant. Solidarity in this case was, furthermore, found in the elements of retroactive pension rights, the invalidity regime, indexation mechanisms and complementary benefits for survivors. It was especially pointed out that no selection of risks through medical examination was necessary for the insurance regime.

However, the capitalization scheme was applicable in the operation of the medical specialists' fund. Also, the amount of benefits was linked to

15 Joined Cases *C-180/98* to *C-*184/98 *Pavlov and Others [*2000] ECR I-6451.

16 One of the roles of the medical specialists fund was to collect contributions and forward them to the insurer or to set the premiums with the chosen insurer (according to the age, sex, income etc.).

the financial results of the medical specialists' fund. In that regard, it was concluded that when it operates, the medical specialists' fund acts as an undertaking which pursues economic activity, so the rules on competition and market freedoms should be applicable in that regard.

When analyzing the principle of solidarity in the relevant case law, the connections of this principle with social policy objectives need to be observed. In that regard, the case *Brentjens' v Building Materials Trade Fund* (hereinafter: BMT Fund) needs to be mentioned too. In this case, the Court of Justice of the EU decided on the issues raised in the proceedings on Brentjens' refusal to pay the BMT Fund its contributions.[17] In that regard, the Court of Justice of the EU underlined that the agreements resulting from collective bargaining are pursuing social objectives. Such agreements result from social dialogue and can be directed towards the establishment of supplementary pension schemes managed by pension funds to which affiliation can be made compulsory. The purpose of such a scheme is actually an important factor in determining its characterization within social policy objectives. A scheme such as this one serves to provide guarantees on the provision of a certain level of pension for all workers. It also aims at the improvement of their working conditions and remuneration. In that regard, a scheme such as this one is characterized by significant social policy objectives.

Economic activity and undertaking – the principle of solidarity

The interpretations of the Court of Justice of the EU are relevant for elaborating on the economic activity of such funds, as well as on the fulfilment of the requirement of undertaking in relation to the applicability of competition rules. Actually, in order to evaluate which way solidarity and social aims influence the applicability or non-applicability of relevant competition rules, it is necessary to observe the criteria relevant for the existence of economic activity, as well as of an undertaking in each case.

17 Case C-115/97 *Brentjens' v BMT Fund* [1999] ECR I-6025.

Furthermore, the analysis will encompass the relevant case law in that regard to the extent necessary for the better understanding of the place of the principle of solidarity in such schemes.

For clarification purposes, it needs to be pointed out that the relevant case law determined that economic activity is every activity of an industrial or commercial nature which offers goods and services on the market.[18] Furthermore, the fact that the entity which pursues the activity in question takes over certain risks providing the activity[19], or the fact that the activity is profit-making in its substance will indicate the economic nature of the activity.

The notion of undertaking encompasses *every entity engaged in an economic activity. In that regard, it is of no relevance which legal status the entity has, or how it has been financed.*[20] *An* undertaking might also encompass natural persons, considering that the legal status of the entity carries no relevance in such a classification. So, as the Advocate General Jacobs has explained in his Opinion in the case *Pavlov and Others,* the underlying idea of such an approach is to exclude that the existence or non-existence of specific legal forms (in which some entity or person will provide services and goods with a view of profit) determines the existence of an undertaking for the purposes of the application of the relevant market rules.[21] However, the Advocate General Jacobs divided the spheres relevant for the activities which are provided by the notion of undertaking. In that regard, he distinguishes between the economic and personal sphere of activities. Furthermore, the Advocate General Jacobs claims that when the notion of undertaking encompasses natural persons, special care should be taken to delineate the border between the activities in their economic or business and personal spheres. Simplified, professionals can be regarded as undertakings. When a group of professionals buys tickets for a concert or for a private (collective) trip to a chosen destination, this falls into their private sphere of activity. However, when the professionals buy office equipment, such activities

18 Case C- 118/85 *Commission v. Italy [1978]* ECR 2599, *para. 7; Case C-35/96 Commission v. Italy [1998]* ECR I-3851.

19 *Pavlov and Others, op.cit., fn 17, para. 74.*

20 See for example Case C-41/90 *Höfner & Elser v Macrotron GmbH [1991]* ECR I-1979, *para. 21.*

21 Opinion of the Advocate General Jacobs in Joined Cases C-180/98 to C-184/98 *Pavlov and others,* 23 March 2000, para. 107.

fall into their economic sphere of activity (where the relevant rules on market freedoms and competition apply). This distinction is very interesting considering that it opens further debate on the right criteria for setting the border between the relevant spheres. It is obvious that the purpose of the activity carries great importance while defining the category where the activity should be placed. Considering that the notion of undertaking is elaborated within this subject to the extent necessary for understanding the main concept of the applicability of competition rules to the relevant funds and the principle of solidarity, further analysis of this matter falls outside the scope of this elaboration. Having in mind the notions of economic activity and undertaking, it can be further said that in *Poucet and Pistre* the Court of Justice of the EU underlined the social function of the relevant insurance schemes. Actually, it was determined that the relevant insurance schemes are only directed towards the fulfilment of social functions. Considering that their activity is based on the principle of solidarity, and is entirely non-profit in its nature, the conclusion was that such statutory benefits are not linked to the amount of contributions paid.[22] Finally, the Court of Justice of the EU concluded that the activity of such funds should be regarded as non-economic activity. Also, the fact that such entities fulfil an exclusively social function was the main indicator for the establishment of the absence of an undertaking.

Actually, it can be said that the relevant activity of such funds is protected from dynamic market flows. The solidarity schemes and the social nature of the activities present the elements which have contributed to such a treatment of the funds. The competition rules were not applicable in this case.

It is interesting to observe which elements were actually discernible in case *FFSA and Others* while determining the nature of the activity in question. In that regard the supplementary nature of the scheme and the applicability of the capitalization principle implied the existence of economic activity. Also, there existed a certain linkage of benefits to contributions paid and to investments made into the entity. This further indicated that the amount of benefits was dependant on the contributions paid.

Similarly to the case *FFSA and Others*, in *Albany*, the Court of Justice

22 Ibid., para.18.

of the EU concluded that the TIT Fund operates according to the capitalization principle, as well as that the amount of benefits depends on the investments made into the TIT Fund. Further arguments concern the fact that an exemption from compulsory affiliation to the TIT Fund can be made, but it needs to be connected with other schemes of pension funds which can grant at least equivalent rights and benefits as those granted by the TIT Fund.[23]

Having all this in mind, it was established that the economic nature of activity exists. Furthermore, as it was explained before, the fact that the entity was non-profit in nature or the fact that the entity was operating an activity which encompassed limited elements of the principle of solidarity did not affect the classification of the activity as economic activity. The existence of such elements was not considered as being significant for exempting the activity of the entities from the economic sphere and applicability of competition rules on the market.

In the case *Brentjens'* the BMT Fund was also characterized as an undertaking which pursues economic activity on the market, considering it was engaged in competition with other insurance companies. The indicator of such an economic nature of the activity was the fact that the amount of benefits depended on the financial results of investments made. As the Court of Justice of the EU held in its relevant jurisprudence, the non-profit nature of the BMT Fund as well as the presence of the principle of solidarity in its activity were not sufficient to conclude that its activity should be placed out of scope of the applicability of competition market rules.

Finally, similar interpretations were provided in the case *Drijvende Bokken against Transport and Dock Industry Pension Fund (hereinafter: TDIP Fund)*[24] which was led on the refusal of Drijvende Bokken to pay contributions to the TDIP Fund. This fund was operating on the principle of capitalization and the amount of contributions and benefits were determined by it. It was relevant for the determination of the TDIP Fund as being engaged in economic activity on the market, considering the amount of benefits was closely linked to the financial results of the investment made by it. As in the

23 *Albany*, op.cit., fn 13, para. 81 - 83.

24 Case *C-219/97 Drijvende* [1999] ECR I-6121.

cases mentioned before, the fact that the TDIP Fund was operating on a non-profit basis as well as that its activity encompassed the element of solidarity was not determinant in defining its activity as an economic one. Also, the TDIP Fund was operating as an undertaking and the relevant market competition rules were applicable in that regard.

Having in mind all the aforementioned, it is evident that the economic nature of an activity (as well as the existence of an undertaking) depends greatly on the linkage of benefits to contributions made, or on the applicability of the principle of capitalization in the operation of insurance schemes. Furthermore, the prevailing social function of an insurance scheme can be an indicator of the absence of economic activity. More concretely, the operating of insurance funds which are totally directed towards the fulfillment of social objectives need to be sheltered from competition on the market. The further analysis will show what should be discernible in that regard.

The principle of solidarity and the justification of restrictions

The question which stands unanswered for further analysis is whether the elements of solidarity, even if present to a limited extent, can make some difference on the market. This question is grounded, considering that the insurers which are obliged to operate their business and provide services under the solidarity principle, and can be placed in a less competitive position on the market, if compared to those not operating under such an obligation. In other words, if the freedom to contract and freedom to frame the content of such contracts is limited with the principle of solidarity or certain social aims, it is evident that entities operating in this way will possibly be limited in making profit. Also, considering they are operating under the application of the rules on effective competition, such entities can suffer significant losses when they are exposed to intense market forces.

In that regard, it can be said that the presence of the elements of solidarity, as well as the orientation of the activity towards the fulfilment of social aims can serve as a justification of the restricted application of the rules safeguarding effective competition on the market. According to some authors (Ross 2009: 94), solidarity presents the central value, but also the instrument which serves the justification of restrictions which can result from the interplay between markets and social justice.

Even a limited presence of the principle of solidarity can be relevant for justifying the entrustment of certain special or exclusive rights which can provide "protected" market status in comparison with other insurers. Indeed, the fact that a certain entity operates with the obligation to apply the principle of solidarity, even when limited in scope, says that such an entity can suffer a less competitive position on the market in comparison with other entities. This amplitude actually leaves certain space for the derogation of the applicable rules on effective competition, in cases where such restrictions or derogations can be justified as being necessary and proportionate to the protection of the interest of the users. So, when it is necessary to derogate from the applicable rules on effective competition in order to protect the social aims and general interest of the insured persons, the insurance schemes can enjoy special rights and a special position on the market. However, the introduced derogations should not restrict competition more than it is strictly necessary in order for the objectives to be fulfilled and the general interest protected.

If the interpretations in the case *FFSA and Others* are taken into consideration, it can be concluded that the arguments put forward on the non-profit nature of the Fund, as well as on the principle of solidarity present within it were not considered as determinant while deciding on the classification of the Fund as an entity which pursues economic activity. The Fund was declared as being an undertaking. However, those elements were relevant while deciding on the ability of the Fund to compete on the market (and provide services) with other insurance companies under the provisions of competition law. Considering that the Fund was granted the exclusive right to manage supplementary pension schemes, it was important to see whether such rights can be justified as the rights conferred for the protection of the general interest.

Furthermore, in case *Albany* the intensity of competitiveness of the TIT Fund was relevant in order to establish whether or not the TIT Fund can be placed on an equal footing with other insurance companies on the market. In that regard, the Court of Justice of the EU elaborates the presence of the principle of solidarity in the activities of the TIT Fund. Actually, in case the principle of solidarity and pursuit of a social objective are present in the activities of a certain entity, they need to be taken into account and analysed in order to be able to determine to what extent the rules on effective competition (or in the relevant case on prohibited agreements) can be applicable in a particular case. Also, these elements were necessary for analysing whether the TIT Fund should be placed in the same position as other insurance companies which operate under dynamic market conditions. These two characteristics, as well as its purpose and existence, were crucial while deciding on the fact whether the TIT Fund was fully competitive or its competitiveness can be regarded as decreased in relation to other insurance funds and companies on the relevant market.

Considering that the supplementary pension scheme was fulfilling a social function within the pension system of the Netherlands, the Court of Justice of the EU pointed out that the removal of compulsory affiliation to the supplementary pension fund would lead to the possibility for employers to seek better insurance offers which could be agreed for young and healthy employees. Those employees present good risks, considering they have good health and they bring very low risks to the health insurance company as a whole. The gradual spill over of good risks would furthermore leave the TIT Fund with most of the bad risks insured, demanding greater financial resources for benefits. As a result, the financial stability of the TIT Fund may be brought into question, and in a situation such as this may result in shortages. Having in mind the lack of linkage between risks and contributions, and finally benefits, it is clear that the greater percentage of bad risks could seriously undermine the principle of solidarity incorporated into the activity of the TIT Fund. Also, it would seriously undermine the protection of the general interest. It was exactly these possibilities which justified the exclusivity of the rights conferred for the provider of services.

Distinguishing between the compulsory insurance schemes which were based on the principle of solidarity to a significant extent and those which

were intended to supplement the old-age pension scheme (compulsory in nature), it was clearly stated that the incorporation of the principle of solidarity carries great importance. In that regard, the fact that certain benefits from the insurance schemes are the same for all persons insured within such schemes (even in cases where contributions were linked to income), as well as the fact that pensions were funded by employed persons, were considered as the relevant indicators of the presence of solidarity to a greater extent in such schemes. Furthermore, the fact that the pensions were not linked to benefits paid, next to the fact of the financial reallocation of resources from the area having resources to the areas lacking resources, was relevant in order to determine that the principle of solidarity is significantly incorporated into the scheme. The named indicators imply that the scheme needs to be compulsory, as well as that such a scheme needs to be excluded from competition on the market as a whole.

However, supplementary optional insurance schemes (such as the one in case *FFSA and Others* or case *Albany)* intended to supplement the basic compulsory scheme were considered as being undertakings. In these cases, the schemes were operating on the basis of benefits which were linked to contributions paid, and investment made, so although present, the principle of solidarity was not incorporated into the schemes to such an extent to exclude the applicability of the competition rules. The non-profit character of the funds, as well as the limited presence of the principle of solidarity did not alter the application of the rules on market competition. Similar conclusions were drawn in case *Pavlov and Others,* where the intensity of incorporation of the principle of solidarity into the activity of the medical specialists' fund was not strong enough in order to classify the insurance scheme as being exempt from the rules on effective competition on the market.

Furthermore, in case *Brentjens' v BMT Fund* it was established that the activity was economic, while the rules on the effective competition on the market were applicable. However, the fact is that the presence of the principle of solidarity (even when it is limited in scope), next to social objectives and restrictions or controls on investments made by the sectoral pension fund, could influence the competitiveness of the BMT Fund by making it less competitive on the market. In that regard, it needs to be

pointed out that certain derogations concerning the applicability of the rules on effective competition need to be made. Having in mind the relevant case law, it can be said that the decreased competitiveness of such insurance schemes has been recognized. Although the relevant rules are applicable, they are applicable to a limited extent. Also, restrictions of effective competition can be acceptable, if they are properly justified. According to the literature, the protection of the general interest can be very helpful in that regard (Van de Gronden 2011: 139 – 140).

So, for example, in the present case the exclusive right for managing the supplementary pension scheme in a given sector can be justified by the fact that the removal of exclusive rights could jeopardize the fulfillment of the special rights conferred to the BMT Fund. Similarly as in the case *Albany*, the danger of the removal of exclusive rights can be seen in the possibility for undertakings with young employees (who are in a better health condition and who are engaged in non-dangerous activities, presenting good insurance risks), to turn themselves to the more advantageous insurance terms. Such spilling over of good risks towards other private insurers would actually result in greater shares of bad risks (meaning older employees, who are engaged in more dangerous activities) at the BMT Fund, with the eventual consequence of non-capability of the BMT Fund to offer pensions at acceptable cost to insured persons.

Considering that the Court of Justice of the EU has already ruled that the economic viability or financial balance of the undertaking entrusted with the operation of service of general economic interest should not be threatened in order for the justification of special or exclusive rights to be accepted[25], it is understandable that it would be sufficient to prove that the fulfillment of the special tasks of general interest would be jeopardized in case of the removal of exclusive rights. The result will be the justification of the restrictions of effective market competition and maintenance of the exclusive rights of the relevant insurance scheme. Again, solidarity has played a significant role in justifying the restriction of competition and entrustment of special rights. In all cases where contributions do not reflect insured risks, such restrictions could be necessary and such justifications could find their place.

25 C-320/91 *Corbeau* [1993] ECR I-2533, para. 14 to 16.

It is interesting to observe the level of solidarity present in the justification grounds. If the principle of solidarity characterizes the insurance scheme as a whole, then the activity would be sheltered from the intense competition arena and the relevant rules on effective competition on the market would not be applicable at all. If the principle of solidarity is present in a certain insurance scheme, but to a limited extent, then the entity will be subordinated to the relevant rules on effective competition on the market. However, in case such an entity suffers a less competitive position on the market due to the principle of solidarity (and the necessary fulfillment of social aims) then there is the possibility to tolerate the necessary and proportionate restrictions of the effective competition on the market.

Conclusion

The principle of solidarity significantly influences the position of the insurance schemes on the market. Also, it is closely linked to the pursuing of social aims and social policy objectives. The principle of solidarity can be manifested in various ways in practice. For example, it can be said that the absence of the linkage between contributions paid and insured risks, as well as any rights referring to the possible redistribution of financial resources imply that solidarity is present. Furthermore, solidarity carries great relevance in determining the nature of the activity (and existence of an undertaking) and the applicability of the rules on effective competition on the market. The insurance schemes can be exempted from the applicability of the relevant rules. However, in order to succeed in this, the insurance funds need to be characterized as having the principle of solidarity in their essence. In case solidarity marks such schemes but to a limited extent, the activity and behaviour of the insurance entity will be marked as economic and subordinated to the applicability of the rules on effective competition on the market. However, there is a possibility to limit the scope of the applicability of the rules on effective competition in as much as it is necessary to compensate for the decreased competitiveness on the side of the insurance entity. Of course the particularities of each case will determine whether the activity in question can be exempted from the competitive market arena.

In that regard, the principle of solidarity presents the significant benchmark in deciding on this matter.

The Member States have significant discretion in organizing and regulating their social systems. Also, they have significant discretion in assessing the level of the principle of solidarity, which marks a certain insurance activity. The particularities of each national pension system will be relevant in that regard, while the individual Member State will have the right to organize the functioning of the pension systems.[26] In case *Pavlov and Others,* the Advocate General Jacobs pointed out that the supplementary pensions present a matter of great significance in social terms in the EU Member States. Also, the Advocate General Jacobs again underlined the discretion of the Member States in organizing their social security systems.[27]

Such discretion can be tricky, because it leaves space for wider interpretations of the principle of solidarity for the sake of final users. In other words, the Member States can determine that the principle of solidarity is present in a certain activity (more or less). Furthermore, they are enriched with the power to cover various protective measures on the market which benefit one insurer, under the mask of the protection of social aims, and the implementation of the principle of solidarity. Such a situation creates greater legal uncertainty. It is true that the national courts (or even the Court of Justice of the EU) can offer certain safeguards of the interest of insured persons if the case is brought to their attention. Still, greater clarifications are definitely needed in order to clarify certain issues. For example, the principle of solidarity should be defined through its main elements, and such a definition needs to be used in the whole EU. Obviously, the Court of Justice of the EU considers that a certain activity needs to be characterized as an economic one, in case it is based on the capitalization principle, or in case its benefits depend on its financial investment or contributions. Also, if there exists no distribution of financial resources between those who are still working and those who are retired, or between those who have financial resources and those who do not but receive their pension, such an insurance scheme cannot invoke the exemption from the relevant rules on effective market competition.

26 Case C-238/82 *Duphar and Others* [1984] ECR 523; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, para. 27.

27 As it was explained before, such reasoning was underlined through the relevant case law (for example, Duphar v Netherlands, Ibid., para. 16).

Having in mind the analysis made, it needs to be stated that the Court of Justice of the EU is quite reluctant in relation to the declaration of the exemptions from the rules on effective competition in cases of insurance schemes marked with the principle of solidarity. This opens the space for further diversification of interpretation and grey areas. However, such a cautious approach of the Court of Justice of the EU can be understood if the discretionary powers of the Member States are taken into consideration. The eventual solution can be seen in the clearer definition of the principle of solidarity as the adjudicatory benchmark for the applicability of competition rules. More precise criteria applicable in each case are necessary in order to decrease the level of legal uncertainty.

Finally, the compulsory affiliation to certain insurance schemes needs to be constantly observed. Market forces have their value in ensuring good insurance on the market. The possibility to choose between insurance packages and options is desirable, considering it influences the service of the insurer and the whole market to be more efficient, productive and closer to the user. In that regard, the reservation of certain insurance funds as compulsory ones cannot be regarded as the best solution in each case. These thoughts are in compliance with the selected interpretations and case law. According to the selected case law it seems that economic activity exists always where it cannot be considered that the principle of solidarity encompasses the activity as a whole. In other words, if the indicators of solidarity do not prevail to a significant extent, the Court of Justice of the EU concludes that the activity is covered with the rules on effective competition on the market.

However, it is true that the financial resources for pensions need to be secured. This can be acceptable if it can only be realized through the establishment of compulsory affiliation to one insurance scheme. The careful application of the proportionality principle is necessary in order to ensure that such shelters are provided for insurance schemes very exceptionally. Only in this way possible misinterpretations and hiding under the umbrella of the principle of solidarity with completely different intentions can be decreased to a minimal extent.

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