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The purpose of the present study is to explore the interaction between, on the one hand, EU State aid law and, on the other, social and health services. This issue – which falls within the wider debate on the «infiltration»[1] of EU law into «national social spaces»[2] – comes increasingly under the scrutiny of the Commission and of the EU Court of Justice (CJEU), raises new questions and is characterised by a significant degree of uncertainty.

The analysis is carried out within the framework of EU primary, secondary and soft law, as well as of the case-law of the CJEU and the Commission's sectoral practice.

The matter is examined through the lens of the relationship between State, market and welfare provision, a topic which is at the core of the current debate on services of general economic interest (SGEI).

The primary objective of this research is to understand how the SGEI legal framework concerning State aid is applied, and adjusted, in the field of social and health services. The analysis will however also look beyond SGEIs, investigating which other avenues are available under EU State aid law to allow public support in the welfare sector.

The first chapter sets the stage for the analysis. The starting point is the meaning of the expression «social and health services». The notion in question does not correspond either to an EU law concept or to a shared notion in the laws of the Member States. Therefore, in order to understand what «social and health services» are, an overview of the history, theory and practice of welfare systems in Europe is provided. The meanings assigned to the notion of «social services» at the

[1] The term was used for the first time in G. LYON-CAEN, *L'infiltration du droit du travail par le droit de la concurrence*, in *Droit ouvrier*, 1992, p. 313.

[2] On the concept of «national social spaces», see M. FERRERA, *Social Europe and its Components in the Midst of the Crisis: A Conclusion*, in *West European Politics*, 2014, pp. 825-843 and F. COSTAMAGNA, *National social spaces as adjustment variables in the EMU: A critical legal appraisal*, in *European Law Journal*, 2018, pp. 163-190.

national level are also briefly addressed. The focus is then shifted from the national to the EU level, exploring the boundaries, scope and function of the concept of «social services of general interest» (SSGIs) and investigating the relationship between this notion and the other EU categories concerning public services, such as «services of general interest» (SGI), «services of general economic interest» (SGEI) and «non-economic services of general interest» (NESGI). After that, a description of the EU legal framework on social and health services is provided, covering primary, secondary and soft law. Finally, the chapter addresses the issue of the adoption of a comprehensive legal framework on SSGIs. This section considers the legal and political feasibility, the desirability and the possible content of such a solution.

The purpose of the second chapter is to understand whether, and to what extent, entities operating in the health and social sectors can constitute undertakings within the meaning of art. 107 TFEU, thus falling within the scope of State aid law. To this end, the «functional» notion of economic activity, as developed in the case-law of the CJEU, is explored. The analysis focuses, in particular, on the peculiar features that this notion acquires in the context of the health and social sector, distinguishing between social security and healthcare. In order to establish whether a social security scheme is economic in nature, the Court's assessment is based on the respective importance of the economic and solidarity features of the system. Such an approach entails a flexible application of the functional and abstract criterion, as the Court considers the organisation and functioning of the scheme at issue in light of the specific and actual legal framework governing the system. There is still uncertainty as to the criteria that the Court uses in order to decide whether the economic or the solidarity features are predominant in a given regime. In the field of healthcare, a tension between a "classic" and an "attenuated" version of the functional

approach can be identified. There appears to be a tendency to rule out the economic nature of the activity when a «Beveridge» healthcare system is at issue, whereas entities operating in the context of a «Bismarck» model are generally viewed as undertakings. As welfare systems increasingly acquire a "mixed" nature, combining elements from both the «Beveridge» and the «Bismarck» models, it might be desirable to develop a more nuanced approach, making sure that the criteria adopted are capable of capturing the complexities that characterise the systems in practice. The question of the economic nature of social and health services should be placed in the context of the modernisation processes that Member States initiated to respond to the current welfare crisis. Such transformations, whereby economic efficiency and competition elements are embedded in social and healthcare systems, make it increasingly likely that EU institutions will conclude for the economic nature of welfare activities, thus subjecting them to the application of competition law.

In light of such a prospect, it is vital to ensure that the provisions of State aid law are applied in a way that adequately takes into account the peculiar nature of welfare services. Chapters 3 and 4 are precisely concerned with the question whether, and to what extent, the application of State aid rules is, or can be, adjusted when health and social services are at issue.

The third chapter sets out the legal framework on the financing of social and health services in light of State aid law. After sketching the core features of the EU State aid provisions, the analysis focuses on what the compensation of public service obligations entails from a State aid law perspective. In this regard, the *Altmark* case has clarified under what conditions public service compensation does not constitute State aid. In *BUPA*, where health insurance was at issue, the EU judges opted for a "light touch" in the application of the *Altmark*

criteria. The chapter subsequently addresses the SGEI Packages, focusing on the status of social and health services under the *Almunia* Package. An important development in this regard is the «Evaluation of State aid rules for health and social services of general (economic) interest and of the SGEI de minimis Regulation» launched by the Commission on June 17, 2019. The objective of the initiative is to verify to what extent the current SGEI Package is adequate in relation to the welfare sector.

The fourth chapter examines if and how the CJEU and the Commission adapt and modify the application of State aid law when social and health services are at issue. In the context of social housing, both the Commission and the General Court subjected access to the flexible treatment granted by the *Altmark* SGEI Decision to the condition that the States' housing policies were in line with the "European" concept of social housing as developed by the Commission. Furthermore, by applying in this sector the principle that an SGEI must be «necessary and proportionate to a real public service need»,[3] the General Court potentially opened the way to a pervasive control by the institutions as to how welfare services are organised at the national level. Concerning healthcare, the Commission's approach appears to be more flexible. Much like in social housing, the issue has often been about the margin of discretion held by Member States in the definition of SGEIs. Unlike what happened regarding housing policies, the Commission appeared unwilling to examine whether the actual situation in the national market justified the imposition of public service obligations, adopting a more cautious and formal approach. As regards the General Court, the *CBI* judgment expresses a tension between the recognition, in principle, of the peculiar nature of

[3] General Court, 15 November 2018, case T-202/10 RENV II, *Stichting Woonlinie*, para. 81.

the hospital sector and the adoption, in practice, of a rigorous approach which appears to mark a shift away from the "light touch" *BUPA* case-law. The Commission's practice on social security also signals that the *BUPA* «alternative» *Altmark* test seems to have been abandoned. In particular, the third and fourth *Altmark* conditions are usually applied strictly. Moreover, when assessing the compatibility of aid measures under art. 106, para. 2, TFEU, the Commission has the ability to significantly influence the structure of social security systems. At the same time, the practice shows that it is sometimes sufficient to adjust certain design elements to ensure that the measure is compatible with the internal market.

The SGEI framework is not the only avenue to reconcile public support to welfare and State aid law. In this regard, the Commission's practice according to which services of a "purely local nature" do not constitute State aid has a significant potential in the health and social sectors. Further options are offered by the derogations concerning aid having a social character granted to individual consumers and aid aiming to facilitate the development of certain economic activities or of certain economic areas.

The overall picture is finally examined in light of the Lisbon Treaty, which strengthened the social dimension of the Union in terms of values, objectives and, by granting the Nice Charter the same legal values as the Treaties, fundamental rights. The innovations brought about by Lisbon present a remarkable potential in guiding the action of the institutions in the application of the State aid provisions to the social and health sectors. The new primary law framework requires the institutions to take into account the social value of such services when interpreting and applying State aid law. The *Almunia* package

moves in this direction, by establishing in the SGEI Decision[4] that aid granted in certain social and healthcare sectors is compatible with the internal market and exempted from the notification obligation. However, certain welfare sectors, such as social security, do not fall within the scope of the Decision; moreover, in order to benefit from the Decision, the measures at issue have to comply with a set of stringent conditions. Therefore, the interpretation of the State aid rules given by the Commission and the Court is crucial to ensure that welfare services are safeguarded. When applying the *Altmark* criteria, the conditions established by the SGEI Decision and the requirements to determine the compatibility of a measure, the action of such institutions must be informed by the protection of social values and of the wide discretion of Member States in the SGEI area, as provided in primary law. In this regard, the *CBI* judgment[5] restates and develops the principle, established in *BUPA*, that certain sectors should be afforded a special treatment. The General Court explicitly recognises that «although the conditions stated in the *Altmark* judgment and in the SGEI package concern all sectors of the economy without distinction, their application must take into account the specific nature of the sector in question».[6] In particular, as held in *BUPA*, «in the light of the *particular nature* of the SGEI mission in *certain sectors*»,[7] it is appropriate to show flexibility with regard to the application of the *Altmark* criteria, «in a manner adapted to the particular facts of the […] case» at hand.[8] Applying such reasoning to the health sector, the judges state: «the criteria laid down by the Court of Justice in the

[4] See Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (hereinafter, «SGEI Decision»).
[5] General Court, 7 November 2012, case T-137/10, *CBI*.
[6] *Ibid.*, para. 85.
[7] *Ibid.*, para. 86. Emphasis added.
[8] *Ibid.*

Altmark judgment concerning transport, which is unquestionably an economic and competitive activity, cannot be applied as strictly to the hospital sector, which does not necessarily have such a competitive and commercial dimension».[9]

It is not yet clear what the flexibility invoked by the judges implies in practice. It is possible, in this regard, to identify certain problematic areas and to speculate on possible developments and actions with a view to strengthening the ability of EU State aid law to take into account the specific nature of welfare services.

A first issue concerns the definition of SGEIs and, in particular, the role of the existence of a market failure as a precondition to establishing a SGEI and the interpretation of the concept of «manifest error», which circumscribes the scope of control that the institutions are entitled to exercise concerning Member States' choices in this field. The General Court's judgment *Stichting Woonlinie*, establishing, in the context of social housing, that the manifest error review includes verifying that the SGEI is «necessary and proportionate to a real public service need»,[10] transposes to the welfare sector a principle developed in the *SNCM*[11] case, which concerned an harmonised sector. Such an approach is at odds with the case-law according to which the intensity of the control that the institutions can exert varies depending on whether a sector is harmonised or not.[12] The position adopted in *Stichting Woonlinie* is not consistent with the protection of social values and with the «wide

[9] *Ibid*, para. 89.
[10] *Stichting Woonlinie*, para. 81.
[11] General Court, 1 March 2017, case T-454/13, *Société nationale maritime Corse Méditerranée (SNCM) v. Commissione*.
[12] *Ibid.*, para. 113: «where there are specific rules of EU law governing the definition of the content and scope of the SGEI, they are binding on the Member States' discretion». See also point 46 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest.

discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest»[13] recognised by primary law. It is therefore desirable that the institutions revisit this approach, returning to a rigorous interpretation of the concept of «manifest error».

I believe, moreover, that the Lisbon framework can play a crucial role in guiding the compatibility evaluation under art. 106, para. 2, TFEU and art. 107, paras 2 and 3, TFEU. For example, the approach of the *Altmark* package with regard to the compensation calculation has been described as «éminemment comptable».[14] It might be useful to start reflecting on the possibility of embedding considerations that are not strictly financial in the determination of the level of compensation, in particular in the SGEI Decision, which, as discussed, is especially relevant for the welfare sector.

The Member States, finally, should embrace a logic of openness and cooperation towards the EU institutions, as this is the only way to effectively protect their «social sovereignty». The Commission's practice and the case-law show that it might be sufficient to adjust certain elements in the design of the system to ensure the compatibility of the measures. Moreover, as shown by the British «National Employment Savings Trust» case,[15] the obstacles to public intervention might stem from a wrong interpretation of the EU rules by the national authorities rather than from the rules themselves. It is only by cooperating with the institutions that such mistakes can be avoided.

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[13] Protocol no. 26 on services of general interest.

[14] F. MARTUCCI, *Faut-il des catégories de l'économie sociale de marché ? Une lecture des catégories de services*, in B. BERTRAND (dir.), *Les catégories juridiques du droit de l'Union européenne*, Bruxelles: Bruylant, 2016, pp. 353-354.

[15] Commission Decision C(2014) 4071 final of 25 June 2014, State aid SA.36410 (2014/N) – United Kingdom, Modifications to the National Employment Savings Trust – NEST.

The Rome Treaty was founded on a «division of labour» according to which the supranational level would deal with economic integration, while national competences on social policy would remain intact. It is obvious that such arrangement does not reflect the actual situation. If the permeability of national social protection systems to EU law is undeniable, the study of the interaction between State aid law and welfare services shows that the EU rules in this field grant the States significant margins for effectively pursuing social objectives. This does not mean that the relationship between welfare and State aid law is unproblematic: the Commission and the Court, when adopting decisions in this field, are faced with an extremely complex and delicate task. This clearly emerges from the uncertainties and contradictions that characterise the case-law and decisional practice. I believe, however, that the EU legal order provides the tools to adapt the application of the State aid provisions to welfare services, in compliance with the primary law framework, and that, by progressively refining the criteria on the basis of which the special nature of welfare is taken into account, a sufficient degree of legal certainty can be ensured. In a landscape of ever-growing mistrust towards the Union's ability to adequately protect social values, the interaction between State aid law and welfare services casts a positive light on the chances of reconciling the economic and social spheres in Europe.