Public Private Partnerships in the social Healthcare Systems

Patrina Paparrigopoulou,
Ass. Professor, University of Athens

INTRODUCTION

The term «social health care systems» refers to systems in which the degradation of human health is considered a social risk. These systems are divided in:

a) National healthcare systems, namely systems that cover the entire population and are financed mainly by the State through taxation (e.g. United Kingdom, Ireland, Denmark, Finland, and Sweden),

b) Social insurance based systems that cover the insured and are financed by the social insurance funds through contributions (e.g. Germany, Austria, France, Belgium, Luxembourg, the Netherlands etc.) and

c) Mixed systems where the national health care system operates but it is financed by social insurance funds and the State (e.g. Greece, Italy, and Spain)[1].

Partnerships in healthcare systems raise two basic questions, which is the focus of this paper. Firstly, if the particular nature of the healthcare activity imposes the establishment of a specific legislative framework different from the general one in force for partnerships in the other sectors of the administrative action (A.).

Secondly, if european legislation and case law on the internal market and competition influence the formation of PPPs and furthermore if they result in a 'quasi-harmonisation' of the social health care systems and a de facto limitation of the relative competence of the EU Member States (B.). In other words, if social insurance funds and social healthcare organizations have an economic activity and are

[1] *V. Xatzopoulos,* "Health Law and Policy"J, "The Impact of the EU", Selected Courses of the Academy of European Law, EUI/OUP 2003.
A common point of all social health care systems is social solidarity. The case of national health systems is about national solidarity and it is summed up in the equal right of citizens receiving proper health goods and services through the payment of taxes according to income. If health insurance finances national health systems, it is about solidarity among the members of the insured group (internal) and this finance is summed up in the equal right of citizens to insurance coverage through the insurance capital, which is formed from contributions according to income.

considered under the EU law as undertakings, then partnerships with private sector are they still characterized as PPPs or are they the equivalent to Private – private partnerships?

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A. Necessary establishment of specialized scheme for partnerships in social health care systems.

1. Partnerships from a legal standpoint are not a novum[2]. The concept of partnerships is not defined in the EU law, however, it is accepted[3] that it refers to every type of contractual relation between public authorities and private undertakings in relation to construction projects or provision of goods and services in the administrative action sectors and that there are two types of partnerships:

a) The "institutional" represented by the creation of a new legal entity in which at least one public authority and one or more private undertakings participate, or in the participation in an existing legal entity of at least one public authority and one or more private undertakings.

b) The "conventional" with which public authorities enter into contracts and assign the provision of goods and services to private undertakings.

The characteristics of the partnerships do not constitute a special legal category that enriches the existing ones[4]. The practice of entering into partnerships

[2] The relation between the public and private sector regarding the sub sectors of administrative action is foremost connected to ideological choices and financial parameters and is one of the fundamental issues that every legal order regulates.

[3] European Commission, Green Papera on Private Public Partnerships and European Law on Public Contracts and Concessions, COM(2004) 327 final.

[4] Cited in literature see indicatively, *Sp. Panagopoulos* "The new institutional framework of partnerships between the public and the private sector after Law 3390/2005", in "PPP, L. 3389/2005 for partnerships of public and private sector, ed. A. Kaisis" (in Greek), p. 44, in the same collection see *A. Kaidatzis*, "The field of application of partnerships between the public and the private sector. A constitutional ruling in light of the case law of the Council of State", p. 65, the following as characteristics of partnerships:

- Long duration of the relation among partners
- Financing a project in total or in part by private capital (own funds and loans) without excluding partial public funding.
- The payment of the contractual consideration.
- Partitioning the risks of the project. According to the methodology of Eurostat only in the case where the private partner assumes a large portion of the risks (and particularly construction risk and also the availability risk or the demand risk) the liabilities assumed by the Public sector from the partnership is permitted not to be accounted in the public debt of the country.
- The increased role of the private partner that can participate in different phases of the project (study, construction, funding, management, etc.).
- Application of the EU law. In particular, the principles of free establishment and free services

between the State and public and private authorities in general with the object to construct a public project or grant a pubic service, is known for years now, as well as the participation of public authorities and private entities in joint ventures[5]. These actual partnerships are not something new, but their objective is. The establishment of a single market in the EU is based on the ideas of free competition, the priority of the market as a mechanism for regulating economic and social relations and an acceptance that the consumers will benefit in terms of productivity, quality of services and innovation. The objective of the State and public authorities in general, is to step back from productive or enterpreneurial activities and to be limited to regulatory activities and in the fulfilment of certain missions, e.g. national defence, public order, etc. Partnerships contribute in succeeding the above objective because:

- In case where the Member States establish special legislation, this would result in the simplification and systemisation of the usually dispersed regulations and the creation of an environment of trust and security in order to attract partners from other Member States in the EU.

- They are considered to be financially more efficient compared to traditional public contracts; this however should be demonstrated with specific financial data[6].

- Governments can carry out projects through partnerships and provide services that would require spending a greater percentage of their budget; this however applies only if the project or the service can be financed without raising the users' expenses in a manner that would block or limit their access to the goods and services and provided future generations are not unreasonably impacted.

2. Healthcare activity is special because of its scope, the way the market operates and the involvement of the "social sector of the economy" along with the public and private sector. In greater detail:

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provision apply (articles 43 and 49 of TEC) and the principles of public contracts (transparency, proportionality, equal treatment of candidates, non-discrimination etc.).

5 *Ep. Spiliotopoulos*, Public owned companies, ed. I. Zacharopoulos, 1963, p. 3.

6. In France, for example, the prior evaluation of the economic results in relation to traditional contracts, so that it results that the partnership is the best solution to meet the public interest, is the requirement for the partnership. On the contrary, in Greece Law 3389/2005 for partnerships does not stipulate such obligation, as it presumes that partnerships, in any case, are more beneficial than traditional contracts.

a) Health care activity refers to the rehabilitation and maintenance of human health and prevention of its degradation[7.] Its object, namely human life and health, differentiates it from other activities and services[8].

Sometimes healthcare activity is divided into clinical and administrative.

- Regarding hospital care, clinical activity is excluded from partnerships as a rule. There are exceptions like Portugal and Spain. Partnerships, as a rule, pertain to cleaning services, disposal of hospital waste, diet, security etc.
- On the contrary, social insurance funds enter into agreements with natural and legal entities, which have as their main scope clinical activity, as a rule, for external hospital care, for example extra clinical tests, physiotherapy etc.

Therefore, it is not the nature of clinical activity that sets limits in partnerships since external hospital clinical activity as a rule can be the subject of contractual regulations, but the prevailing perceptions in every country and the way the system has been organized.

b) The percentage of GNP provided for healthcare activity is rather high in all Member States of the EU[9]. The social healthcare systems try to provide high quality services to the users and diminish their cost. To date in EU we can see two directions: from one side the French concept of "public service" (service public) and the cooperation of the public sector with the profit and non profit private sector and from the other hand, the English inspiration for the infiltration of rules and competition techniques in the healthcare system through the regulation of supply and demand.

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7. *B. Bonnici*, La politique de la santé en France, ed. PUF, Que sais-je, [3]2003, p. 60, *C. Évin*,, Les droits des usagers du système de santé, ed. Berger - Levrault, 2002, p. 49.

[8] Health law as a scientific branch has been developed during the last decades and this is due to three main reasons: The significance acquired by the right in protecting health after the Second World War, the prevalence of the idea that health is the State's responsibility and the extent and variety of possibilities but also the risks to health because of the use of modern science and technology achievements. Under these conditions States focus on regulatory activities limiting their involvement in the productive activity. See *J. Moreau., D. Truchet*, Droit de la santé publique, ed. Dalloz, [6]2004, pp. 6-9.

9. These expenses take up the second place in the EU and they show grave increasing trends, due to the increase of life expectancy, the diseases of senior citizens and the rapid progress of technology. The OECD has recorded this problem since the early 90's.

Public service in its functional meaning[10] is perceived as an objective limit of governmental authority. According to Duguit, *social solidarity* and, according to Hauriou, *social contract,* are the bases for limiting governmental authority[11]. Social solidarity is based on social objectives that make public services a guarantee for social cohesion, namely due to the existence of the State. Therefore, only public services can satisfy the greater needs of society. The State guarantees public interest by issuing general and abstract rules of law. In English law, on the contrary, there is a fair perception that the general needs of society can be satisfied through the operation of the market, and where this is not possible, through public utilities. The State is none other than a referee in the disputes between consumers and producers and the rules of law primarily come from custom and case law.

The operation of the market can contribute to the regulation of the supply of services and health goods through the competition among entities that offer such goods and services. But it cannot contribute to the regulation of demand in services and health goods because we have an *imperfect market*[12] given that this need is determined primarily by health professionals and not by users, who, as a rule, do not have the sufficient scientific and technical knowledge to decide themselves. The inherent inability of the market rules and techniques to regulate the demand side in health services and goods justifies the State intervention. Therefore State regulation is necessary to keep demand and supply in balance.

c) Also operating in social healthcare systems is the so-called "social economy sector" or "third sector" which does not have a profiteering nature, it is based on the principle of solidarity and one vote for every member, producer, user or consumer[13]. The World Health Organization (WHO) and the International Labour Organization (ILO) deem partnerships as the collaboration of public authorities, private companies

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[10] *Ep. Spiliotopoulos*, Greek Administrative Law, ed. A. Sakkoulas-Bruylant, 2004, p. 12. "Public services in its material meaning is the activity of public legal perisons or individuals or private legal persos who act by cncession and has as its object the provision of goods or services to the public for the satisfaction of certain public needs, determined in each instance by the legal order (e.g. education, public transport, water supply, telecommunications, postal service, provision of electric energy etc.)".

11. *J. Chevallier,* «Regards sur une évolution», AJDA, June 1997, p. 10.

12. See *J. Allsop*., Health Policy and the National Health Service, ed. Longman, 1985 ό.π., p. 198, who refers to B. Abel -Smith., Value for Money in Health Services, ed. Heineman, London, 1976, κεφ. 4, *R Klein*, The Politics in the National Health Service, ed. Longman, 1983, p. 153 κε, J.-P. Dumont, Les systèmes de protection sociale en Europe, ed. Economica, [4]1994, p. 47

[13] *A.-F Cammilleri*., La protection sociale en Europe, εκδ. GLN Joly, 1993, p. 336 s.

and the sector of social economy [14]. Public social private partnerships (PSPPs), as a special category of partnerships, are developed internationally. The originality of the PSPPs is that non-profit entities collaborate with public authorities and private companies to achieve a social objective and in this case to improve health, especially of the vulnerable population groups[15]. The basic benefit of PSPPs is that social services are not regulated top-down, but in cooperation with the society of citizens[16]. An illustrative example is the collaboration of the WHO, Phizer and the Bill and Melinda Gates Foundation to produce vaccines for the countries of Africa. The EU, without expressly excluding the sector of social economy, does not boost such co-operations[17]. Therefore, the institutional framework does not take full advantage of all the potential in the health sector. Naturally, taking advantage of the social sector of the economy requires certification procedures, evaluation of the economic and social benefits of each third sector participant, control of their activity and mainly coordination with the public authorities and undertakings. This issue is still in the stage of infancy in the EU and in many Member States.

3. Examples from UK and France.

Regulating the supply of health services can be performed by introducing rules of competition and market mechanisms and by evaluating the provided goods and services.

The health care system in the United Kingdom allows organized groups of doctors or even insurance companies to obtain specialized healthcare services and offer them during a period of time to their subscribers for a pre-established price that it is advanced in regular instalments (Health Maintenance Organizations)[18]. These organized groups either provide services or negotiate and obtain hospital and other specialized services from third parties (doctors, hospitals, special centres etc.) The function of Health Maintenance Organizations invalidates the inherent trend of

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[14] *R. Widdus*, «Public – private partnerships for health: their main targets, their diversity, and their future directions», Bulletin of the WHO, 2001, 713 κε *M. Reich*, «Public-private partnerships for public health, Nature Medicine», v. 6, 1990, p. 619.

[15] *M. Reich,* ibidem.

[16] *Chr. Bovin*, «The Development of Public Private Parnterships at European level», EPPPL Review, 1/2006, p. 5.

17. Legislation in some EU member-states, e.g. in Greece, epxpressely refer to companies and therefore exludes the the sector of social economy.

[18] See *J.-P. Dumont*, op.c. p. 52, *J.-J Dupeyroux., M. Borghetto, R. Lafore, R. Ruellan*, Droit de la sécurité sociale, Précis Dalloz, 142001, p. 291 κε, *J.-P Chauchard*., Droit de la sécurité sociale, εκδ. L.G.D.J., ^{3}2001, p. 260 κε, *N. Destais*, Le système de santé. Organisation et régulation, εκδ. L.G.D.J., 2003, p. 212 s.

excessive consumption that characterizes every health system. Providers, in order to attract and keep their members, offer attractive-competitive prices and high quality services.

In France the public service of hospital care[19] permits the establishment of a relationship of collaboration between the public and the private sector: Both sectors cooperate and benefit mutually from the existing medical equipment. By this cooperation the over-coverage of risks and subsequent waste of resources is avoided taking into account that medical equipment can often be extremely costly. Administrative control, relevant to the suitability of the supply of private health care services that participate in the public health service, includes licensing and operational control. This cooperation is superior to partnerships, because the latter pertain as a rule to a single project or service and not to the cooperation and coordination of the private with the public health services sector, in order to avoid waste of resources and better quality of healthcare services. Therefore, partnerships when compared to the traditional public contracts have better economic results but their contribution in order to diminish the cost of health care systems is not enough. The collaboration extends, beyond the public hospital care service and the establishment of a common method of funding public and private hospitals, to the creation of a structure that promotes the coordination of the private with the public sector[20] and the joint provision of services to the population, such as for example the formation of health networks[21].

In conclusion, there is a need for the development of a European policy and probably a scheme for partnerships in social healthcare systems that would respond to the nature of the healthcare activity. All available possibilities and in particular the

19. The commissioning of a public service, in the functional sense, to private agencies is termed "concession". Such concession is made for a specific period a) by a contract concluded with the State or other public authorities and is sanctionned by a legislative act or approved by a regulatory administrative act, or b) by an administrative act. The contract or act of concession determines in detali the terms in which the concessionnaire has an obligation to supply the public with goots or provide the services. See *Ep. Spiliotopoulos*, Greek Administrative Law, op.c., pp. 257-258.

20. *M. Dupont, C., Bergoignan-Esper, C. Paire.,* Droit hospitalier, εκδ. Dalloz, 2007, p. 35 s: *J.-P Duprat*, «La portée des normes dans le domaine de la biomédecine», RFAS 3/2002, p. 248 s.

21. The health networks aim at the facilitation of access to health care, the co-ordination of constant and multidisciplinary approach and education, the ensuring of the patient's care relevant to his needs, the prevention, the rating and the participation in the actions of public health. They consist of experimental care networks and hospital care networks. Also participating in these are public and private legal entities as well as health professionals. Payment of the participants in health networks is made in advance. They are particularly regulated by articles Law 6321, D 766.1.1 of the Public Health Code and may acquire the legal form of a union. See *Fr Ponchon*., La loi du 4 Mars 2002. La mise en pratique. La loi relative aux droits des malades et à la qualité du système de santé, ed. Berger-Levrault, 2003, p. 70, *J. Moreau ., D. Truchet*, p. 168, *K. Souliotis*, The role of the private sector in Greece, Papazisi ed., 2000, p. 71.

social sector of economy must be utilized and coordinated. Even if health is to be considered a commercial good, the inefficiency of the market mechanisms to regulate the demand side requires the intervention of the State. The inappropriate legal framwork for PPPs for social healthcare systems explain the small growth they have. Their majority involves the development of basic infrastructures, while the provision of services becomes secondary and institutionalized partnerships are almost non-existent. As a consequence collaboration of private, social and public sectors is necessary within a market mechanism and the supervision of the State.

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B) 'Quasi-harmonisation' of social healthcare systems in EU through legislation and case law for the internal market, State aid and competition

In the EU the organization and operation of social insurance systems and social healthcare systems falls in the competence of the Member States. However, provisions for the internal market provide for the establishment of binding rules of law (articles 39-61 TEC), either to facilitate free movement of people, services and capital or to be restricted in order to protect public health. These provisions, as well as provisions for competition (articles 81-85 TEC), which are gradually enriched and interpreted by the ECJ, affect national health protection systems and are sometimes questioned relevant to the implementation of the principle of subsidiarity[22]. The findings of the ECJ case law relevant to free movement, State aid and competition of the social healthcare systems are examined below.

1. Relevant to free movement case law, regardless of whether or not it involves a national health system or insurance based healthcare system or a mixed system:

a) It has extended the right of European citizens to health services and goods to other Member States of the EU, and directly accepts the parallel application of the primary law for free movement with the secondary law and in particular with the Regulation 1408/1971, as in force.

[22] Art. 5 par. 2 TEC. During 1958-1998 the Community based on the provisions for the internal market published 233 Regulations, Directives, Proposals, Recommendations, and OCJ Decisions which affected the national health systems, see European Commission, Health and Consumer Protection DG, The Internal Market and Health Services Report, of the High Level Committee on Health, 17.12.2001, http://www.europa.eu.int, p. 19.

b) It has accepted that medical services and health services in general are covered by the scope of articles 49 and 50 of TEC for free provision of services, independently if they are provided inside or outside the hospital[23].

c) It has accepted that the user of services does not need to personally pay the cost in order for hospital care[24] to be an economic activity. It is sufficient that its insurance organization has contractually assumed the funding of care on the basis of a pre-determined services provision invoice.

d) It has also accepted that health services that are provided free by the national health system financed from taxation constitute an economic activity subject to provisions for the internal market[25].

e) It has accepted that mandatory affiliation for the risks of an accident at work and occupational disease in a statutory social isnurance scheme must be in compliance with articles 49 and 50 of TEC. Therefore, it must be viewed ad hoc:

1) If the compulsory statutory insurance system, as in the case of Germany, excludes or impedes the insurance companies established in other Member States, which insure the same risks, to offer their services to the German market and also discourages companies operating in Germany to enter into contracts with insurance companies from other Member States[26].

2) If these restrictions can be justified by mandatory reasons of public interest, e.g. risk of disturbance of the economic equilibrium of the social insurance system.

The reasoning of this decision could also perfectly apply to the health insurance, in case there is an issue of compatibility of the mandatory affiliation to a statutory scheme of health insurance.

2. In the area of State aid the decision for State aid in the form of compensation in order to provide public service, approved after 2005 and often called package of Altmark measures, is based on the following principles: Member States determine which services are of general economic interest. The award procedure

[23] ECJ 286/1982 & 26/1983, Luisi and Carbone, ECR 1984, 377, ECJ C-159/1990, Society for the protection of unborn children Ireland, ECR 1991, I-4685, ECJ C-158/1996, Kohl, ECR 1998, I-01931 και C-120/95, Decker, ECR 1998, I-01831, C- 368/1998 Vanbraekel, ECR 2001, I-5363.

[24] ECJ C-157/1999, Smits και Peerbooms, ECR 2001, I-5473, ECJ C-385/1999, Müller-Fauré and Van Riet, ECR 2003, I- 04509.

[25] ECJ C-372/2004, Watts, ECR 2006, I-04325.

[26] ECJ C-350/2007, Kattner Stahlau GmbH not yet published in ECR.

allows compensation of entire net cost that is charged to companies, which undertake these missions. There is no need for notification of the EU for these compensations if they are less than 30 million Euros annually or even without limit in the case of the social housing and hospital sector. The Commission has until the end of 2009 to add more items in this framework if necessary[27].

3. However, more important problems have arisen by the application of the provisions for the competition in the social healthcare systems and the social security schemes (articles 81, 82, 86 of TEC). The dispute is about the nature of social healthcare systems and social security organizations. Under the EU law are they considered being undertakings or not?[28]

a) Concerning to the social insurance funds initially prevalent was the opinion that they could not operate as undertakings[29]. However, later on ECJ admitted that this could be the case under specific conditions[30]. The ECJ case law refers to the social insurance organisation that pays retirement benefits using criteria of mandatory/optional, solidarity/contributory principle and the unfunded/funded financing system. In essence the criteria used by the ECJ are nothing more than the result of the legislative or contractual manner of establishing every scheme. It demonstrates, therefore, a presumption, and this is confirmed by the ECJ case law according to which: A statutory fund is not an undertaking and it is not subject to European law relevant to competition. On the contrary, a contractual fund, since it has all the conceptual features of private insurance, is an undertaking according to European law. It is a simple presumption and it is confirmed if the affiliation to the

[27] ECJ C-280/2000, Altmark Trans GmbH του ΔΕΚ, ECR 2003 I-7747.

[28] The primary legislation of the EU establishes a simple presumption for the financial nature of an activity. It is examined whether there is a competitive market in which more companies are competing (comparative criterion) and whether the specific activity is taking place within the framework of a market and under market conditions. Hence, public participation in the market (provident power) is a presumptive financial activity, when on the contrary market regulation (administration power) is not. Activities that are an expression of the State imperium are excluded from this presumption. A large part of the theory supports that an activity with social purpose is excluded from the application of EU law relevant to business competition, because it is an expression of social solidarity.

[29] ECJ C-159, 160/1991, Poucet et Pistre, ECR 1993, I-637.

[30] ECJ, C-67/1996, Albany, ECR, 1999, I-5751, ECJ, C-115/1997, C-117/1997 Maatschappi etc , R., 1999, I-6121, ECJ, C-222/98, Henri van der Woude, ECR 2000, I-07111, C-180/1998 – C-184/1998 Pavel Pavlov , ECR 2000, I- 06451, C-218/2000, Cisal dι Battistelo Venanzio & C. Sas, Opinion of the General Advocate Jacobs, ECR 2002, I-00691, ECJ, C-264/2001, C-306/2001, C-354/2001και C355/2001 AOK Bundesverband, et.c , ECR 2004, I-024493, C-205/2003, FENIN, Opinion of the General Advocate P. Poiares Maduro, R., OOO . P. Paparrigopoulou, Supplementary social insurance in community law of competiotion, ed. Ant. N. Sakkoulas, 2002.

scheme in question is mandatory or optional, if social solidarity or the contributory principle prevails and if the funded or the unfunded system is applied[31].

b) Relevant to social healthcare systems: the criterion of solidarity is the guarantee of universal access to health services by establishing one single price for the user and eliminating the disparities of actual costs for services. So when the services are provided free there is no link between the cost of the service the user-paid price. In the case that social health services are provided only by the State or controlled by the State, then they have a simple social character and they are not subject to the field of application of the provisions for the market and competition. If, on the contrary, social health services are provided along with the private ones, then in force is article 86 par. 2 of TEC[32] whereby undertakings of general economic interest may be exempted from the application of European competition law if they are closely connected with the State and if the concrete economic activity is important for society.

In particular, ECJ has considered that:

- Self-employed doctors exercise an economic activity subject to the provisions for the internal market[33].
- Non-profit groups of people that provide medical assistance on duty and in particular ambulance services and are paid by user charges and by the public sector (for the infrastructure) exercise an economic activity[34].
- The German health insurance funds when they establish the higher amount paid for medicine are not undertakings, because[35] they do not operate under market conditions, they do not compete against each other or against private companies for

[31] To date, it seems that in the EU it is accepted that services with a pure social nature are not companies of general financial interest and in particular: a) Statutory schemes of social insurance which seek a pure social purpose, operate on the basis of the principle of social solidarity and they provide social security benefits independently of the payment of contributions. b) Other basic services provided directly to the beneficiary and facilitate social inclusion and cohesion and the establishment of fundamental rights, e.g. the benefit of public education which is financed from the tax revenue and is an expression of the State providence for culture and education.

[32] Arrticle 86 par. 2 of TEC provides that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules of competition, in so far as the application of such rules dones not obstruct the performance, in law or in fact of the particular tasks assingned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of Community".

[33] C-180/1998 – C-184/1998 Pavel Pavlov , ECR 2000, I- 06451.

[34] ECJ C-475/1999, Glöckner, ECR 2001, I-8080.

[35] ECJ C-264/2001, C-306/2001, C-354/2001, C-355/2001 AOK Bundesverband, ECR 2004, I-02493

the statutory mandatory benefits or medicines that are the main object of their operation and they establish medicine prices on the basis of the law.

- The Spanish national health system financed by the insured contributions and taxation that covers the total of the insured providing health services, does not exercise economic activity by purchasing medical tools from companies, which it then uses for the treatment of patients[36]

In this case an association of hygiene producers (FENIN) claimed that the great delay for its members' payment constituted an abuse of the organizations dominant position that manage NSIs, and is contrary to the provisions for protection of competition. The Court of First Instance and later on ECJ accepted that offering goods or services to a given market is what characterises the concept of economic activity and not the market activity itself. Therefore, the purchase of medical tools is not separated from the use for which the medicine is intended and the characterisation of the activity as economic or not depends on the use intended for the health goods.

At any rate in this case the supplementary, but logically foremost claim of FENIN that the activity of the purchase of hygiene goods is of an economic nature, because the subsequent provision of medical care is of an economic nature, was rejected as inadmissible and was not examined in its essence. Relevant to this claim there was the positive opinion of the Advocate General according to which in the Spanish health system there should be a distinction between the provision of health insurance services from the provision of health services. In the examined case, health insurance falls within the realm of solidarity and is therefore characterized as social. On the contrary, in the case of heathcare services it should be examined if the market needs are fully satisfied by the public health sector or if the private health sector participates, in which case it should be characterized as economic.

By summing up ECJ case law the following result:

1. Although Member States have the authority to regulate the organisation and operation of health systems and social insurance, nevertheless, this authority is controlled by judicial process in case it is contrary to the provisions for the internal market and competition. Therefore, the mandatory affiliation to statutory insurance

[36] Court of First Instance T-319/199 FENIN, ECR II 00357, ECJ C-205/2003, ,ECR, I- 06295 that dismisses the appeal of FENIN).

scheme could be contrary to the provisions for the internal market or/and the provisions for competition.

2. Universal access to the social healthcare systems, that is to say, solidarity is not related itself with the provision of medical services but with the insurance or tax coverage of the risk. Therefore, the social insurance activity should be separated from the healthcare activity. Social insurance activity lies outside the European law for internal market and competition provided social solidarity and State control come first.

3. The provision of medical services and health services in general constitute an economic activity, especially when the public and private sector provide these services at the same time. FENIN did not take into account if the purchase of medical equipment was an economic activity, because it is used in the provision of medical care (economic activity). However, this issue may come up again, since it is not rare for national health systems to take advantage of their dominant position in the market of health services, e.g. with long delays in paying their suppliers.

4. The public and the private sector could provide medical services. Therefore, any preferential treatment of the public sector or private entities that manages the system on its behalf in the degree that it is not justified according to article 86 par. 2 affects competition.

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CONCLUSIONS

1. The nature of healthcare activity and the aim for provision of high quality health services with bearable financial cost impose the processing and introduction of a specialized institutional framework for partnerships between public authorities, the social sector of economy and private undertakings (PPSPs).

2. In recent years, social security, social services and social healthcare systems are subjects of discussions and concern, mainly because the greater participation of the private sector enhances the difficulties in the application of rules for the internal market, competition and State aid and public contracts[37]. The ECJ is a lever for the introduction of relevant regulations. Its jurisprudence results in a 'quasi harmonization' in the law of social protection, because it leads to the establishment of

[37] Commission of the European Communities, Communication from the Commission, Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union, COM 2006, 177 final.

common values, concepts, rules and terminology[38]. However, if and under which conditions the social healthcare systems are undertakings of general economic interest is a very delicate issue and not at all obvious.

3. The synthesis of the conclusions of ECJ case law, of the different opinions on this issue from Member States and of theory seems to lead to the introduction of a special regime for services of general social interest (SGSI), including health services. The legislative clarification of the criteria for the distinction between economic nature SGSI and SGSI without economic nature presents the advantage of the systematisation of the case law conclusions and creation of an environment of trust and security, basic conditions for the development of PPSPs. In case that social insurance funds and healthcare organizations have an economic activity and are considered undertakings under the EU law, partnerships with private entities are equivalent with private-private partnerships that is to say cooperation between private companies.

4. Very briefly, the introduction of special legal frameworks for public social private partnerships (PSPPs) and services of general social interest SGSIs is necessary to achieve the goal of high quality healthcare services with bearable financial cost.

[38] *A. Stergiou*, The Community Judge and the coordination of social security system, (in Greek) Thessaloniki, ed. Sakkoulas, 1997, p. 16.