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**THE NATURE OF A HEALTHCARE SYSTEM – IDENTIFYING
STATE AID IN THE FINNISH HEALTH AND SOCIAL
SERVICES REFORM**

Bachelor's thesis

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ABSTRACT

This thesis aims at evaluating the proposed Finnish freedom of choice in public healthcare system from the EU state aid law perspective. The research is performed with qualitative method and is based on relevant national and EU legislation and academic literature. The research question is: does the proposed freedom of choice system in combination with the special tax and insolvency rules applied to state entities constitute illegal state aid? The hypothesis of the author is that the freedom of choice system creates a situation where state entities providing services in the market are in advantageous position compared to their competition due to illegal state aid.

The results illustrate that the freedom of choice system combined with the special tax and insolvency rules are likely to constitute illegal state aid. SGEI exception is inapplicable due to incompatible compensation scheme. Evaluated system is found to be economic despite its elements of solidarity. The paper shows that in the ECJ's assessment of economic nature of an activity, profitability is a decisive factor.

Keywords: competition, state aid, economic activity, solidarity, national healthcare

INTRODUCTION

The applicability of European Union's (EU) state aid regime to the realm of public healthcare systems within the Member States remains an issue not comprehensively regulated nor answered by the EU institutes to this date, regardless of the relatively long history of EU competition and state aid law. It has been noted by academic and legal professionals that the increasing liberalization in the public services sector, such as the public healthcare, poses substantive difficulties for the national courts and consequently, legislators as well, from the EU competition law viewpoint.¹ It has been argued, that the competition rules are considerably more refined even regards to sports than they are to healthcare,² which seems surprising considering the comparative significance of these issues.

Since 2015 the ongoing Finnish Health and Social Services Reform, including a Government Bill to introduce a freedom of choice system for the clients of public healthcare (Freedom of Choice Act)³, had been in the process of preparation, and had met a multitude of complications of both political and legal nature on the way. Amongst these, was the question of whether or not the proposed system contains elements of illegal state aid in the meaning of Article 107 Treaty of the Functioning of the European Union (TFEU), and consequently, whether the proposed legislation should have been notified to the Commission in accordance with Article 108 (3).⁴

The Finnish Government had for long decided not to notify the Commission of the proposed legislation, despite the risk that the proposed system could have constituted illegal state aid was identified by the Government in the preamble of the Government Bill.⁵ This policy changed during

¹ Szyszczak, E. (2017). The Altmark Case Revisited: Local and Regional Subsidies to Public Services. – *European State Aid Quarterly*. No. 3, p. 395

² Van de Gronden, J., Sauter, W. (2011). Taking the Temperature: EU Competition Law and Health Care. – *Legal Issues of Economic Integration* 38. No. 3, p. 238

³ HE 16/2018 Hallituksen esitys eduskunnalle laiksi asiakkaan valinnanvapaudesta sosiaali- ja terveydenhuollossa ja eräiksi siihen liittyviksi laeiksi. 2018. Accessible: <https://www.finlex.fi/fi/esitykset/he/2018/20180016#idp447705360> , 14.2.2019

⁴ Merikanto, T. (2019). *Analyysi: Sote-matkan 11 käännettä ja tulos vai ulos? Onko perustuskilpailukuntakin vaarassa tahraantua politikoinnista?* Accessible: <https://yle.fi/uutiset/3-10645572> , 14.2.2019

⁵ HE 16/2018, *Supra nota* 3, see 2.3.6 and 3.3.10

February 2019 when the Government decided to notify the Commission of the proposed legislation, although not pursuant to Article 108 (3) TFEU, but instead as a measure not constituting state aid but notified for reasons of legal certainty in accordance with Commission Regulation (EU) 2015/2282.⁶ This was done to evade the legislative stand-still caused by actual state aid notification.

An unforeseen turn not taken fully into consideration when commencing this research, was the stepping down of the Finnish Government on 8th of March 2019, which had the effect of discontinuing the legislative process, at least for the time being.⁷ Due to the occurrence of this rather rare event, it remains unclear whether or to what extent the framework proposed by the Freedom of Choice Act or other parts of the ill-fated reform, will be proposed again or enforced. It would, however, seem very unlikely that the Freedom of Choice Act would be entirely buried, considering the amount of resources used to its preparation and the apparent urgency to reform the national healthcare system.

Despite the contemporary state of affairs, the topic remains interesting from academic point of view. The applicability of EU state aid rules to Beveridgian-style national healthcare systems in general is a question under constant discussion. While the Finnish system studied in this paper may not be put to test as soon as it was initially intended, it still provides a good example of a modern national healthcare system potentially incompatible with the EU single market, and thus, is a good basis for a study. Nevertheless, as the legislative procedure in Finland has presently come to a halt, the question is not likely to be answered by EU Courts any time soon. Any conclusions made in this paper, therefore, remain speculative.

This paper shall focus on the potential state aid elements contained in the Government Bill for the Freedom of Choice Act. Freedom of Choice Act is likely the most controversial of the legislative proposals connected to the reform in regard to state aid rules, due to the existence of beneficial tax and insolvency regimes for state entities that would find themselves competing with private undertakings in the framework of the Act.

⁶ Sosiaali- ja terveysministeriö, note, *Ministeriöt toimittivat loput ratkaisuehdotukset maakunta- ja sote-lakeihin sosiaali- ja terveysvaliokunnalle*, accessible: https://stm.fi/artikkeli/-/asset_publisher/ministeriot-toimittivat-lopuratkaisuehdotukset-maakunta-ja-sote-lakeihin-sosiaali-ja-terveysvaliokunnalle, 28.2.2019

⁷ Toivonen, T. (2019). *Sote kaatoi hallituksen – pääministeri Sipilä: Edellytyksiä etenemiselle ei ole, se on minulle valtava pettymys*. Accessible: <https://yle.fi/uutiset/3-10679239>, 13.3.2019

The aim of this study is to examine using qualitative methods, the contents of the Freedom of Choice Act in the light of relevant legislation and academic views taken on the concept of state aid in the recent years, and find if the proposed system would be in conflict with the EU's state aid rules. The research question is thus, whether the framework of the Freedom of Choice Act in combination with the beneficial tax and insolvency regimes for state entities in Finland would constitute illegal state aid in the meaning of EU law? The hypothesis of this study is that the proposed system creates, a situation where state entities providing services in the system are in an advantageous position compared to their private competition, due to existence of illegal state aid.

The first part of the study will introduce the framework of the proposed national healthcare system as well as that of the EU state aid regime. In the second part, the system and its suspected state aid elements are scrutinized in the light of the state aid rules. The third part of the study is committed to the evaluation of the healthcare system's economic nature, a major factor in the overall assessment, after which a plausible option for aligning the proposed system with the EU law is briefly discussed in the fourth part.

1. BACKGROUND

In this part the elements of interest of the proposed legislation in the Freedom of Choice Act as well as the relevant EU competition law rules are introduced, after which the two are compared in the next part to identify the potential state aid elements contained in the proposed system.

1.1. Freedom of Choice Act

1.1.1. General overview

Freedom of Choice Act is a complex legislative instrument, which only constructs a part of the Health and Social Services Reform. For the purposes of this study, it suffices to know that the proposed system contains multiple elements providing an amount of freedom of choice for the client of public healthcare, in relation to the service providers from whom the client may receive the services.

The proposed legislation introduces a freedom of choice scheme into a part of the Finnish public healthcare system. The general purpose of the new model is to provide the clients of public healthcare and social services a freer choice regarding the service providers from whom they can obtain the services from, and in addition improve the availability and quality of the services as well as equality and cost-effectiveness of the healthcare system.⁸ To reach these goals, the Freedom of Choice Act also provides extended possibilities for private and third sector service providers to produce public healthcare services alongside public entities.⁹ Counties however, would as organizers of public healthcare and social services, bear the eventual responsibility for securing the availability of services in one way or another, by producing them themselves through an unincorporated county enterprise or by subcontracting.¹⁰

⁸ HE 16/2018, *Supra nota* 3, see 3.1

⁹ *Ibid.*, see 3.3

¹⁰ *Ibid.*, see 3.3

In practical terms the Freedom of Choice Act would establish a system where the same public healthcare services are produced by public and private entities, against nominally the same remuneration paid by the counties and eventually, the state. While participation in the system would be open for all willing private and third sector undertakings satisfying given criteria, it would not be mandatory. This would mean that in effect, the public healthcare sector would be shared between two kinds of service providers; public and private. The potential state aid elements scrutinized in this study would affect the competition between the public and private producers, the public entities being the recipients of the aid.

1.1.2. The role of the unincorporated county enterprises

The unincorporated county enterprise, which every county would have to have, would be a public institution with dual purpose in the context of the Freedom of Choice Act. It would provide healthcare and social services through its service centres, hospitals and other units, and in addition act as an administrative body exercising public powers by assessing clients' needs for services in relation to certain categories of services.¹¹ The unincorporated enterprises would be owned by the respective counties, and considered state entities.¹²

Unincorporated county enterprises could partially outsource or privatize the provision of direct-choice services unlike other categories of services, but would not be required to do so.¹³ Therefore, these enterprises would offer their services alongside their private counterparts as well as perform activities as a public authority in assessing clients' needs, a task preserved only for them by the Act.

1.1.3. Different categories of services and compensation

The services included in the freedom of choice system are placed in different categories, in which the contents of the service, the eligibility of different service providers and the funding scheme differ.¹⁴ The categories of services of interest in this study are those under personal budget, health and social services voucher and services of direct-choice.

¹¹ *Ibid.*, see 3.3.5

¹² *Ibid.*, 3.3.13

¹³ *Ibid.*, see 3.3.3

¹⁴ *Ibid.*, see 3.3.1

Personal budget and service voucher would be granted by the unincorporated county enterprise for an individual with long-term or specific service needs, and the client would be able to choose a service provider of his liking and receive the prescribed service up to the amount set in the budget or voucher.¹⁵ The direct-choice services on the other hand are basic services, for instance, normal visits to doctor or dentist and medical examinations, and would be remunerated to the chosen service provider on basis of capitation-based compensation.¹⁶

The capitation-based compensation means a fixed sum, calculated on the basis of the client's expected needs, paid by the county to the service provider, public or private, against every client signed up for that service provider.¹⁷ The expected expenses of a client would reflect the average needs of a similar person on national scale, rather than be based on the actual costs generated by services used by the client.¹⁸ The amount of capitation-based compensation thus would vary from person to person on the basis of his age and other underlying medical factors but would be paid regardless of the actual expenses.

The client could choose the service provider of his liking, including the county enterprise, in relation to all different service categories, from any of the service providers. For the direct-choice services the client could choose and change the service provider for whom he is listed every six months.¹⁹

1.2. European Union legislation on state aid

1.2.1. General prohibition

The basis of the EU rules regarding state aid is laid in primary EU legislation in the TFEU namely, in the Article 107 (1), which sets out a general prohibition of state aid distorting competition and affecting the internal market.²⁰ The general rule provides criteria for assessment of whether an action taken by a Member State is to be considered state aid. Criteria is in the form of four conditions which are to be met simultaneously.

¹⁵ *Ibid.*, see 3.3.4 and § 24-31

¹⁶ *Ibid.*, see § 65 and yksityiskohtaiset perustelut 9 luku

¹⁷ *Ibid.*, see 3.3.8

¹⁸ *Ibid.*

¹⁹ *Ibid.*, § 20

²⁰ Craig, P., De Búrca, G. (2015). *EU Law: Text, Cases, and Materials*. 6th Ed. Oxford: Oxford University Press. p. 1133

Firstly, the measure has to provide an advantage to the recipient undertaking or undertakings in question, secondly, the measure has to be selective, thirdly, the aid has to be granted through state resources, and lastly, the measure has to distort the competition and affect trade within the single market.²¹ The last two conditions are distinct in Article 107 TFEU however, they are considered inextricably linked.²² The aforementioned criteria are more precisely defined through secondary legislation, for the most part by decisions given by the European Court of Justice (ECJ) and the general policy developments of the European Commission in this field.²³

1.2.2. Conditions of the Article 107 (1) TFEU

In their definition for the advantage conferred to the recipient of state aid, the ECJ as well as the Commission, have taken the broader approach, meaning that the substance instead of the rationale or form of the aid is the determining element.²⁴ Although the Commission has provided non-exhaustive list regarding different types of aid including tax exemptions and preferential interest rates to mention a few, the ECJ has taken a clear view that any positive or negative measure creating a benefit for its recipient is to be considered as state aid.²⁵

The second condition is selectivity, which differentiates general measures from measures of state aid.²⁶ This means quite simply the requirement that the aid must only be granted to selected undertakings, regions or sectors instead of all undertakings in all economic sectors and areas within the Member State.²⁷ The concept of a selective system is a broad one in this context, as even a measure which is open to all undertakings but in reality only benefits a certain part of the undertakings, even if the benefitting group is bigger than the non-benefitting, is considered *de facto* selective.²⁸

²¹ Bacon, K. (2013). *European Union Law of State Aid*. 2nd Ed. Oxford: Oxford University Press. pp. 20-21

²² Piernas López, J. J. (2015). *The Concept of State Aid under EU Law*. 1st Ed. Oxford: Oxford University Press. p. 183

²³ Hancher, L., Ottenvanger, T., Slot, P.J. (2016). *EU State Aids*. 5th Ed. London: Thomson Reuters trading as Sweet & Maxwell. pp 50-51; Bacon (2013), *supra nota* 21, p. 20

²⁴ Craig, de Búrca, *supra nota* 20, p. 1133; Hancher, *et al.*, *supra nota* 18. pp. 52-53

²⁵ Craig, de Búrca, *supra nota* 20, pp. 1133-1137

²⁶ Bacon, K. (2017). *European Union Law of State Aid*. 3rd Ed. Oxford: Oxford University Press. pp. 69-70; *State Aid Law of the European Union*. (2016). /Eds. H.C.H. Hofmann, C. Micheau. Oxford: Oxford University Press. pp. 129-130

²⁷ Piernas López, *supra nota* 22, pp. 144-150

²⁸ *Ibid.*, p. 103

In relation to the third condition that the aid is to be provided through Member State or its resources, it is the view of both the Commission and the ECJ that the definition of a Member State or its resources includes, in addition to state itself, any public or private undertaking designated or established by the state, as long as the state has taken control over those undertakings and has been involved in the adoption of the measure constituting aid.²⁹

The fourth condition, the requirement for the aid to distort or threaten the competition and affect the trade in the single market, is usually perhaps the least problematic of the four. Generally the provision of aid situates the recipient undertaking in a more favourable position in relation to its competitors, which clearly distorts, or at least threatens, the competition.³⁰ The test the ECJ employs, is to see whether the position of the recipient undertaking has actually improved after receiving the aid, and if this is the case, then the condition has been met.³¹ In relation to the effect on the trade on the single market, it suffices if there is a potential effect on the trade, which significantly broadens the scope of this definition.³²

1.2.3. Exceptions

There are exceptions to the general rule laid down by Article 107 (1) TFEU. The Article itself lists certain types of aid that are to be considered compatible with the single market in its second paragraph, as well as certain types of aid that may be considered compatible with the single market on the discretion of the Commission and the ECJ.³³ The exceptions laid down in Article 107 (2) relate to aid to individual consumers, natural disasters, historical disadvantages of former Eastern Germany, and in case of 107 (3), to economic development, projects of common European interest, culture and heritage and so forth.³⁴

In addition to the categories introduced above, the Council may in accordance with Article 107 (3) (e), add new categories of aid to those contained in the same article, provided that the aid is considered compatible with the single market and that the Commission has proposed such addition.³⁵ The Council may also in exceptional circumstances and only after application by a

²⁹ Craig, de Búrca, *supra nota* 20, pp. 1137-1138

³⁰ *Ibid.*, pp. 1138-1139

³¹ *Ibid.*, p. 1138

³² Piernas López, *supra nota* 22, pp. 195-199

³³ Craig, de Búrca, *supra nota* 20, pp. 1139-1144; Bacon (2017), *supra nota* 26, pp. 92-95

³⁴ Craig, de Burca, *supra nota* 20, pp. 1139-1144

³⁵ Bacon (2017), *supra nota* 26, pp. 120-121

Member State, bypass the Commission and authorize a specific measure of aid as compatible with the single market, with an unanimous decision.³⁶ The exceptional circumstances are defined by Advocate General Cosmas, as ‘—something extraordinary unforeseen or at least something not permanent or continuous and of course something other than normal’.³⁷

The most interesting exception in our context, concerns Services of General Economic Interest (SGEI), which relate to the provision of public service tasks falling outside the scope of Article 107 (1) TFEU by virtue of Article 106 (2) TFEU and by that of SGEI Decision³⁸ based on Article 106 (3).³⁹ The SGEI decision provides a safe harbour for certain categories of aid, including compensation for the provision of SGEIs by hospitals and health and long-term care of social character, which evade the notification obligation laid down in Article 108 (3) TFEU.⁴⁰

Nevertheless, measures falling within the scope of the Decision have to fulfil conditions on entrustment, duration, permitted compensation, control of overcompensation as well as on reporting and monitoring, in order for the exemption to apply.⁴¹ These conditions dictate, that the operation of the service must be entrusted to the undertaking through an official act, it cannot in its duration in general exceed 10 years, the compensation paid for the SGEI cannot exceed the amount necessary to cover the actual costs of provision of the service, that measures have to be taken to return any overcompensation paid to the undertaking and lastly that Member States are liable to monitor and report to the Commission any aid granted on basis of the Decision.⁴²

For aid measures on SGEIs that do not fall within the scope of the SGEI Decision, notification to the Commission is mandatory.⁴³ As in the case of Article 107 (2) TFEU described before, the Commission accepts aid as compatible with the single market, on the condition that the requirements of Article 106 (2) are met.⁴⁴ The five conditions derived from the Article and clarified

³⁶ *Ibid.*, pp. 121-123

³⁷ *Ibid.*, pp. 122-123 referenced in Opinion of the Advocate General, 22.11.1995, Council of the EC v Commission, C-122/94, EU:C:1995:395, para 83

³⁸ Commission Decision (EU) No. 21/2012/EU of 20 December 2011 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, OJ L 7, 11.1.2012, pp. 3-10

³⁹ Bacon (2017), *supra nota* 26, pp. 109-111

⁴⁰ *Ibid.*, p. 111

⁴¹ *Ibid.*, pp. 112-113

⁴² *Ibid.*, pp. 112-113

⁴³ *Ibid.*, p. 113

⁴⁴ *Ibid.*

in the Commission Framework Communication⁴⁵ are namely, the existence of a genuine SGEL, official entrustment of the service, necessity of the measure, its proportionality and lastly, the requirement that the measure should not affect the development of trade contrary to interests of the single market.⁴⁶ According to Kelyn Bacon QC, these criteria are in practice being tested very closely in the same manner as the first three conditions of the Altmark test.⁴⁷

Outside the primary legislation of the EU, there is the Block Exemption Regulation⁴⁸, which establishes further exemptions from the general rule, for certain categories of aid, mostly related to regional aid, aid to small and medium sized enterprises, research, innovation, development, environmental and training aid, aid for local infrastructures and aid for disabled or disadvantaged workers.⁴⁹

⁴⁵ Commission Communication (EU) European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, pp. 15-22

⁴⁶ Bacon (2017), *supra nota* 26, pp. 114-119

⁴⁷ *Ibid.*, p. 114

⁴⁸ Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1

⁴⁹ Craig, de Búrca, *supra nota* 20, p. 1145

2. STATE AID ELEMENTS IN THE FREEDOM OF CHOICE ACT

In this part, the elements contained in the Government Bill of the Freedom of Choice Act are put into comparison with the conditions laid down in Article 107 (1) TFEU, to assess the potential problems between the proposal and the functioning of the single market. After identifying the possible problems, the applicability of derogations to the general rule is scrutinized.

It is to be heard in mind that the following assessment is done in view of all the activities carried out by any service provider within the sphere of the freedom of choice system, instead of only those performed by the unincorporated county enterprises. The freedom of choice system places the county enterprises effectively on the same market with any private or third-sector service providers in relation to freedom of choice services. This is true from the client's viewpoint, as even the objective of the system is to provide options for the clients of public healthcare and thus enhance competitiveness as explained above.⁵⁰ Considering that the legal status or nature of the entity is of no consequence within the EU competition and state aid realm,⁵¹ there seems to be little reason to dissociate the activities carried out by the unincorporated county enterprises from those performed by other entities, except for the part limited to the exercise of public authority by the county enterprises.

2.1. Applicability of Article 107 (1) TFEU

Freedom of Choice Act may contain elements potentially considered state aid in the meaning of Article 107 TFEU. The most prominent and clear examples in this regard being the tax benefits to which all public institutions are subjected to in Finland as well as the insolvency protection they receive, a note brought up in the Government Bill as well.⁵² It seems possible that all the cumulative conditions of Article 107 (1), mentioned previously, would be met in a scenario where public institutions, such as the unincorporated county enterprises, are offering services in the same

⁵⁰ See 1.1.

⁵¹ Hatzopoulos, V. (2012). Economic Constitution of the EU Treaty and the Limits Between Economic and Non-Economic Activities. – *European Business Law Review*. No. 23. p. 987

⁵² HE 16/2018, *supra nota* 3, see 2.3.6

market with private and possibly third sector service providers, while being immune to bankruptcy and at least partially to taxation.

This scenario would likely become realized, should the proposed legislation come into force in its present form. The possibility of the system falling within the scope of Article 107 (1) TFEU was introduced already in the Government Bill, but for reasons of academic integrity the scheme will be thoroughly assessed in the light of the conditions discussed above.

2.1.1. Advantage

The advantage in this case refers to the preferential positioning concerning taxation and insolvency issues of the unincorporated county enterprises in comparison to all private and third sector service providers working on the same market. Public authorities and state entities, such as the unincorporated enterprises, are partially exempted from taxation and are not subjected to normal insolvency measures by virtue of the Income Tax Act (Tuloverolaki) and the Bankruptcy Act (Konkurssilaki) respectively.⁵³ This renders these organisations less liable to financial risk and provides a competitive advantage tax-wise over their counterparts in the private and third sectors, which is a problem noted even by the Government in its proposal.⁵⁴

Given the broad definition of an economic advantage that the Commission and the ECJ have adopted, and that tax benefits and guarantees against insolvency are indeed quite clear examples of measures constituting an advantage when they are not available for all undertakings in the same sector,⁵⁵ it seems that the advantage condition would definitely be fulfilled in this case. Regarding the protection against bankruptcy, it is noteworthy that the Commission's Notice on Guarantees⁵⁶ clearly states the policy, that undertakings whose legal form renders bankruptcy or other insolvency measures non-applicable, is regarded as aid.⁵⁷

⁵³ Konkurssilaki 20.2.2004/120. see § 3; Tuloverolaki 30.12.1992/1535. see § 21

⁵⁴ HE 16/2018, *supra nota* 3, see 2.3.6

⁵⁵ Hofmann, Micheau, *supra nota* 26, pp. 84-85

⁵⁶ Commission Notice (EU) on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, pp. 10-22

⁵⁷ Hancher, *et al.*, *supra nota* 18, pp. 356-357

2.1.2. Selectivity

When assessing the selectivity condition, it is again to be recalled that in the health and social services system proposed by the Freedom of Choice Act, unincorporated county enterprises would be effectively offering services on the same market with private and third sector organisations.⁵⁸ The preferential taxation and insolvency protection rules are only applicable to public entities, which would seem to render the measure inevitably *de jure* materially selective when there are also other actors, not subjected to the same benefits, offering services in the same market.

It has been noted by academics, that the selectivity criterion is however, somewhat problematic especially regards to measures of fiscal nature, such as taxation and that the EU Courts have formulated a three-step test, in order to more clearly assess this condition.⁵⁹ The steps of the test are to identify first, the system of reference, secondly, whether the measure constitutes an exception from that system, so that it treats economic actors in a comparable situation in a different manner, and lastly if the measure can be justified by the nature of the system of reference.⁶⁰ Here it is worth noting, that especially in regard to tax measures, the existence of an advantage and that of selectivity, are closely linked, as the advantage received by an undertaking may be established only in comparison with the normal taxing scheme.⁶¹

2.1.2.1 System of reference

As the suspected aid measure concerns the insolvency protection and beneficial taxation received by county enterprises, the appropriate system of reference would seem to be the normal income tax and insolvency regime, and their application in the context of service producers within the freedom of choice system framework. It is worth mentioning, that the same benefits have been considered as constituting state aid already in prior instances, in relation to production of other public services by state enterprises.⁶²

⁵⁸ HE 16/2018, *supra nota* 3, see 3.3

⁵⁹ Hofman, Micheau, *supra nota* 26, pp. 132-133

⁶⁰ *Ibid.*, p. 133

⁶¹ Chesaites, N. (2017). Tax Incentives as State Aid. - *EU Competition and State Aid Rules: Public and Private Enforcement*. (Eds.) V. Tomljenović, N. Bodiřoga-Vukobrat, v. Butorac Malnar, I. Kunda. Berlin: Springer. p. 262

⁶² Virtanen, M., Valkama, P. (2009). Competitive Neutrality and Distortion of Competition: A Conceptual View, - *World Competition* 32, No. 3, pp. 400-402

The applicable market, even though it apparently is not the primary concern of the Commission or Courts when assessing selectivity,⁶³ would be the public healthcare and social services sector, as provided by the Freedom of Choice Act, and more specifically the categories of services under the freedom of choice of clients. In this system, public, private and third sector undertakings would situate themselves in the same market as competitors, which is one of the primary aims of the proposal in order to *inter alia*, enhance the cost-efficiency of the healthcare system.⁶⁴ Therefore, it seems clear that the position of the unincorporated enterprises should be compared against position of the normal types of undertakings producing same services within the framework of the Freedom of Choice Act.

2.1.2.2. *Selective measure*

Second step is to establish whether there are undertakings within the chosen reference system, who are treated in less favourable manner compared to the suspected recipient of aid.⁶⁵ In our case it would seem clear that all service providers except for the unincorporated county enterprises, are liable to bankruptcy and normal taxation, as they have not been exempted from either.⁶⁶ It is worth underlining here, the derogations from the normal tax and insolvency regimes are selective in the sense that they categorically exclude undertakings other than state, including county and municipality owned.⁶⁷

This would constitute a *prima facie* selective measure, as only public undertakings are receiving the preferential treatment within the freedom of choice service sector.⁶⁸ The selective nature of the measure is not undermined by the constantly widening scope of the concept taken by the ECJ, which has even considered derogations open for all willing undertakings as selective, although this approach have been criticised.⁶⁹

However, considering the legal position of the unincorporated county enterprises compared to those of other types of undertakings within this framework, it seems that despite the similar factual

⁶³ Hofmann, Micheau, *supra nota* 22, p 135

⁶⁴ HE 16/2018, *supra nota* 3, see 3.1

⁶⁵ Bacon (2013), *supra nota* 17, p. 74

⁶⁶ See Konkursilaki and Tuloverolaki, *supra nota* 53

⁶⁷ *Ibid.*

⁶⁸ Bacon (2013), *supra nota* 21, p. 76

⁶⁹ Nicolaides, P. (2017). Excessive Widening of the Concept of Selectivity. *European State Aid Quarterly*. No. 1. p. 72

position within the system, their legal position may be somewhat different. The public entities would be acting on behalf of the organizer of services, namely counties, on basis of law, as their objective to provide public services guaranteed to the citizens by virtue of the Constitution, whereas other undertakings would be acting on contractual basis, although still under public service obligation. Regardless of the difference in the basis of their commitment, the reality however, is that even the private undertakings would be performing under public service obligation, the same as the county enterprises.

It could in addition, following the idea introduced by Chavrier, even be argued that the unincorporated county enterprises are not the institutions burdened with the public service obligation in the first place, but simple service providers for the counties, while counties actually bear the initial duty of providing the services.⁷⁰ This argument despite its logic, seems however, unnecessary in our case, since the position of the county enterprises cannot be considered significantly different to that of other service providers in this context.

It is however, possible in the light of this fact and academic views taken on the definition of reference system after the case of *Paint Graphos*⁷¹, that the beneficial taxation and insolvency regimes for the unincorporated county enterprises could be regarded as a special system provided by national legislator to all state enterprises in all sectors, rather than a derogation from the general regime within the freedom of choice system framework.⁷² This difference between the reference system's definition in its broad and narrow sense could render the position of the county enterprises incomparable with other service providers.

Considering the EU Courts' tendency to privilege the viewpoint of the objective of the measure, it remains as a possibility that the unincorporated county enterprises would be considered to act within their own system.⁷³ This would imply that they are not in a situation comparable to that of their actual market competitors within the freedom of choice services sector, who nevertheless, are in factually the same position. This approach would eventually relieve the measure of its *prima*

⁷⁰ Nistor, L. (2011). *Public Services and the European Union: Healthcare, Health Insurance and Education Services*. The Hague: T.M.C. Asser Press. p. 249

⁷¹ Judgement of the Court, 8.9.2011, *Paint Graphos and Others*, C-78/08-C-80/08, EU:C:2011:550

⁷² Buendia Sierra, J. L., (2018). Finding Selectivity or the Art of Comparison, - *European State Aid Law Quarterly*, No. 1, p. 87

⁷³ Hofmann, Micheau (2016), *supra nota* 26, p. 135

facie selective nature, as every comparable entity, i.e. other unincorporated county enterprise, would receive the advantage while none of the other undertakings would.

Considering however, that the very same preferential taxation and insolvency treatment of public undertakings has already been scrutinized by the Commission in the decision regarding state aid provided to Destia, where the selectiveness of those measures was confirmed by condemnatory judgements on the measures as state aid,⁷⁴ it would seem logical that the same conclusions would be made regarding the unincorporated county enterprises. Similar decision was bound to be made regards to Palmia, another Finnish state enterprise, yet the Finnish Government took action to solve the issue before decision was made.⁷⁵ It was nevertheless, argued by the Finnish Parliament's Constitutional Committee, that the freedom of choice system is not comparable with the aforementioned cases, since it differs from both in regard to the elements of solidarity and public service obligation, which were not present in the cases of Destia and Palmia,⁷⁶ yet these differences have more significant implications towards the fundamental nature of the system than in relation to the reference system.

2.1.2.3. *Justification*

The last step of the selectivity test is to determine whether the measure can be justified by the fact that it derives directly from the internal logic of the referenced framework, its implementation follows the justification and it is proportional.⁷⁷ According to Bacon, the differentiation between undertakings has to be inherent to the system for it to be considered justifiable in the meaning of this condition.⁷⁸

Although it could be argued, that the freedom of choice system is generated for the purpose of securing the provision of public healthcare and social services, the argument itself would hardly justify why undertakings within this system would have to be treated differently. This feature does not present itself as inherent to the system, in the sense that the system by its nature, actually

⁷⁴ Commission Decision (EU) of 11 December 2007 on the aid No C 7/06 (ex NN 83/05) implemented by Finland for Tieliikelaitos/Destia, OJ L 270, 10.10.2008, pp. 1-30

⁷⁵ Aalto-Setälä, I., Koivuniemi, H. (2017). Finland – Strict Interpretation of EU State Aid Rules Creates a Constitutional Impasse for the Finnish Health and Social Services Reform. – *European State Aid Quarterly*, No. 3, p. 503

⁷⁶ *Ibid.*

⁷⁷ Bacon (2013), *supra nota* 21, pp. 78-79

⁷⁸ *Ibid.*, p. 80

endorses the benefits to the efficiency and productivity gained by the competition in the sector, as is evident from the aims of the proposed legislation.⁷⁹

It would seem more reasonable to deduce that the internal logic of the system actually necessitates the existence of an undisturbed competitive environment, in order to reach the said objectives, rather than the opposite. Thus, it would be difficult to conceive a justifiable argument in relation to the system inherently requiring such a differentiating measure in relation to unincorporated county enterprises in the context of the freedom of choice-services.

2.1.3. By state through state resources

The condition of the aid having to be provided by the state or through state resources, despite their actual wording, have been considered as cumulative.⁸⁰ In our case, it can be demonstrated without difficulty that the aid measure is imputable to the state, as all the critical elements creating the aid measure, namely the preferential taxation and the insolvency regime, as well as the freedom of choice-service sector on which the aforementioned measures apply, are all legislated directly by the Finnish state.⁸¹

State guarantees are clear examples of state aid measure. For the part of the tax exemption provided for the county enterprises, it has been established early in the caselaw of the European courts, that foregoing tax revenues, which in the normal situation would be received by the state, constitutes the use of state resources, regardless of the measures negative nature.⁸² Thus, both of these cumulative conditions seem to be satisfied.

⁷⁹ HE 16/2018, *supra nota* 3, see 1.2

⁸⁰ Ezrachi, A. (2018). *EU Competition Law: An analytical Guide to Leading Cases*. 6th Ed. Oxford: Hart Publishing. pp. 663-664

⁸¹ *Ibid.*

⁸² Chesaites (2017), *supra nota* 61, pp. 258-259

2.1.4. Distortion of competition and effect on the single market

The distortive effect on the competition created by the beneficial taxation and insolvency regime provided for the unincorporated county enterprises, would in the scenario seem clear, considering a potential effect on the competition suffices for the fulfilment of this condition.⁸³ Even though identifying the relevant affected market is not in all cases even necessary,⁸⁴ in the present one it would not pose difficulties, as it is evident from the framework of the Freedom of Choice Act that all undertakings, public, private and third sector, who are willing or obliged to provide the services of freedom of choice, are competing within the same market.

The effect on the trade between Member States in the single market on the other hand, may be presumed, as the services in question without doubt are to be considered within the free movement of services in the single market. The EU courts do not in this regard, require necessarily actual effect on the trade but consider even conceivable effect sufficient.⁸⁵ The presumption that the trade between Member States could possibly if not even likely, be affected, is not too difficult to take.

2.2. Applicability of the SGEI exception

As discussed in part 1.2.3. of this study, there are exceptions to the general prohibition of state aid. The possibility of employing a relevant exception will be discussed in this part of the study. It seems rather obvious considering the welfare service aspects concerned in the freedom of choice system, that most prominent exception from the options available, would be the one provided for SGEI's.⁸⁶ It is however, worthy of mentioning that the Government Bill introducing the Freedom of Choice Act, does not itself propose to apply this exception in relation to the whole system, since it heavily relies on the alleged non-economic nature of the whole system, which will be discussed in the next part of the study.

As introduced earlier, the exception for state aid in form of compensation for providers of SGEI's may apply in certain cases by virtue of Article 106 (2) TFEU, conditions of which are clarified by the SGEI Decision and in cases falling outside of its scope, by the Commission's Framework

⁸³ Quigley, C. (2009). *European State Aid Law and Policy*. 2nd Ed. Oxford: Hart Publishing. pp. 51-52

⁸⁴ *Ibid.*

⁸⁵ Hofmann, Micheau (2016), *supra nota* 26, pp. 155-156

⁸⁶ Nistor (2011), *supra nota* 70, pp. 242-245

Communication. While the SGEI Decision covers compensation for hospital and other public healthcare services in principle,⁸⁷ it is arguable whether the freedom of choice system fits into its scope. Despite the nature of the services in question, the compensation scheme introduced by the Freedom of Choice Act would hardly satisfy the conditions given by the SGEI Decision. Especially the capitation-based compensation system for the services of direct-choice, would by default seem to give rise to overcompensation in situations where persons listed for the service provider would not use the services to the amount of the compensation received by the undertaking. It seems inconceivable that the expenses could be estimated beforehand with sufficient precision to avoid overcompensation without any recovery system.

Furthermore, the present exception is admitted only in relation to compensation paid for the provision of services of general economic interest,⁸⁸ which arguably would not in all cases cover the tax benefits and insolvency protection enjoyed by the unincorporated county enterprises. Even if the compensation system would be regarded as compatible with the conditions of the SGEI Decision, or the Framework Communication, which would seem unlikely, the exception should then logically have to apply not only to the unincorporated county enterprises but to all other service providers as well, since they are in effect, providing the same services. This would not eliminate the fact that the county enterprises would still find themselves in considerably more favourable position in the market compared to the other SGEI providers, due to the tax and insolvency protection benefits they receive unlike the other service providers.

Even though the applicability of the SGEI exception would situate the activities outside the scope of state aid rules, the Commission's Framework Communication clearly states that the compensation for SGEI services, when admitted to multiple undertakings, should be calculated on the same basis for every recipient of the aid.⁸⁹ Whether or not the tax and insolvency advantages would be considered to be related to the burden of the public services entrusted to the unincorporated enterprises, is practically of no consequence since even if this would be true, the same advantages should be granted in addition to those enterprises, to all other undertakings providing the same services, or to none.⁹⁰ Considering the fact that only the county enterprises are admitted to these advantages, may in itself be considered as evidence of their redundancy in relation to

⁸⁷ Commission SGEI Decision (2011), *supra nota* 38, Article 2(1) b,c

⁸⁸ Commission SGEI Decision (2011), *supra nota* 38, Article 5

⁸⁹ Commission Framework Communication (2011), *supra nota* 45, see 2.7

⁹⁰ *Ibid.*

provision of the entrusted public services. Similar conclusions have been made by the Commission regarding the same advantages provided to Destia, after it started offering services on the newly liberated market.⁹¹

Therefore, it is less than probable for the compensation scheme introduced by the Freedom of Choice Act to be regarded compatible with the conditions of the SGEI exception, since the system would seem to incorporate compensation scheme inherently generating overcompensation, without introducing an avoidance or recovery system. Moreover, it is arguable whether the tax benefits and the insolvency protection enjoyed exclusively by the unincorporated county enterprises would themselves count as advantages reasonably related or necessary in relation to the provision of the public services entrusted to the enterprises. Albeit the assignment of these benefits would seem theoretically plausible if these enterprises were not performing within the same market with all other service providers, since then they would not count as discriminatory. The requirements of the SGEI Decision nor those of the SGEI Framework Communication, closely related to the Altmark test, would thus not seem to be satisfied as such.

⁹¹ Destia decision, *supra nota* 74

3. THE ECONOMIC NATURE OF THE SYSTEM

While the existence of an illegal state aid measure seems in the light of this study somewhat inevitable in relation to the system set up by the Freedom of Choice Act, as the criteria set in the Treaty is met, and no exception seems applicable to the system as such, still a counterclaim exists in the very nature of the system. Finnish government relies heavily on the argument that activities exercised within public healthcare and social services sector, remain non-economic.⁹² The relevance of this argument is that the EU competition regime only applies to economic activities, thus rendering any state-aid-like measures exercised within non-economic frameworks compatible with the single market.⁹³

Should the activities performed within the freedom of choice system therefore be considered non-economic, there would be no collision with the TFEU regardless of whether the conditions of Article 107 (1) are met. This turns the point of interest to the question of whether the government's argument regarding the nature of the activities is sound or not. This issue will be addressed in this part of the study, on the basis of notions made on the other hand by the Finnish Government and on the other, by academics and especially paying due regard to ECJ's rather recent decision in case t-216/15⁹⁴, where the Slovak national health insurance scheme, bearing resemblance to the Finnish freedom of choice in healthcare services system in its basic elements in this regard, was found to be economic.

3.1. View of the Government

In the Government Bill for the Freedom of Choice Act, the Finnish legislator took the view that the reformed public healthcare scheme incorporating the freedom of choice system, would remain

⁹² HE 16/2018, *supra nota* 3, see 2.3.6

⁹³ Liszt, M., Čulinović, H. (2017) Certain Aspects of State Aids to Services of General Economic Interest. - *EU Competition and State Aid Rules: Public and Private Enforcement*. (Eds.) V. Tomljenović, N. Bodiroga-Vukobrat, v. Butorac Malnar, I. Kunda. Berlin: Springer. p. 296

⁹⁴ Judgement of the General Court, 5.2.2018, Dôvera zdravotná poisťovňa, a.s. v European Commission, t-216/15, EU:T:2018:64

non-economic,⁹⁵ although it is mentioned as well that not even the present system has been systematically scrutinized by the EU Courts.⁹⁶ This raises the question of whether even the present public healthcare system would count as non-economic, which might not necessarily be the case considering the rather wide contemporary scope of EU competition and state aid regime.⁹⁷ It would nevertheless, seem probable for the present system to be at least considered to fall within the scope of SGEI exception, due to its apparently more deficit-based method of financing. The Government however, pointed out that, since the proposed system is apparently of an unprecedented type,⁹⁸ there is no possibility to determine the systems nature on basis of a simple analogy to an identical system. Whether the activities contained within the system are economic would therefore has to be decided via individual analysis.

In the Government Bill, the question was discussed based on multiple factors and their implications towards the solidarity and, eventually economic or non-economic nature of the system.⁹⁹ These factors are for practical reasons divided below into two categories. First, the factors alleged by the Government to indicate a non-economic system, and second, the factors implying the opposite are introduced. Comments reflecting the academic views taken on the issues are added to the respective arguments.

3.1.1. Indications towards a non-economic system

3.1.1.1. Exercise of public powers

The Government took the view that the system incorporated exercise of public powers in the meaning of the Commissions SGEI Communication.¹⁰⁰ However, it is unclear whether public healthcare as such would qualify as exercise of public powers, since such interpretation cannot be made directly from the Communication. As introduced in part 1.1.2. of this study, the unincorporated county enterprises do indeed exercise public powers in their decision-making regarding the service needs assessment of clients.

⁹⁵ HE 16/2018, *supra nota* 3, see 3.3.10

⁹⁶ *Ibid.*, see 2.3.6

⁹⁷ Sauter, W. (2012). The Impact of EU Competition Law on National Healthcare Systems. – *European Law Review*. Vol. 38. No. 3. pp. 465-466

⁹⁸ HE 16/2018, *supra nota* 3, see 1.2

⁹⁹ *Ibid.*, see 3.3.10

¹⁰⁰ Commission Communication (EU) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2011), OJ C 8, 11.1.2012, see 2.1.2.

However, administrative tasks are only assigned to the unincorporated county enterprises, and thus are clearly not indispensable in relation to the provision of the actual healthcare services, it would seem unlikely for them to be seen as inseparable from the other services. Inseparable connection between the exercise of public powers and economic activities being necessary to call upon this excuse.¹⁰¹

3.1.1.2. Aim of the system

The aim of the system, which has been discussed in part 1.1.1. of this study, was considered to be social, which is indeed considered a factor implying to a non-economic activity. This approach has been criticized as well, on the grounds that it fails to consider differences in social systems.¹⁰² It is also interesting that cost control is mentioned as one of the main aims, although it would definitely count as an economic objective,¹⁰³ which would not necessarily be considered a social one in the strict sense.

3.1.1.3. Coverage of the system and mandatory participation

The system would cover the whole population of Finland. As listing to a service provider would be mandatory every client of the public healthcare, the coverage would be more or less comprehensive. This is usually considered to indicate a non-economic nature by the Court as well.¹⁰⁴

3.1.1.4. Method of financing

As the services would be financed by the state with tax funds, the contributions paid by individual person are both compulsory and income rather than risk related. The benefits were also considered to be nearly or completely free, since only minor client fees, paid to the county irrespective of the service provider, would be charged for the services. These elements are to some extent considered to indicate non-economic activities also academic views,¹⁰⁵ although it has been made clear by the ECJ that this is not necessarily true, as also services provided for free may constitute economic

¹⁰¹ Graells, A. S., Anchustegui, I. H. (2016). Revisiting the Concept of Undertaking from a Public Procurement Law Perspective – a Discussion in EasyPay and Finance Engineering. – *European Competition Law Review*. No. 37.

¹⁰² Hatzopoulos (2012), *supra nota* 51, pp. 983-984

¹⁰³ Sauter (2012), *supra nota* 97, p. 461

¹⁰⁴ Hatzopoulos (2012), *supra nota* 51, pp. 983-984

¹⁰⁵ *Ibid.*

activity.¹⁰⁶ It is clear however, that the recipient of the service not being liable to remunerate the service provider, is an implication of solidarity.

3.1.1.5. Ratio of contributions paid to benefits received

While the amount of contribution paid by a person would vary based on the person's income, the benefits received would be linked to person's needs. This is a definite sign of solidarity and thus indicates non-economic nature.¹⁰⁷

3.1.1.6. Inability to choose clients

The fact service providers would be obliged to accept all clients in relation to the services of direct-choice, unlike in case of other categories of service, indicates in the Government's view a non-economic nature. The same approach has been presented by academics in relation to social securities as diminishing adverse selection,¹⁰⁸ yet it is unclear whether this element affects the whole of the system while only applying to one category of services within it.

3.1.1.7. Regulation and supervision of activities

Lastly, it is pointed out by the Government that the sector would be heavily regulated and supervised by the state. While this is true, it is also the case for many entirely economic activities, such as sales of tobacco. The contributions and benefits are still being decided under state control, is considered as an implication of a non-economic activity.¹⁰⁹

3.1.2. Indications towards an economic system

3.1.2.1. Remuneration for provision of services

It was noted by the Government that compensation would be paid for the service providers would indicate an economic nature for the activities in general. While this is true, it has been pointed out by academics and caselaw that existence of remuneration is not even compulsory for an activity to be regarded as economic in this context.¹¹⁰

¹⁰⁶ Odudu, O. (2011). Are State Owned Healthcare Providers that Are Funded by General Taxation Undertakings Subject to Competition Law? – *European Competition Law Review*. Vol. 32. No. 5. pp. 235-236

¹⁰⁷ Hatzopoulos (2012), *supra nota* 51, pp. 983-984

¹⁰⁸ Kloosterhuis, E. (2017). Defining Non-Economic Activities in Competition Law. – *European Competition Journal*. Vol. 13, No. 1. pp. 145-146

¹⁰⁹ Hatzopoulos (2012), *supra nota* 51, p. 983

¹¹⁰ Odudu (2011), *supra nota* 106, p. 235

3.1.2.2. Possibility to profit

The Government acknowledges the fact that compensation system provides possibility to profit from the provision of services in question, and in addition the use of profits would not be in any way restricted, which is true not only in the case of private service providers but as well in that of the unincorporated county enterprises. This has strong implications not only towards non-solidarity¹¹¹ but for the economic nature of the activity in general, as may be seen from the next section of the study.

3.1.2.3. Pricing of the services

It was pointed out in the Government Bill, that while the prices for the services of direct-choice and service vouchers could not be freely decided by the service providers, which would not be the case for prices of the personal budget services. This was considered by the Government as indication of economic activity, which seems agreeable. It can still be argued that in the academic views, the difference in the pricing mechanics for the different categories of services would not necessarily be of much significance, as none of the pricing systems seem strictly deficit-based, a criterion seen as decisive by certain academics.¹¹²

3.1.2.4. Competition between service providers

The existence of competition between service providers in quality and even in pricing regarding certain services shown above,¹¹³ was considered by the Government to imply an economic activity. This factor has been also examined by the Court in prior caselaw and found to indicate economic activity.¹¹⁴

3.1.2.5. Possibility to offer additional services

It was also pointed out that the private service providers would be free to offer any additional services for their clients, at the clients' own expense. The possibility to use the provision of public services to support the commercial interests of an undertaking seems clearly to indicate an economic activity.¹¹⁵ The argument has been made by academics, that both lack of commerciality

¹¹¹ Hatzopoulos (2012), *supra nota* 51, p. 983

¹¹² Bovis, C. (2010). Public Procurement, Public-Private Partnerships and Public Services in the EU. – *European Public Private Partnership Law Review*, No. 5. p. 90

¹¹³ see section 3.1.2.3.

¹¹⁴ Kloosterhuis (2017), *supra nota* 108, p. 123

¹¹⁵ Nicolaides, P. (2017). Not Even the Church Is Absolved from the State Aid Rules: The Essence of Economic Activity. – *European State Aid Quarterly*. No. 4. p. 535

and competition are strong indicators of a *sui generis* market, usually associated to the public service sector, while their existence is considered to imply the opposite.¹¹⁶

3.1.2.6. *Financial risk*

Unlike the unincorporated county enterprises, the private service providers would bear financial risk for their activities, due to the lack of insolvency protection and proper risk equalization system. This fact was admitted by the Government and is a definite indication towards an economic activity also in the view of academic literature.¹¹⁷

3.2. Economic activity in the EU law

Economic activity in the EU's competition law regime, has been simplistically defined through two conditions; first, the activity should include offering of goods or services on a market, and second, the activity is to be such that it may be performed in pursue of profit.¹¹⁸ The meaning of these conditions in the public healthcare sector had been discussed for instance by Odudu in his work.¹¹⁹ An assessment along similar lines in relation with the activities within the freedom of choice system be take place below.

3.2.1. Provision of services

The meaning of service has been a topic of some discussion in the decision given by the EU courts, however, it is quite evident from the caselaw of the EU courts at this point, that healthcare services generally satisfy the definition of service in the meaning of internal market law, despite opposite arguments have been made in the history.¹²⁰

One of the characterizations given by the Court of Justice describes a service as being something that satisfies a beneficiary's request without being a material good.¹²¹ Considering the services contained in the freedom of choice system have already for the most part been offered by also private undertakings in the market,¹²² and normal healthcare services predominantly seem to fulfil

¹¹⁶ Bovis (2010), *supra nota* 112, p. 88

¹¹⁷ Kloosterhuis (2017), *supra nota* 108, pp. 123,131

¹¹⁸ Hatzopoulos (2012), *supra nota* 51, pp. 990-991

¹¹⁹ Odudu (2011), *supra nota* 106, pp. 231-241

¹²⁰ Odudu (2011), *supra nota* 106, p. 235

¹²¹ Judgement of the Court, 20.11.2001, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, C-268/99, EU:C:2001:616, para 48

¹²² HE 16/2018, *supra nota* 3, see 2.1.15

the given description, it would seem unfruitful to challenge the argument in relation to the activities in question. Besides, no opposing allegation as to the status of the activities as services in the meaning of the TFEU, has been made in the Government Bill.

Thus, it would seem evident that the different healthcare activities carried out within the freedom of choice system would, or at least following the logic of the previous approaches in the caselaw, should be regarded as services in the context of EU law.

3.2.2. Potential to profit

Regarding the second condition, even the existence of hypothetical competition in the market has been considered to suffice to demonstrate the possibility to profit from the activity.¹²³ Furthermore, according to the broader approach of the ECJ, the possibility to profit from the provision of services, is assessed as if any conceivable judicial or other practical restrictions to profit in a certain legal regime or geographical area would be non-existent.¹²⁴ The question therefore, is not whether anyone is or ever has been profiting from the provision of the said service, but rather whether it is in theory plausible to profit from it.¹²⁵

In addition, it has been pointed out in academic literature, that the method of financing does not affect the basic nature of the service.¹²⁶ What is to be considered instead, is whether the services are fundamentally excludable or not.¹²⁷ Excludable services are those, which can be profitably offered in a market, since those unwilling or incapable of paying consideration may be excluded from the provision of the service.¹²⁸ This admittedly renders the scope of the concept of economic activity very wide. Definite majority of the services provided by public healthcare are technically excludable, although they could be rendered non-excludable through state intervention, specifically through state financing in our case. This, however, does not affect the fundamental nature of the service, which is economic according to this approach, since the services are technically excludable.¹²⁹

¹²³ Hatzopoulos (2012), *supra nota* 51, pp. 990-991

¹²⁴ Odudu (2011), *supra nota* 106, pp. 234-235

¹²⁵ *Ibid.*

¹²⁶ Odudu (2011), *supra nota* 106, p. 236

¹²⁷ *Ibid.*, pp. 235-236

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

Some academics have suggested, nevertheless, that the Court is more prone to assessing not only the abovementioned hypothetical profitability of provision of a service, but also the actual situation in the market as well. For instance, Kloosterhuis argues that the Court evaluates whether the activity is actually carried out by competing private undertakings, whether the entity in question is remunerated by the recipient of the services and thus competing with the private undertakings, and whether the entity bears financial risk, instead of only the hypothetical circumstance.¹³⁰

Considering that the activities in case of the freedom of choice system would be performed within a market where both public and private entities are by design competing for the same public healthcare clients with the means of quality, customer satisfaction and to some extent even pricing, and where the private entities face financial risks, it seems clear that even the more functional criteria used by the ECJ would likely be met. The fact that the recipients of the services would not directly remunerate the service providers, seems unimportant in a context where all entities providing these services, including private ones, would be compensated by the state.

From another viewpoint, the argument has also been introduced by academics, that non-economic activities are defined by market failure, which is to say that truly solidarity-based activities cannot be carried out by undertakings in an economically viable fashion.¹³¹ In the case of services within the freedom of choice system, it seems apparent from the fact that private undertakings would be offering the services, that doing so would be economically plausible.

While offering healthcare services based on solidarity principle would for obvious reasons be unsustainable for a profit pursuing undertaking on its own in normal circumstances, the freedom of choice system would create in a sense a *sui generis* market, where the situation would be the opposite. The solidarity principle would only affect the tax payers' and state's possibility to profit from the provision of services, however, not the possibilities of service providers and their investors, including the unincorporated county enterprises. Therefore, it is arguable whether this *sui generis* market would be fundamentally different from the normal one, considering it does not lack profitability, which is usually considered as the element differentiating public services from commercial ones.¹³²

¹³⁰ Kloosterhuis (2017), *supra nota* 108, p. 123

¹³¹ Nicolaidis (2017b), *supra nota* 115, pp. 535-536; Kloosterhuis (2017), *supra nota* 108, pp. 133-134

¹³² Bovis (2010), *supra nota* 112, p. 96

It is clear from the previous part of the study that the activities were considered profitable even by the Finnish Government, in addition to the fact that they recognised the existence of financial risk for the private service providers. Even if the activities of the unincorporated county enterprises would be evaluated in isolation of the rest of the market, the only significant difference would be the absence of financial risk, due to the alleged state aid. The presence of the possibility to profit seems thus sufficiently evident in this case, despite the services being offered in *sui generis* market of sorts.

3.2.3. Effect of solidarity and the Slovak case

While the general criteria for economic activity in the meaning of EU law has been satisfied as shown above, the effect of solidarity for the evaluation would still have to be taken into account, as was suggested in the Government Bill.

Solidarity within a system is considered by the Court as an indication of non-economic nature of activity,¹³³ although the sufficient degree of solidarity required to find an activity non-economic remains unclear.¹³⁴ As may be deduced from the factors introduced in section 3.1., the freedom of choice system indeed seems to contain elements implying an amount of solidarity. Whether these elements are sufficient to classify the activities as non-economic raises however, serious doubts in the light of recent ECJ caselaw and certain academic views taken on the issue.

While the system would admittedly contain elements of solidarity, it would still render the provision of the services profitable, as shown in the previous section of the study. This factor alone would seem decisive in some academical views, since the very nature of a non-economic activity seems to be its unprofitability.¹³⁵ Furthermore, similar approach has been taken by the ECJ, when even the predominance of solidarity within a system has not been deemed sufficient to render an activity non-economic when the system enables service providers to profit, and the market is a competitive one, as shown by the decision in the Slovak health insurance case.¹³⁶

While the two systems are not identical, the implications of the decision cannot be undermined. The Slovak system introduced even greater amount of solidarity in comparison to the Finnish

¹³³ Kloosterhuis (2017), *supra nota* 108, p. 118

¹³⁴ Hatzopoulos (2012), *supra nota* 51, p. 982

¹³⁵ Nicolaidis (2017b), *supra nota* 115, pp. 535-356

¹³⁶ Dôvera zdravotná poisťovňa, a.s. v European Commission, *supra nota* 94, paras 58, 64

system, as was recognized in the Government Bill.¹³⁷ Considering that despite the solidarity contained within the framework, the existence of profitability was the determinative factor, it seems clear that the Finnish freedom of choice system would fit the same description.

¹³⁷ HE 16/2018, *supra nota* 3, see 3.3.10

4. PROPOSALS

As it seems, the problems for the freedom of choice system from the EU state aid law viewpoint are threefold; first, the system counts as an economic one, second the system does not fit within the scope of the SGEI exception, and third, the system contains an element of state aid in the insolvency protection and tax benefits for the unincorporated county enterprises. Eliminating any one of these problems would render the system compatible with the internal market law. Achieving this objective without defeating the aims of the reform, however, limits the plausible options considerably.

Attacking the first problem would seem impossible without abandoning the main elements of the reform, namely the competitiveness and profitability, while eliminating the initial source of dispute, namely the beneficial tax and insolvency regime for state entities, would seem unthinkable from the viewpoint of the public authorities, granted that these activities could be separated from the provision of economic services of the unincorporated county enterprises.

This, however, would mean in effect, privatizing the whole sector. As said, the system would seem inevitably economic, however, considering the SGEI sector is situated in a sense, between economic and non-economic areas,¹³⁸ it would seem definitely a more plausible option. The SGEI exception on the other hand, would seem applicable only if the compensation method was changed to a more deficit-based, or if the system was to contain measures to recover overcompensation. Again, these sorts of changes would be likely to defeat the purpose of the system altogether, as they would render the participation of private undertakings significantly less attractive, thus diminishing the competition and efficiency gains.

Therefore, it would seem that the most likely way to render the freedom of choice system compatible with the internal market, would be to fully privatize the part of the public sector which provides the service included in the system, except for the activities that actually contain exercise of public powers, namely the service needs assessment in relation to the healthcare and social

¹³⁸ Hatzopoulos (2012), *supra nota* 51, p. 984

services, as was initially proposed in the prior Government Bill.¹³⁹ This would ensure a level playground for all the service providers without eliminating the aims of the reform, as no service provider would be enjoying from the beneficial tax and insolvency regimes but the system would remain competitive and attractive for private undertakings to take part in.

As explained earlier, fully privatizing the provision of these public services was considered unconstitutional by the Constitutional Committee of the Finnish Government, as it would endanger the equal right to healthcare and social services. The fact still seems to remain, that if the advantages granted by competitiveness, profitability and other elements representative to commercial markets are sought after, it is more likely than not that the EU competition and state aid law will impact the system. While this may be considered a nuisance, it should be kept in mind that these rules are intended for the protection of competition, and as such, evading or violating them is likely to result only in a less competitive environment, which would ultimately render the advantages sought, futile.

The concerns of the Constitutional Committee may very well be justified, yet their conclusion does not lead to a better result. The equal availability and quality of services could be guaranteed by simply relying on the possibilities created by the exception for SGEIs where needed, not through illegal state aid. In fact, it could be argued that the distorted competition within the market could in theory, be more likely to endanger the equal treatment of the clients, than the opposite.

¹³⁹ HE 16/2018, *supra nota* 3, see 3.2

CONCLUSION

The aim of this study was to find, if the national healthcare system introduced by the Finnish Freedom of choice Act would be in compliance with the EU state aid rules. The question asked was more specifically, whether the beneficial tax and insolvency regimes applied to state entities in Finland would, in combination with the new framework of freedom of choice system, constitute illegal state aid? The hypothesis of the author was that state entities providing services in the market would find themselves in an advantageous position compared to their competitors due to existence of illegal state aid.

After outlining both the framework of the new healthcare system and that of the EU state aid rules in 107(1) TFEU, in the first part of the paper, it was found in the second part, that the abovementioned benefits could indeed constitute potential state aid. It was established that the special tax and insolvency regime satisfied the cumulative criteria used by the ECJ to define measures constituting state aid. The benefits were found to confer a rather obvious advantage to the unincorporated county enterprises in relation to their competition in the market, as well as these benefits were found to be selective, as they only apply to state entities. It was affirmed that the advantage is sourced through state resources, since the measure in question concerns primarily fiscal benefits. As also the distortive effect on the competition and the potential effect on the internal market was demonstrated, the state aid nature of these elements became clear.

The applicability of the exception for SGEIs was assessed, however, it appeared that the compensation method of the system, especially the capitation-based compensation for the direct-choice services, did not comply with the requirements set for the necessary safeguards. The system was found to liable to cause overcompensation by design, without introducing any sort of recovery system. Thus, this exception was considered inapplicable.

The Government's argument regarding the non-economic nature of the system was scrutinized in the third part of the paper, and it was found that despite the existence of multiple factors indicating towards social solidarity, the system still involved activities which satisfied the EU's definition for

service, and were not only conducted in a competitive manner but were also profitable. While it has been suggested that the ECJ evaluates the economic nature of a system on basis of solidarity and the actual market circumstances, it is clear from the recent caselaw the Court, that even potential profitability of an activity has been considered a decisive factor in this assessment. This seemed to be true regardless of the amount of solidarity contained within a system, as even the predominance of solidarity was not considered an excuse. There is, therefore, little reason to believe that the system examined in this paper would be an exception from the earlier cases, which despite concerning for the most part insurance style systems, bear significant resemblance to the proposed freedom of choice system.

The answer to the research question thus, would seem to be that the special tax and insolvency protection regimes enjoyed by the state entities in combination with the proposed freedom of choice system in healthcare, indeed constitute illegal state aid in the meaning of 107(1) TFEU. The hypothesis of this paper is therefore affirmed, as this study shows that the unincorporated county enterprises would find themselves in an advantageous position in relation to other service providers, due to the state aid, they would be receiving in the beneficial fiscal treatment.

As it was discovered in part four of the study, eliminating the said state aid without separating the authoritative activities of the unincorporated county enterprises from their economic activities, thus *de facto* privatizing the public service sector, would prove near impossible. Remodelling the compensation scheme to one fitting within the scope of SGEI exception would be likely to defeat the purpose of the reform, i.e. raising *inter alia* effectiveness, cost efficiency and quality through introducing new competition to the market in the shape of profit pursuing private service providers. Removing the prominent profitability from the framework would be likely to eliminate the inducement to participate from the viewpoint of such undertakings. On the other hand, privatizing the sector would not only eliminate the state aid from the system, but also likely enhance the competition on the market, as the playground would be level for all service providers, thus helping to reach the initial goals of the reform.

LIST OF REFERENCES

Scientific books:

1. Bacon, K. (2013). *European Union Law of State Aid*. 2nd Ed. Oxford: Oxford University Press.
2. Bacon, K. (2017). *European Union Law of State Aid*. 3rd Ed. Oxford: Oxford University Press.
3. Craig, P., De Búrca, G. (2015). *EU Law: Text, Cases, and Materials*. 6th Ed. Oxford: Oxford University Press.
4. Ezrachi, A. (2018). *EU Competition Law: An analytical Guide to Leading Cases*. 6th Ed. Oxford: Hart Publishing.
5. Hancher, L., Ottenvanger, T., Slot, P.J. (2016). *EU State Aids*. 5th Ed. London: Thomson Reuters trading as Sweet & Maxwell.
6. *State Aid Law of the European Union*. (2016). /Eds. H.C.H. Hofmann, C. Micheau. Oxford: Oxford University Press.
7. Nistor, L. (2011). *Public Services and the European Union: Healthcare, Health Insurance and Education Services*. The Hague: T.M.C. Asser Press.
8. Piernas López, J. J. (2015). *The Concept of State Aid under EU Law*. 1st Ed. Oxford: Oxford University Press.
9. Quigley, C. (2009). *European State Aid Law and Policy*. 2nd Ed. Oxford: Hart Publishing.

Scientific articles:

10. Aalto-Setälä, I., Koivuniemi, H. (2017). Finland – Strict Interpretation of EU State Aid Rules Creates a Constitutional Impasse for the Finnish Health and Social Services Reform. – *European State Aid Quarterly*, No. 3. 501-503
11. Bovis, C. (2010). Public Procurement, Public-Private Partnerships and Public Services in the EU. – *European Public Private Partnership Law Review*, No. 5. 85-96
12. Buendia Sierra, J. L. (2018). Finding Selectivity or the Art of Comparison, - *European State Aid Law Quarterly*, No. 1. 85-92

13. Chesaites, N. (2017). Tax Incentives as State Aid. - *EU Competition and State Aid Rules: Public and Private Enforcement*. (Eds.) V. Tomljenović, N. Bodiřoga-Vukobrat, v. Butorac Malnar, I. Kunda. Berlin: Springer. 253-272
14. Graells, A. S., Anchustegui, I. H. (2016). Revisiting the Concept of Undertaking from a Public Procurement Law Perspective – a Discussion in EasyPay and Finance Engineering. – *European Competition Law Review*. No. 37. 93-98
15. Hatzopoulos, V. (2012). Economic Constitution of the EU Treaty and the Limits Between Economic and Non-Economic Activities. – *European Business Law Review*. No. 23. 973-1007
16. Kloosterhuis, E. (2017). Defining Non-Economic Activities in Competition Law. – *European Competition Journal*. Vol. 13, No. 1. 117-149
17. Liszt, M., Čulinović, H. (2017). Certain Aspects of State Aids to Services of General Economic Interest. - *EU Competition and State Aid Rules: Public and Private Enforcement*. (Eds.) V. Tomljenović, N. Bodiřoga-Vukobrat, v. Butorac Malnar, I. Kunda. Berlin: Springer. 291-313
18. Nicolaidis, P. (2017a). Excessive Widening of the Concept of Selectivity. *European State Aid Quarterly*. No. 1. 62-72
19. Nicolaidis, P. (2017b). Not Even the Church Is Absolved from the State Aid Rules: The Essence of Economic Activity. – *European State Aid Quarterly*. No. 4. 527-536
20. Odudu, O. (2011). Are State Owned Healthcare Providers that Are Funded by General Taxation Undertakings Subject to Competition Law? – *European Competition Law Review*. Vol. 32. No. 5. 231-241
21. Sauter, W. (2012). The Impact of EU Competition Law on National Healthcare Systems. – *European Law Review*. Vol. 38. No. 3. 457-478
22. Szyszczak, E. (2017). The Altmark Case Revisited: Local and Regional Subsidies to Public Services. – *European State Aid Quarterly*. No. 3. 395-407
23. Van de Gronden, J., Sauter, W. (2011). Taking the Temperature: EU Competition Law and Health Care. – *Legal Issues of Economic Integration* 38. No. 3. 213-241
24. Virtanen, M., Valkama, P. (2009). Competitive Neutrality and Distortion of Competition: A Conceptual View, - *World Competition* 32, No. 3. 393-407

EU legislation:

25. Commission Decision (EU) No. 21/2012/EU of 20 December 2011 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, OJ L 7, 11.1.2012, 3-10

26. Commission Notice (EU) on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, 10-22
27. Commission Decision (EU) of 11 December 2007 on the aid No C 7/06 (ex NN 83/05) implemented by Finland for Tieliikelaitos/Destia, OJ L 270, 10.10.2008, 1-30
28. Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, 1
29. Commission Communication (EU) European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, 15-22
30. Commission Communication (EU) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2011), OJ C 8, 11.1.2012, 4-14

Finnish legislation:

31. Konkurssilaki 20.2.2004/120
32. Tuloverolaki 30.12.1992/1535

EU court decisions:

33. Judgement of the Court, 20.11.2001, Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie, C-268/99, EU:C:2001:616
34. Judgement of the Court, 8.9.2011, Paint Graphos and Others, C-78/08-C-80/08, EU:C:2011:550
35. Judgement of the General Court, 5.2.2018, Dôvera zdravotná poisťovňa, a.s. v European Commission, t-216/15, EU:T:2018:64

Other sources:

36. HE 16/2018 Hallituksen esitys eduskunnalle laiksi asiakkaan valinnanvapaudesta sosiaali- ja terveydenhuollossa ja eräiksi siihen liittyviksi laeiksi. 2018. Accessible: <https://www.finlex.fi/fi/esitykset/he/2018/20180016#idp447705360>, 14.2.2019
37. Merikanto, T. (2019). *Analyysi: Sote-matkan II käännettä ja tulos vai ulos? Onko perustuslakivaliokuntakin vaarassa tahraantua politikoinnista?* Accessible: <https://yle.fi/uutiset/3-10645572> , 14.2.2019
38. Sosiaali- ja terveysministeriö, note, *Ministeriöt toimittivat loput ratkaisuehdotukset maakunta- ja sote-lakeihin sosiaali- ja terveysvaliokunnalle*, accessible:

https://stm.fi/artikkeli/-/asset_publisher/ministeriot-toimittivat-lopun-ratkaisuehdotukset-maakunta-ja-sote-lakeihin-sosiaali-ja-terveysvaliokunnalle, 28.2.2019

39. Toivonen, T. (2019). *Sote kaatoi hallituksen – pääministeri Sipilä: Edellytyksiä etenemiselle ei ole, se on minulle valtava pettymys*. Accessible: <https://yle.fi/uutiset/3-10679239>, 13.3.2019