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Defining non-economic activities in competition law

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ABSTRACT

This article discusses how (non-)economic activities are defined in European competition law. It examines the criteria developed by the European Court of Justice, whether these criteria are consistent, and whether they are also applied logically. In this examination, a legal as well as an economic perspective is taken. It appears that economic insights can contribute substantially to the understanding of the Court's approach.

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1. Introduction

The definition of the concept of undertaking is of crucial importance for the determination of the scope of competition law.¹ In European competition law, an undertaking comprises any entity that engages in economic activities, irrespective of its legal form and method of financing.² The exact legal meaning of “economic activities” has to be inferred from case law. It is therefore important to understand the case law well, and this is not always easy. The thinking of the Court of Justice of the European Union (hereafter: the Court) reveals signs of a quest for the right criteria. In that quest, it seems that, over time, inconsistencies have crept in. In addition, it is sometimes difficult to determine what the Court regards

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¹In this article, “competition law” is understood to be the European Union's competition law as well as national competition laws that follow European law in this regard. The term “non-economic activities” is used in the present article because this is common in the case law. To economists, this is however a strange term because in the production of “non-economic” goods and services scarce resources are used with the aim to contribute to social welfare. This is the essence of what economics is about.

²Case C-41/90 *Höfnér and Elser v Macrotron* EU:C:1991:161, para 21.

as essential criteria rather than ancillary or secondary criteria. Furthermore, criteria must be conceptually correct, but also suitable for use in the real world. At times, it seems these two aims are at odds with each other.

The first part of this article (Sections II and III) contains a “pure” analysis of European case law on the concept of undertaking, which means an analysis based on the case law itself, without the use of an additional theoretical concept. It emerges that the common thread in the case law is that the *nature* of the activities, as well as the *objective* that they promote, constitute the main decisive principle in the assessment. This reflects the essence of the functional approach as adopted by the Court, which means that an activity is considered to be of an economic nature only if it is carried out or *can* be carried out in a market by private undertakings.³ In order to put this approach into practice, the Court has developed several criteria. First, the Court has looked for indications of whether the existence of a market could factually be observed in the case at hand. In addition, the Court has determined several contextual factors of relevance. The most important of these are (1) whether the examined activity amounts to the exercise of state authority or, in the case of social insurances, embodies a substantial degree of solidarity, (2) how the entity that performs the activity is financed and (3) whether or not that entity has any commercial latitude. This article will show that, generally speaking, the application of these contextual criteria is closely related to the functional approach from which they are derived. However, sometimes these criteria seem to have taken on a life of their own; side issues seem to have become main issues. Does this mean that the Court did not consistently apply its own functional approach? Or is the usefulness of this approach too limited, so that the Court had to find other criteria? These are some of the questions to which this article aims to provide an answer.

To deepen the analysis, an economic approach will be adopted in the second part (Sections IV and V). In this, it is explored whether and to what extent the theoretical framework of market failures may provide answers for the definitional questions that we encountered in the first part and whether this enables us to understand and apply the functional approach better.

One key question that arises in this context is, whether activities of the same nature always have the same status under competition law, regardless

³The purpose of this approach is, that the scope of competition law is objectively defined, irrespective of the way in which activities are legally embedded, which may differ between States (see *infra* Section II.A).

of any differences in national choices, and in the way in which they are embedded in national law. An affirmative answer to this question would do justice to the idea that, within the European Union, legal rules should apply as uniformly as possible. This is consistent with the teleological interpretation of European Union law, which guarantees that this law is incorporated into national legal systems in a uniform manner. Another possible line of thought could however be that national governments still have discretion to determine the scope of European competition law.⁴ Remarkably, the European Commission gives credit to the latter view. In several documents, the Commission has stated that the status of an activity may depend on the way in which matters are organized, which can vary from one member state to another.⁵ This view seems difficult to reconcile with a strict functional approach, in which only the nature of the goods should count.⁶ In a strict functional approach it would thus not be feasible to shield activities that are basically of an economic nature from the scope of competition law.⁷ Whether this position can actually be maintained is another question that this article wishes to answer.

Although it may look as if the European case law has resulted in a jumble of criteria over the years, it follows from the analysis below that there is a method in this madness. It appears that the case law has consistently followed a broad, functional approach. This basically means that activities are of an economic nature if they at least *can* be performed in a market by private undertakings. All of the Court's criteria can be understood and applied against this background, but it should be noted that this is not always clearly visible in the case law itself.

Nevertheless, the functional approach gives rise to complex questions, because it is not clear exactly why and when an activity is or is not suited to be performed by private undertakings in a market. In practice, this is a very tough question to answer. That is why it is worthwhile to test the

⁴In this sense, W Hatzopoulos, 'The Concept of "Economic Activity" in the EU Treaty: From Ideological Dead-ends to Workable Judicial Concepts' Collège d'Europe Research paper in Law 06/2011 and L Nistor, *Public Services and the European Union, Healthcare, Health Insurance and Educational Services* (Asser Press 2011) 144.

⁵Most recently: Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU OJ C 262/1 19.7.2016 (*Notice State aid*), paras 12–13. In this line of thinking, the Commission considers it also possible that activities that belong to the essential functions of the state are nevertheless economic if the member state decides to introduce market mechanisms (para 17).

⁶As also noted by Sauter; W Sauter, *Coherence in EU Competition Law* (OUP 2016) 77.

⁷On the other hand, it is possible that member states expand the scope of their national competition laws to activities that have a non-economic character according to European law. From a community perspective, this does not raise any objections, since the effectiveness of European competition law is not affected. See: M Szydło, 'Leeway of Member States in Shaping the notion of "Undertaking" in Competition Law' (2010) *World Competition Law and Economics* (33) 549.

merits of an economic approach. Economics offers insight into the question of the conditions under which markets function well, so that they can optimally contribute to the welfare of society. Often, some kind of government intervention is needed to create such conditions. In other instances this is not enough: the market fails in supplying the good in question. This is what we may call the natural domain for government activities, which may coincide with the domain of non-economic activities in competition law.⁸ In the second part of this article, it is shown that an economic perspective can indeed lead to a better understanding of the case law, and may help in categorizing the various criteria that have been developed by the Court. The conclusion is that, outside the realm of social security, a line of reasoning based on the concept of “non-excludability” can help to make a distinction between economic and non-economic activities. With regard to cases within the realm of social security, the concept of “adverse selection” can be applied.

This does not mean that defining economic activities amounts to a simple exercise in practice. For one thing, government interventions can sometimes be explained by multiple motives. Furthermore, it is difficult to draw a hard line between economic and non-economic activities; that divide is often fluid. The final conclusion of this article is therefore that, when distinguishing between economic and non-economic activities, pragmatic solutions are sometimes to be preferred over a principle-based approach. Even so, those pragmatic solutions will need to have a logical link with the core principle of the functional approach.⁹

II. The Höfner ruling and the functional approach to the concept of undertaking

A. Case law prior to Höfner

The Höfner ruling from 1991, which will be discussed below, is one of the most important rulings for the definition of the concept of undertaking,

⁸The objective of a non-economic activity is thus to create a service that cannot be created through market forces, but also, in my opinion, to create a service level that substantially exceeds any level that the market could create (see *infra* para IV.B.2).

⁹For the sake of completeness, it is noted that this article will not extensively discuss the specific legal questions about *separability* of non-economic activities from economic activities and about *purchasing* activities. These questions are addressed in, *inter alia*, Joint cases T-443/08 and 455/08 *Mitteldeutsche Flughafen and Flughafen Leipzig Halle v Commission* EU:T:2011:117, case C-288/11P *Mitteldeutsche Flughafen and Flughafen Leipzig Halle v Commission* EU:C:2012:821, case C-138/11 *Compass-Datenbank v Republik Österreich*, EU:C:2012:449, case C-205/03 *Federación Español de Empresas de Tecnología Sanitaria (FENIN) v Commission* EU:C:2006:453 and in case C-74/16 *Congregación de Escuelas Pías Provincia Betania* EU:C:2017:496, respectively.

but also one of the most controversial.¹⁰ It expands on previous case law.¹¹ In those previous cases, there was already a trend visible, whereby the Court looked beyond the formal-legal circumstances and instead focused predominantly on the nature of the activities.¹² In this approach, it is examined whether the entity fulfils the “function” of a private undertaking, consisting of the supply of goods in a market.¹³ The rationale behind this approach is that the objectives of community legislation would be jeopardized if the application thereof were to depend on, for example, the legal status of an activity under national law. When the same activities would fall under community competition law in some member states and not so in others, this would harm the unity and effectiveness of community law.¹⁴

B. The Höfner ruling

Compared with previous cases, *Höfner* was clearly a borderline case. The case was about employment procurement of higher staff, which, in Germany, is an activity over which the Office for Employment (the “Bundesanstalt”) had a legal monopoly.¹⁵ It was not self-evident that this concerned an economic activity. After all, employment procurement is a key instrument in social and economic policy.¹⁶ No payments were asked for the procurement activities of the Bundesanstalt; it was mainly financed by contributions from employers and employees, irrespective of the actually provided services.¹⁷ The Court ruled first that “[...] the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed [...]”.¹⁸ The Court continues:

¹⁰The controversial nature of this ruling came from the potentially very broad definition of the concept of undertaking that it contained (see *infra* Section II.C).

¹¹In this jurisprudence in particular, it had already been established that the following could be considered to be non-economic activities: (1) the imposition of fees by an independent public body that acts in the public interest, and is devoid of a commercial character, and (2) the granting of concessions by municipalities acting in their capacity as public authorities. See case C-94/74 *IGAV v Ente Nazionale per la Cellulosa* EU:C:1975:81, para 35 and case C-30/87 *Bodson v Pompes Funèbres des Régions Libérées* EU:C:1988:225, para 18.

¹²Case C-118/85 *Commission v Italy (Tobacco Products)* EU:C:1987:283, paras 7–8.

¹³According to the description of this approach by AG Jacobs in case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:28, para 214.

¹⁴Case C-118/85 *Tobacco Products* EU:C:1987:283, paras 10–11.

¹⁵Case C-41/90 *Höfner* EU:C:1991:161, para 4.

¹⁶*Ibid*, para 3.

¹⁷*Ibid*, para 19.

¹⁸*Ibid*, para 21.

The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.¹⁹

This reasoning clearly reveals the functional approach of the Court in this case. It shows that the Court was willing to take a relatively abstract approach to the definition of the concept of undertaking. At the same time, the phrase “has not always been carried out by public entities” indicates that the Court also wishes to take into account the factual, observable circumstances. This ambivalence can also be seen in subsequent cases. Furthermore, it is remarkable that the Court, as opposed to the Advocate General, did not follow the criterion that is applied in the rules for free movement where services are defined as services that are *normally* provided for remuneration.²⁰ Instead, the Court preferred a wider criterion that allows for the qualification of activities as economic if they can *potentially* be carried out by private undertakings.

C. A “broad” or a “strict” approach?

Höfner did produce several reference points for subsequent cases. For example, the principle that the method of financing is irrelevant, is often repeated in subsequent case law. However, the implications of the broad functional approach that could be read in this ruling were soon considered to be far-reaching or even *too* far-reaching. It was feared that an approach that abstracted from factual circumstances on the market would result in a situation where *every* service that the State offers to its citizens could be regarded as economic.²¹

For a period following the *Höfner* ruling, a divergence can be observed between the reasoning of the Advocates General and that of the Court. The Advocates General followed the broad interpretation of *Höfner* by applying the principle that activities are considered to be of an economic nature if these, *in principle*, could be carried out by private undertakings.²²

¹⁹*Ibid*, para 22.

²⁰Currently Article 57 TFEU. See the opinion of AG Jacobs in this case, EU:C:1991:14, paras 19–20.

²¹See JL Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (OUP 1999) 47–49, A Winterstein, ‘Nailing the Jellyfish: Social Security and Competition Law’ (1999) ECLR 324, and Nistor (n 4)143.

²²AG Tesaro in joint cases C-159-160/91 *Poucet et Pistre* EU:C:1992:358, para 8 and in case C-364/92 *SAT Fluggesellschaft v Eurocontrol* EU:C:1993:878, para 9, AG Cosmas in case C-343/95 *Diego Cali & Figli v Servizi Ecologoco Porto di Genova* EU:C:1996:482, para 42 and in case C-35/96 *Commission v Italy (Customs Agents)* EU:C:1998:52, para 51, AG Jacobs in case C-67/96 *Albany* EU:C:1999:28, para 311, in case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:284, para 67, in case C-218/00 *Cisal di Battistello (INAIL)* EU:C:2001:448, para 50, in case C-264/01 *AOK Bundesverband* EU:C:2003:304,

In 1999, eight years after *Höfner*, AG Jacobs expressed the opinion that the Court had also applied this broad approach in subsequent cases.²³

In hindsight, this conclusion was not entirely correct. It became increasingly clear that the Court preferred not to base itself only on an analysis “in the abstract”, but rather also to look at concrete factual circumstances. These are, most notably, reflected in the following questions:

- (a) Is the activity actually carried out by private undertakings that compete with one another?²⁴
- (b) Does the entity in question carry out the activities on payment by the buyer?²⁵
- (c) Does this entity thus compete with private undertakings?²⁶

In addition, the Court also examined whether the entity bears financial risk.²⁷ With this approach, the Court stayed much closer to the factual market circumstances than the broad approach of the Advocates General suggested.

The reason behind this trend might have been that it had quickly turned out that the broad interpretation of *Höfner* created problems, particularly in cases concerning social security. Buendia Sierra noted that the Court, already in *Poucet et Pistre* (1993), completely ignored the question of whether or not the activity could be carried out by private undertakings. In his view, this would have forced the Court to classify the social insurance in question as an economic activity because social insurances (in the broad sense of the word) can, in fact, be carried out by private companies.²⁸

para 27 and in case C-222/04 *Cassa di Risparmio di Firenze* EU:C:2005:655, para 78 and AG Misho in case C-82/01 *Aéroports de Paris* EU:C:2002:115, para 141.

²³Case C-67/96 *Albany* EU:C:1999:28, paras 311 and 330.

²⁴Case C-244/94FFSA EU:C:1995:392, para 17, case C-475/99 *Glöckner* EU:C:2001:577, para 20, case C-327/12 *Ministero dello Sviluppo Economico* EU:C: 2013:827, para 35.

²⁵Case C-35/96 *Customs Agents* EU:C:1998:303, para 37, case C-180-184/98 *Pavel Pavlov and others v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, para 76, case C-475/99 *Glöckner* EU:C:2001:577, para 20, case C-309/99 *Wouters and others v Nederlandse Orde van Advocaten* EU:C:2002:98, para 49, case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência (OTOC)* EU:C:2013:127, paras 37 and 40, case C-327/12 *Ministero della Sviluppo Economico* EU:C:2013:827, para 29.

²⁶Case C-67/96 *Albany* EU:C:1999:28, para 84, case AOK *Bundesverband* EU:C:2004:150, para 54, case C-222/04 *Cassa di Risparmio* EU:C:2006:8, para 121, case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* EU:C:2008:376, para 27, case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* EU:C:2011:112, para 65, case C-1/12 *OTOC* EU:C:2013:127, para 58, case C-185/14 *Easypay and Finance Engineering* EU:C:2015:716, para 43.

²⁷Case C-35/96 *Customs Agents* EU:C:1998:303, para 37, case C-327/12 *Ministero dello Sviluppo economico* EU:C:2013:827, para 29, joint cases C-180-184/98 *Pavlov* EU:C:2000:428, para 73, case C-309/99 *Wouters* EU:C:2002:98, para 48, case C-159/91 *Poucet et Pistre* EU:C:1993:63, para 12, case C-1/12 *OTOC* EU:C:2013:127, para 37.

²⁸Sierra (n 21) 49.

Another striking fact is that the Court in 1997, in *Diego Cali*, returned to the earlier wording of *Tobacco Products* in which economic activities are referred to as activities “of an industrial or commercial nature by offering goods or services on the market”.²⁹ This is repeated verbatim in a considerable number of subsequent rulings.³⁰ It is another indication that the Court does not prefer the more abstract line of reasoning in *Höfner*.³¹ However, there is an echo from *Höfner* in the *Glöckner* ruling, where the Court established that the activities in question (emergency transport services and patient transport services), which the court considered to be of an economic nature, were *not always necessarily* carried out by recognized medical-aid organizations or public authorities.³²

This development shows that the Court chose to adopt a concrete interpretation of the functional approach by basing itself, whenever possible, on what can be actually observed in the market. This seems to make sense since, in practice, an assessment “in the abstract” is not an easy task. However, this does not mean that the more abstract approach has been abandoned. The Court always has the option of falling back to it when the abovementioned indicators offer too little guidance or point in opposite directions. The *Mitteldeutsche Flughafen* case offers a demonstration. In this case, which was about state aid for the construction of airport infrastructure, it was argued that airports are not established by private market participants because such projects are not profitable. The General Court ruled that this is not relevant for the qualification of an economic

²⁹Case C-118/85 *Tobacco Products* EU:C:1987:283, para 7, case C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* EU:C:1997:160, para 16.

³⁰Case C-475/99 *Glöckner* EU:C:2001:577, para 19, case C-309/99 *Wouters* EU:C:2002:98, para 48, case C-222/04 *Cassa di Risparmio* EU:C:2006:8, para 108, case C-205/03 *FENIN* EU:C:2006:453, para 25, case C-49/07 *MOTOE* EU:C:2008:376, para 22, case C-113/07 *SELEX Sistemi Integrati SpA v Commission*, EU:C:2009:191, para 69, case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* EU:C:2012:449, para 35, case C-1/12 *OTOC* EU:C:2013:127, para 36, case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411, para 27, case C-185/14 *Easypay* EU:C:2015:716, para 37.

³¹This development did not escape the attention of the Advocates General. In his opinion in *Cassa di Risparmio* of 27 October 2005, AG Jacobs established that a strict interpretation of the jurisprudence at the time assumed the actual provision of goods or services on a market. However, at that point, he was still a proponent of a broader interpretation in which “[...] the emphasis, when interpreting whether an activity is economic in nature, should be placed on whether that activity could, at least in principle, be carried on by a private undertaking in order to make profits” (case C-222/04 *Cassa di Risparmio* EU:C:2005:655, para 78). Shortly thereafter, on 10 November 2005, AG Poiares Maduro offered in *FENIN* a contrary view. Although the Court continues to refer to *Höfner* consistently, the actual course that is followed has been adjusted, he establishes. He agrees with this because he considers that the broader interpretation of *Höfner* results in a situation where basically every activity would be of an economic nature: “Almost all activities are capable of being carried on by private operators. Thus, there is nothing in theory to prevent the defence of a State being contracted out, and there have been examples of this in the past” (case C-205/03 *FENIN* EU:C:2005:666, para 12). In the literature, this argument has also been put forward by, among others, Nistor (n 4) 143. I will argue below that this objection against the functional approach is based on a misconception (see *infra* sections IV B 2–3).

³²Case C-475/99 *Glöckner* EU:C:2001:577, para 20.

activity.³³ The Court agreed with this: the relevant question is whether or not goods or services are offered on a market, but whether this activity is actually carried out by private undertakings is not the deciding factor.³⁴

III. Imperium, method of financing, commercial freedom

When defining the concept of undertaking, the Court has also considered several contextual factors relevant. The most important of these are (1) the question of whether the activity belongs to the government's *imperium*, (2) the method of financing and (3) whether or not the entity in question has commercial latitude (or is subject to state oversight). These criteria will be discussed below.³⁵

A. Imperium

The term *imperium* seems to refer to the “natural” or “classic” domain of the government. In the case law, reference is often made to a statement made by AG Mayras, who, for the interpretation of Article 51 TFEU, defines public authority as follows:

Official authority is that which arises from the sovereignty and majesty of the State: for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens.³⁶

This description, which was cited by AG Jacobs in *Höfner*, but ignored by the Court in that case, is revisited in later cases, starting with *Eurocontrol*.³⁷ From that point onwards, the principle criterion for the assessment of cases beyond social security is seemingly simple: if the activity is an expression of government authority it falls outside the scope of competition law, and if the activity comes down to offering goods on a market, then it will fall within that scope.³⁸ However, this seemingly simple solution brings

³³Joint cases T-443/08 and 455/08 *Mitteldeutsche Flughafen* EU:T:2011:117, para 115.

³⁴Case C-288/11P *Mitteldeutsche Flughafen* EU:C:2012:821, para 50.

³⁵For social insurances, the Court specifically chose as a criterion the level of solidarity between the insured, while the concept of *imperium* did not play any role in these cases. This criterion is included in the discussion hereafter on financing and the commercial latitude.

³⁶Opinions of AG Jacobs in case C-41/90 *Höfner* EU:C:1991:14, para 22 and AG Tesaro in case C-364/92 *Eurocontrol* EU:C:1993:878, para 9. Art. 51 TFEU states that the provisions on the right of establishment do not apply to activities in connection with the exercise of public authority by a member state.

³⁷Case C-364/92 *Eurocontrol* EU:C:1994:7, para 30.

³⁸Case C-343/95 *Diego Cali* EU:C:1997:160, para 16, case C-82/01 *Aéroports de Paris* EU:C:2002:617, para 75, case C-49/07 *MOTOE* EU:C:2008:376, para 24, case C-113/07 *SELEX* EU:C:2009:191, para 70, case C-138/11 *Compass-Datenbank* EU:C:2012:449, para 36 and case C-327/12 *Ministero dello Sviluppo economico* EU:C:2013:827, para 32.

several problems. First, it leads to a shifting of the definition question to the meaning of the concept *imperium*. Second, the problem of form-based classification emerges, as it may seem that activities can now be shielded from competition law by conferring a special legal status on them and/or enveloping the activities with special powers.

The Court has given different interpretations of the concept of *imperium*. *Eurocontrol*, which dealt with airspace supervision, contained a multi-dimensional approach. First, it established that, from a geographical perspective, the responsibility for the activity in question belonged to the sovereignty of the contracting states and was exercised on their behalf.³⁹ The Court also gave weight to the presence of special powers of coercion that are typical of State actions, and which thus deviate from the normal legal relations between citizens.⁴⁰ Finally, the Court looked into the interests involved in the activities. It established that airspace supervision is performed to the benefit of each aircraft that is present in that airspace, even if it has not paid the route charges owed. As such, the activity is considered of public interest.⁴¹ These factors combined led the Court to reach the conclusion that Eurocontrol's tasks are "typical" public-authority powers, which, consequently, are not of an economic nature.⁴²

In *Diego Cali*, the Court offered a more concise analysis. That case concerned inspections to prevent pollution of the marine environment in the harbour of Genua. Without much substantive argumentation, the Court concluded that this was a task in the public interest, which belonged to the essential functions of the State.⁴³ As such, it was considered an exercise of powers that are typically those of a public authority, as the Court puts it simply.⁴⁴ The ruling does not clearly explain *why* this is an interest that the government needs to protect, perhaps because it is more or less self-evident. However, the Advocate General did go more deeply into the issue. First, he pointed out that the marine environment is a public asset that must be protected in the interest of the people living in the area.⁴⁵ He then stated that the inspection tasks cannot be carried out effectively within a competitive system because they need to be performed independently from the payment of fees.⁴⁶ Furthermore, he concluded that the presence of a

³⁹Case C-364/92 *Eurocontrol* EU:C:1994:7, para 20.

⁴⁰*Ibid*, paras 23–24.

⁴¹*Ibid*, paras 25 and 27. See also the opinion of AG Tesaro in this case who, in broad terms, rules that the following falls under the *imperium* "(-) the fundamental powers of a public authority in areas such as general and fiscal administration, justice, security and national defence" (EU:C:1993:878, para 9).

⁴²Case C-364/92 *Eurocontrol* EU:C:1994:7, para 30.

⁴³Case C-343/95 *Diego Cali* EU:C:1997:160, paras 19–22.

⁴⁴*Ibid*, para 23.

⁴⁵Opinion of AG Tesaro in case C-343/95 *Diego Cali* EU:C:1996:482, paras 46–47.

⁴⁶*Ibid*, para 49.

market cannot be presumed, as the element of supply and demand in the relationship between the provision of services and the paying parties is lacking.⁴⁷ Finally, he noted the great importance of environmental protection to current and future generations, an interest that is also embodied in Community law. In his view, preventive environmental protection could therefore not be understood as anything other than a core State activity.⁴⁸

Compass-Datenbank is the third case that can shed light on the question of how the *imperium* is defined.⁴⁹ This case concerned the administration of a public register of companies. In this case, too, the Court's analysis is very concise. On the basis of *Eurocontrol* and *Diego Cali*, it concluded that a data collection activity on the basis of a statutory obligation for undertakings to disclose the data and related powers of enforcement falls within the exercise of public powers. As a result, such an activity is not of an economic nature.⁵⁰ In contrast to the Court, the Advocate General in this case, too, explored more deeply the interest that is served by the activity concerned. He argued that the register serves a general interest of legal certainty. The register is public, and the data included in it have a legal status. In that respect, the register differs from business information that is collected and commercialized by private parties.⁵¹

It thus appears that the Court sometimes pays more attention to the existence of special powers or means of enforcement than to the nature of the activity itself. As such, a side issue threatens to become a main issue.⁵² At the end of the day, the functional approach should only concern the nature of the activities itself.⁵³ In my view, the abovementioned case law justifies this interpretation.⁵⁴

⁴⁷Ibid, para 53.

⁴⁸Ibid, para 56.

⁴⁹In several other cases the Court considered activities to be included in the *imperium*, such as the subsidizing of organizations that are active in the public interest or social assistance (*Casa di Risparmio di Firenze*) and the authorization of motorcycling events (*MOTOE*). These cases do not offer additional insight in the general lines along which the Court defines the *imperium*.

⁵⁰Case C-138/11 *Compass-Datenbank* EU:C:2012:449, para 40.

⁵¹Ibid, paras 47–55. In *MOTOE* too, without further explanation, the power to give consent to applications for authorization to organize motorcycling events is considered an exercise of public-authority powers (case C-49/07 *MOTOE* EU:C:2008:376, para 46).

⁵²Several rulings of the General Court too, could mislead readers here. See joint cases T-231 and 237/06 *Netherlands and Nederlandse Omroep Stichting (NOS) v Commission* EU:T:2010, paras 98–99 and case T-461/13 *Spain v Commission* EU:T:2015:891, para 38. However, upon closer examination of these rulings, it appears that the General Court did indeed regard the nature of the activities themselves as the leading definition criterion.

⁵³This is also the opinion of Winterstein (n 21).

⁵⁴It is however unfortunate that, for this conclusion, support must be found in the opinions of the Advocates General in *Diego Cali* and *Compass-Datenbank* in particular, because these rulings unto themselves offer little clarity with regard to this key question.

Several rulings in which the Court *does* conclude that economic activities are present, also show that special powers or means of enforcement are not necessarily a deciding factor. For example, the Court did not hesitate to regard the “public” power of British Telecommunications to set tariffs as part of the exercise of economic activities.⁵⁵ The public employment activities in *Höfner*, too, were regarded as economic activities even though, under German law, these were carried out under State authority.⁵⁶ In *Aéroports de Paris*, the General Court concluded that the fact that an activity is carried out within the framework of a system of special supervision of publicly owned property does not rule out that said activity is of an economic nature.⁵⁷ In that same case, the Court noted that *Bodson* and *Eurocontrol* show that the existence of State prerogatives does not rule out that competition law can be applicable, because, for the question of whether or not there are prerogatives that are typically State prerogatives, the nature and the aim of such activities must also be examined.⁵⁸

B. Method of financing

As already noted, the Court assumed in *Höfner* that the method of financing was not relevant. That statement is of itself unclear, as “financing” can relate to both capital and revenues. It is self-evident that how capital is provided is irrelevant as it is undisputed that also state-owned undertakings can carry out economic activities. It is more likely that the Court referred to revenues. It had to explain after all why an activity that is offered for free could still be qualified as an economic activity. The question to address now is how the method of financing, as interpreted in this sense, played a role in subsequent cases.

1. Social security

It became quickly apparent that the Court had difficulty to apply the *Höfner* approach to social-security cases.⁵⁹ In *Poucet et Pistre*, the Court applied criteria that partially *did* concern the method of financing. What was considered to be of importance was: (1) whether or not the premiums were determined on the basis of solidarity, and therefore had no direct link with the provided services and (2) whether or not participation

⁵⁵Case C-41/83 *Italy v. Commission (telecommunication)* EU:C:1985:120, para 20.

⁵⁶Case C-41/90 *Höfner* EU:C:1991:161, para 24.

⁵⁷Case T-128/98 *Aéroports de Paris* EU:T:2000:290, para 120, accepted by the Court, case C-82/01 *Aéroports de Paris* EU:C:2002:617, para 77.

⁵⁸Case C-82/01 *Aéroports de Paris* EU:C:2002:617, para 81.

⁵⁹Also noted by *Sierra* (n 21) 49.

in the insurance was mandatory. These criteria clearly concern the method of financing. The degree of solidarity and the mandatory participation are the central benchmarks that the Court also uses in subsequent cases.⁶⁰ It is important to note that also in these cases the underlying question was whether the goods can be offered on a market by private undertakings.⁶¹ This is not the case if a high degree of solidarity is required. After all, private firms are not able to enforce participation, and, in a normal market, both insurers and insured are able to select the best option available.⁶² As a result, private insurance schemes have only a limited ability to give shape to solidarity between groups with different risk profiles and/or levels of income.

2. Beyond social security

In cases beyond social security we can observe many different modes of financing of activities that the Court characterized as non-economic. These modes include charges (in *Eurocontrol* and *Diego Cali*), statutory fees (in *Compass-Datenbank*) or free services (in *Selex*). Even though they differ, all these methods of financing clearly can be distinguished from those in the normal process of selling goods on the market. On the other hand, decisions where activities were designated as having an economic nature were often based in part on the fact that a service was carried out for remuneration by the buyer.⁶³ However, as *Höfner* shows, this is not always the case.

It can be concluded that, in both types of cases, the method of financing is indeed relevant in some specific way. However, the investigation of the method of financing leads back to the fundamental question of the functional approach. If the method of financing corresponds with that of regular market transactions, this is an indication of activities that can be offered on the market by private undertakings, and can thus be considered to be economic activities. If it does not, the opposite applies.

C. Commercial latitude

In *Eurocontrol*, AG Tesauro already emphasized that the question of whether the charges are set by a public authority or by the entity in

⁶⁰See *infra* Section V.1.

⁶¹See, for example, case C-244/94 *FFSA* EU:C:1995:392, para 19, case C-67/96 *Albany* EU:C:1999:430, para 84 and case C-264/01 *AOK* EU:C:2004:150, para 54. See also AG Fenelly in case C-70/95 *Sodemare SA and Others v Regione Lombardia* EU:C:1997:55, para 29.

⁶²See *infra* Section V.1.

⁶³See n 25.

question cannot be the deciding factor in defining economic activities.⁶⁴ After all, one of the implications of the functional approach is that governments can perform economic activities themselves, and, in that capacity, are able to make their own commercial decisions.⁶⁵ Conversely, it is also possible that public or private bodies that are organizationally separate from the government, carry out non-economic activities.⁶⁶ Cases like *Diego Cali* reveal that it is not relevant whether or not the State acts directly through its own administration or by way of a body on which it has conferred a certain task.⁶⁷ It also turns out that this can involve some “commercial” latitude without the activity becoming economic. This latitude can, for example, relate to the determination of the level of the necessary charges.⁶⁸ A similar situation arises where member states give qualitative freedom to entities that perform a certain task, for example, in the field of publicly financed education.⁶⁹ It seems therefore, that the “commercial latitude” factor cannot be assessed separately from the nature of the activity itself. In the functional approach, commercial latitude may be a relevant contextual factor, but only as *derived from* the question of whether or not the service can be offered on a market by private undertakings.

1. Social security

When we test this hypothesis against the case law on social security, we find the following. The Court has consistently regarded social-security schemes as non-economic if they are aimed at establishing a high degree of solidarity among the insured. This solidarity can be related to differences in risks, differences in income or other factors. The solidarity aim will lead to a diluted relationship between premiums and benefits. Therefore, selection by both insurers and insured will have to be prevented to keep the insurance scheme viable. This is called “adverse selection”. Adverse selection can be prevented by mandating, as well as obliging, citizens to participate in an insurance scheme and by prohibiting insurers from denying coverage.

⁶⁴Case C-364/92 *Eurocontrol* EU:C:1993:878, para 11.

⁶⁵Winterstein (n 21).

⁶⁶In case C-29/74 *IGAV* EU:C:1975:81, para 53, an independent public body was concerned (non-economic activities). In case C-343/95 *Diego Cali* EU:C:1997:160, para 13, an independent private body was concerned (non-economic activities). In case C-309/99 *Wouters* EU:C:2002:98, para 65, a public institution was concerned (economic activities). In case C-222/04 *Casa di Risparmio* EU:C:2006:8, para 121, banking foundations were concerned (partially non-economic activities).

⁶⁷Case C-343/95 *Diego Cali* EU:C:1997:160, para 17.

⁶⁸As was the case in *Diego Cali* to a certain extent; see n 74 and accompanying text.

⁶⁹See *infra* Section V.3.

It is important to note that a solidarity aim will normally be implemented through the determination of the specific levels of premiums and benefits. The purpose (social or otherwise) of an insurance can thus be deduced from these parameters. In this sense, a limited commercial latitude seems *inherent* to the non-economic nature of social insurances. The solidarity aim implies a limited freedom to determine premiums and benefits by the insurer.

Although the absence of commercial latitude could thus be seen as a consequence of a solidarity aim, the Court seems to consider it a criterion on its own. Especially in the more recent cases, solidarity and oversight by the State are presented as criteria of equal rank.⁷⁰ This seems inconsistent with the principle that the State itself can engage in economic activities. Furthermore, it could make the assessment framework less functional. If multiple indicators are separately given weight, this could create problems when, in real-life cases, the indicators point into different directions.⁷¹

An alternative, and in my view better theory is, that a high degree of solidarity and governmental oversight are conditions that must be *cumulatively* met for an insurance scheme to be of a non-economic nature. This theory is further explored in the second part of this article.⁷²

2. Beyond social security

In cases beyond social security, the factor of commercial latitude has been of limited significance. In some cases, the economic nature of the activities was so evident that few words were needed. For example, in cases about liberal professions the Court limited itself to the establishment (at the most) that the services in question were carried out for remuneration and that the providers accepted financial risks.⁷³ Also in several other cases commercial latitude did not play any role. For example, in *Höfner*, where commercial latitude appears to have been absent, this aspect was not mentioned, and also not in *Glöckner*, *MOTOE* and *Casa di Risparmio*. Yet, in several other cases, commercial latitude *did* receive a certain weight. In *Diego Cali*, the Court found the question of who was allowed to set the inspection fees of some, albeit limited, significance. The Court

⁷⁰See case C-350/07 *Kattner Stahlbau GmGH v Maschinenbau- und Metall- Berufsgenossenschaft* EU: C:2009:127 and case C-437/09 *AG2R Prévoyance* EU:C:2011:112. Case C- 218/00 (*INAIL*) too, did already point into this direction (EU:C:2002:36, para 44).

⁷¹The *Notice State aid* lists not less than six indicators for determining non-economic social-security schemes, and four indicators for economic schemes (paras 21–22).

⁷²See *infra* Section IV.B.6.

⁷³Joint cases C-180-184/98 *Pavlov* EU:C:2000:428, para 76, case C-309/99 *Wouters* EU:C: 2002:98, paras 48–49, case C-1/12 *OTOC* EU:C:2013:127, para 37, case C-136/12 *Consiglio nazionale dei geologi (CNG)* EU: C:2013:489, para 44.

assumed that such power, which lay with the implementing authority, formed an integral part of the surveillance activity. However, the tariffs had “moreover” been approved by the State, the Court said.⁷⁴ Also in *Eurocontrol* and *Compass-Datenbank*, the Court noted that the charges were set by government.⁷⁵ In *Aéroports de Paris*, the Court gave explicit weight to commercial latitude as an evidentiary element. Airport infrastructure management was regarded as an economic activity based on the consideration that this was made available to users in return for a fee, together with the fact that the airport set the charges independently.⁷⁶

The general picture is that the Court adhered to its functional approach in most of these cases and that commercial latitude was, at the most, of limited significance in the assessment. The absence of commercial latitude is sometimes used as a circumstance that is taken into account as a confirming factor.⁷⁷ In the domain of social security (the absence of), commercial latitude plays a more prominent role. This can at least partly be explained by the goal of solidarity which is difficult to reconcile with commercial latitude.

D. Conclusion

In *Höfner*, the Court chose a broad, functional definition of the concept of undertaking, which implies an abstract approach. At the same time, the Court in practice also tried to base its conclusions on factual observations about the existence of a market. However, this cannot be interpreted as a departure by the Court of the broader, more abstract approach.

With regard to the contextual factors *imperium*, method of financing and commercial latitude, it can be concluded that the Court usually sees them in connection with the nature of the activity itself. Sometimes, it seems as if these factors become detached from the functional approach. This may put the consistency of the assessment framework at risk. The second part of this article will look into the extent to which the functional approach of the Court can be understood better if observed through the lens of market failure.

⁷⁴Case C-343/95 *Diego Cali* EU:C:1997:160, para 24.

⁷⁵Case C-364/92 *Eurocontrol* EU:C:1994:7, paras 21–23, case C-138/11 *Compass-Datenbank* EU:C:2012:449, para 39.

⁷⁶Case T-128/98 *Aéroports de Paris* EU:T:2000:290, paras 120–24 accepted by the Court, case C-82/01 *Aéroports de Paris* EU:C:2002:617, paras 78 and 82.

⁷⁷This appears to have been the case in particularly in case C-343/95 *Diego Cali* EU:C:1997:160, para 24 and case C-364/92 *Eurocontrol* EU:C:1994:7, paras 28–29.

IV. The concept of market failure as a definition tool

Economists have developed significant insights into the circumstances in which markets function well. From these insights, the different types of market failure have been derived. When markets fail, consumers are not able to fully achieve their welfare objectives through the market process. Well-known examples of market failures are market power, external effects and the market's inability to create public goods. *Causes* of market failure are factors like economies of scale, transaction costs, imperfect information and the absence of property rights. Market failures can be solved in several ways. First of all, not every deviation from the theoretical concept of perfect competition constitutes a market failure in a strict sense. In many cases, the market is capable of solving market imperfections (which fall under a broad definition of market failure) by itself.⁷⁸ In other cases, government must step in. Governments can address market failures by correcting the market through, for example, subsidies or taxes, or by initiating the provision of certain goods itself. When looking at the government through the lens of market failure, we consider the government's role as complementary to that of the market.

The insights into the nature of market failures (in the broader definition) have had a profound influence on competition law. This is the most apparent in the approach to vertical restraints, where they have led to a more lenient application of the law.⁷⁹ With regard to horizontal cooperation, the influence of the market failure perspective can also be observed, in for example the approach to collaboration in R&D, to codes of conduct for professionals and to arrangements regarding sports.⁸⁰ This perspective may also help to understand the difference between restrictions by object and by effect, as well as the "Wouters" case law.⁸¹ Thus, this conceptual framework is of great importance for how competition law evolves.

That the concept of market failures can also be relevant for the definition of non-economic activities has been considered before.⁸² Buendia Sierra

⁷⁸See A Meese, 'Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust' (2005) JCLE (1) 21. It should also be noted that, from a welfare perspective, not every market failure would necessarily have to lead to government intervention, because the costs of such interventions should also be included in the assessment.

⁷⁹F Easterbrook, 'Limits of Antitrust' (1984) Texas Law Review 63 (1) 10, Meese (n 78) 84.

⁸⁰See P Hammer, 'Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intra-market Second-best Tradeoffs' (2000) Michigan Law Review (98) 849.

⁸¹P Ibanez Colomo 'Market Failures, Transaction Costs and Article 101(1) Case Law' (2012) ELR (37) 541, and C Janssen and E Kloosterhuis (2016) 'The Wouters Case Law, Special for a Different Reason?' (2016) ECLR (37) 335.

⁸²Sierra (n 21), Okeoghene Odudu, *The Boundaries of EC Competition Law, The Scope of Article 81* (OUP 2006) 42–45 and A Ibrahim 'A Re-evaluation of the Concept of Economic Activity for the Purpose of EU Competition Rules: The Need for Modernization' (2015) ECJ (11) 265, 274 and 282.

suggested that the *Höfner* ruling (in particular) contains a distinction between, as he calls it, “diffuse” and “specific” activities. A characteristic of diffuse activities is that their benefits are distributed among all members of a society.⁸³ As a result, as opposed to specific activities, diffuse activities cannot be the object of market transactions between individual buyers and sellers. That is why in Buendia Sierra’s view they are of a non-economic nature. He argues that this distinction could have been applied more consistently in later case law.⁸⁴ Odudu considered that cases such as *Poucet et Pistre*, *Eurocontrol* and *Diego Cali* can be understood by using the framework of public goods, a concept that is related to that of “diffuse” goods, but to which it is not identical, as will be explained below.⁸⁵

It is interesting to flesh out these ideas further. After all, the above shows that the difference between economic and non-economic activities depends primarily on the intrinsic nature of such activities, which makes it important to understand this nature well. The question to be tackled now is, whether the conceptual framework of market failure can be useful for this.

A. Public goods, common resources and solidarity

According to economic literature, public goods possess two characteristics:

- (a) Individual consumers cannot be excluded from the benefits of such goods.
- (b) The benefits of such goods for one consumer do not come at the expense of others.⁸⁶

Classic examples of public goods are law enforcement and the provision of internal and external security (police and defense). Public goods that relate to more current issues in society are the protection of endangered species, air quality and the interests of future generations. Due to the element of non-excludability, the market gives too few incentives to provide public goods by private firms. After all, individuals can enjoy the benefits of public goods regardless of whether or not they actually pay for them. Public goods thus suffer from a *coordination problem*: if

⁸³Sierra (n 21) 48.

⁸⁴*Ibid.*, 59.

⁸⁵Odudu (n 82) 42–45.

⁸⁶RE Just and others, *The Welfare Economics of Public Policy; A Practical Approach to Project and Policy Evaluation* (Edward Elgar 2004) 550.

their production is left to the market, they will be created to a limited degree or not at all. Citizens will instead have to make collective choices about both the provision of public goods and the financing thereof.

This coordination problem also applies for non-excludable goods that are rivalrous, the so-called common resources.⁸⁷ Examples are natural resources that are freely accessible but also scarce, like fishing grounds and freely accessible infrastructure. The mirror image of common resources is the so-called club goods that are non-rivalrous, but for which exclusion is possible.⁸⁸ For example, it is feasible to exclude individual consumers from television broadcasts while their reception is non-rivalrous. Club goods do not suffer from the abovementioned coordination problem because the enjoyment of the benefits can be made dependent on individual payment. These categories are shown in the following table.

Nature of the good	<i>Non-rivalrous</i>	<i>Rivalrous</i>
<i>Non-excludable</i>	Public goods	Common resources
<i>Excludable</i>	Club goods	Private goods

It should be noted that individuals can sometimes create a private substitute for a public good. One can think of a shopping mall that hires private security contractors when public safety is insufficiently guaranteed. In practice, the concept of public goods includes goods that can be provided through private means, but only at considerably higher costs and/or with a considerably lower service level for society as a whole.⁸⁹

In the section below, the starting point is the hypothesis that activities that are typified as non-economic, are characterized by non-excludability. It can however be noted already that this hypothesis fails with respect to social security, because it is technically possible to exclude individuals from the benefit of any insurance scheme. However, there are other reasons why (social) insurances can sometimes not be established through the market system. George Akerlof famously argued that this may be the consequence of information asymmetry. In insurance markets, customers are often better aware of the risks they run than insurers. If risks differ substantially between consumers, risk-selection will occur. Consumers with a low-risk profile will not want to buy an insurance policy at a premium that may be appropriate for the average consumer, but is too high for them. They will either choose a cheaper policy that does match their risk profile or they will not insure themselves

⁸⁷W Nicholson and C Snyder, *Microeconomic Theory* (Thomson 2008) 680.

⁸⁸*Ibid.*

⁸⁹*Ibid.*, 679.

at all. This selection mechanism may, in extreme cases, render an insurance scheme not viable.⁹⁰ A similar effect may arise in the field of life insurance due to the short-sightedness of consumers, resulting in too little investment in an insurance scheme by young people in particular.⁹¹ As with public goods and common resources, a coordination problem is present, leading to the malfunctioning of markets. This problem can be solved by an obligatory solidarity between different groups. To enforce this solidarity, government intervention will often be necessary.

B. Implications for the competition-law analysis

From the previous paragraph, several relevant insights can be inferred for the interpretation of the concept of non-economic activity. First of all, it appears that, of the two typical characteristics of public goods, only the characteristic of non-excludability is relevant. The fact that a good is non-rivalrous has other implications. Many goods offered on the market possess this characteristic, for example media, pharmaceuticals and software. The non-rival nature of these goods implies economies of scale, because the marginal production costs are zero or close to zero. As a result, dominant positions can emerge relatively easily. That is why government intervention is often seen in the classic network sectors in particular.⁹² However, these are considered to be economic activities under European law.

Buendia Sierra has therefore correctly focused his attention on the diffuse character of (the benefits of) non-economic activities. After all, that is what determines the non-excludability, and thus the inability of the market to provide the good. From this follows, that also common resources should be considered non-economic activities. Examples include public infrastructure and the protection of scarce environmental goods.⁹³

⁹⁰GA Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) *The Quarterly Journal of Economics* (84) 488, 492–93 and M Rothschild and J Stiglitz, 'Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information' (1976) *The Quarterly Journal of Economics* (90) 629. This problem can be partially overcome by offering insurances that are tailored to specific high-risk groups with the corresponding differences in premiums. This can be in line with market conditions but conflict with a desire to realize solidarity between groups with different risks.

⁹¹D Chen and R Beetsma 'Mandatory Participation in Occupational Pension Schemes in the Netherlands and Other Countries' (Netspar Academic Series DP 10/1 2015-032).

⁹²As a consequence of market power, but also because private suppliers will have to cover fixed costs, they will tend to charge a price that is higher than the marginal costs, thereby creating a dead weight loss. See J Stiglitz and J Rosengard, *Economics of the Public Sector* (Norton & Co. 2015) 103.

⁹³In the case of free accessible natural resources, the market failure is not reflected in the fact that they are not *created* on the market, but in that they can often not be *preserved* without government intervention.

As said, in theory, the existence of social insurances could be explained by a market failure due to information asymmetry. Enforced risk solidarity would then be needed to remedy this failure. But in fact, social insurance schemes are often also used to attain a fairer distribution of income. This may concern, among others, solidarity between different income groups or differences in family size. So in practice, the solidarity aim can go much further than what is necessary to address a market failure. If so, the objective of the insurance scheme is not *efficiency* (curing a market failure) but *equity* (attaining a fairer distribution of income). In all of these cases participation in the insurance scheme must be mandatory to prevent that solidarity is undermined. While adverse selection can, as market failure, destroy a market as such, it may also lead to the undermining of the distributional goal of insurance schemes that would in itself be viable without such goal.

In thus appears that the activities that cannot flourish on the market are public goods, common resources as well as social insurance schemes of which either the viability as such or the distributional goal is severely undermined by adverse selection. In the rest of this article these categories will, for convenience, together be referred to as *social goods*. It will now be examined what insights the perspective of social goods may yield for the definition of economic activities.

1. Social goods are usually not withdrawn from the market

When the government offers a social good, there is typically no withdrawal of activities from the market as that good would not have been offered without government intervention. This insight ties in with the vision on which the functional approach is based: non-economic activities are activities that, in principle, cannot be carried out on a market by private undertakings.

This line of reasoning has one exception: insurance schemes that would also be viable in a free market, but are aimed at securing solidarity. In these cases, private activities are indeed excluded from the market. This seems to answer the question of whether the functional approach gives governments any discretion to determine whether or not activities are of an economic nature.⁹⁴

2. A social good may compete with private goods

As noted, it is often conceivable that individuals create imperfect substitutes for a social good.⁹⁵ If a society offers a high level of collective security,

⁹⁴See *supra* Section I.

⁹⁵See *supra* Section IV.A.

its citizens will have little need for additional private services. The market's role will thus be smaller: private offerings are pushed out (potentially or actually) by the social good. Social and private goods subsequently continue to compete with each other to a certain extent. This being said, ensuring public safety is undeniably a social good. This shows that care is required when putting forward the argument that an activity is economic on the basis that it competes with private undertakings.

These first two points appear to conflict with each other: although social goods cannot be created on the market, they often compete with private goods to a certain degree. This shows that there is no hard divide between social and private goods, but rather a fluid one. It is reasonable to include in social goods situations in which a collective choice results in a service level for a given good that is substantially higher than what would have been created spontaneously on the market. This means that the *nature* of the activity cannot be seen separately from the *purpose* for which it is created.⁹⁶

The fluidity of the divide between social and private goods is also reflected by the fact that the domain of private goods is heterogeneous in an economic as well as legal sense. This becomes apparent when we look at the so-called Services of General Economic Interest (SGEI). These are economic activities, but the creation of an adequate service level would often not materialize without any kind of government intervention, such as the granting of a subsidy or of a special or exclusive right. One can thus conclude that the difference between SGEI and non-economic activities is only a matter of degree.

3. Offering social goods can be franchised to private undertakings

Private undertakings can provide social goods by government order. The rationale behind social goods does not preclude this by any means. We can see examples of this in the case law. In *Diego Cali*, the task of carrying out environmental inspections by the authorized agency, Consorzio Autonomo del Porto, was transferred to Servizi Ecologici Port di Genova SpA (a private company).⁹⁷ The *Casa di Risparmio di Firenze* case involved banking foundations that were charged with subsidizing institutions of public interest and social assistance.⁹⁸ In both cases, the entities

⁹⁶This addresses the objection that some authors had raised against the broad interpretation of the *Höfner* ruling that, in principle, almost every activity could be carried out by a private undertaking (see n 21).

⁹⁷Case C-343/95 *Diego Cali*, EU:C:1997:160, para 13.

⁹⁸Case C-222/04 *Cassa di Risparmio di Firenze* EU:C:2006:8, paras 119–21.

responsible for the execution of the abovementioned tasks were not considered undertakings for the purpose of executing these tasks.⁹⁹

I therefore do not agree with Advocate General Poiares Maduro's view that a broad interpretation of *Höfner* would lead to a too wide scope of competition law, because, as he argues, even national defense can be franchised to private undertakings.¹⁰⁰ The presence of an option to franchise an activity should, as such, be of no influence on the nature of that activity. When activities of a non-economic nature are the subject of a franchise, this nature also determines the status, under competition law, of the agency that performs the franchise, but only as far as it acts in this capacity (see Section IV.B.5). This is irrespective of whether the agency is a for-profit undertaking or not.¹⁰¹

4. Competition between social goods within a single domain is not possible

Several Advocates General have noted that the provision of a good that they designated as non-economic is inevitably a monopoly activity.¹⁰² Because of non-excludability, duplication of a public good is, in principle, possible nor useful. The same holds for common resources and social insurance schemes. As a rule, governments thus create a single, undivided social good within a certain domain. Under this circumstance, the primary interest that competition law aims to protect (competition in markets) is absent.

However, governments sometimes decide to introduce "scripted" competition between several agencies that they appoint to offer a social good together. In that way, incentives for maintaining efficiency and quality can be created while genuine competition would not be consistent with the nature of the good. The *AOK* case gives an example thereof. The German health insurance schemes collectively formed a system based

⁹⁹See also case C-174/14 *Saudacor* EU:C:2015:733, paras 62 and 75, and AG Tesauro in case C-364/92 *Euro-control* EU:C:1993:878, para 12. Also in the field of social security it is not material whether they are executed by public or private entities; see case C-437/09 *AG2R Prévoyance* EU:C:2011:112, para 43.

¹⁰⁰See n 31.

¹⁰¹This is also the opinion of Winterstein (n 21):

(i) it is a necessary consequence of the functional approach taken by the Court that an activity neither loses its economic nature by the mere fact that it is exercised by the State or by a State body (-) nor becomes an economic activity by virtue of the fact that it is performed by a private company (-).

See also *Sierra* (n 21) 61 giving the example of the management of English prisons by private undertakings.

¹⁰²Opinion AG Tesauro in case C-364/92 *Eurocontrol* EU:C:1993:878, para 13 and AG Cosmas in case C-343/95 *Diego Cali* EU:C:1996:482, para 49.

on solidarity.¹⁰³ However, they did enjoy some degree of freedom in setting the premiums and recruiting customers, which is an argument that competition law should apply.¹⁰⁴ The Court ruled differently though: in this case, the aspect of solidarity was dominant, and competition law was deemed not to be applicable.¹⁰⁵

5. Competition for a franchise should not influence the qualification of an activity

Governments can choose to elicit competition when franchising the performance of a non-economic activity. In that case, it is possible that the competition is restricted, for example, through bid-rigging. From a European law perspective, it remains to be seen whether competition law applies to such situations. In my view, however, it should. Also the competitive process preceding the performance of a non-economic activity deserves protection by competition law. This means that market participants that compete for a contract to perform a public task, should, at that point, be considered to be operating as undertaking.

Such a (preceding) bidding process should however be distinguished from the (subsequent) performance of the public task, which can amount to the provision of a social good. *AG2R Prevoyance* shows that there can be confusion on this issue. AG2R is a provider of a health insurance scheme that is initiated by employees and employers. In its ruling, the Court first established that this insurance scheme had a social objective and involved a high degree of solidarity.¹⁰⁶ The Court then examined to what extent AG2R had “autonomy”. In that assessment, it was considered relevant for determining the nature of the activity, whether or not the social partners and AG2R had any margin for negotiations with regard to the modalities of AG2R’s appointment as provider of the insurance scheme.¹⁰⁷ The Court concluded that it could be the case, and therefore for the national court to examine, that AG2R:

(-) is an undertaking engaged in an economic activity which was chosen by the social partners, on the basis of financial and economic considerations, from among other undertakings with which it is in competition on the market in the provident services which it offers.¹⁰⁸

¹⁰³Case C-264/01 *AOK* EU:C:2003:304, para 54.

¹⁰⁴This was indeed the opinion of AG Jacobs in this case (EU:C:2004:150, para 42).

¹⁰⁵Case C-264/01 *AOK* EU:C:2003:304, paras 56 and 63–65.

¹⁰⁶Case C-437/09 *AG2R Prevoyance* EU:C:2011:112, paras 43–52.

¹⁰⁷*Ibid*, paras 53–64.

¹⁰⁸*Ibid*, para 65.

It seems that two aspects of operating AG2R are confused here: the position of AG2R towards the social partners as bidder for the task to be performed and the nature of that task itself.¹⁰⁹ Here too, conflict may occur with the established principle that (non-economic) activities can be franchised to private undertakings without changing the activity's nature as a result. Competition for the assignment to carry out a certain (public) duty should not stand in the way of the conclusion that performing that duty itself is of a non-economic nature as long as the *execution* of that duty has all the characteristics of a non-economic activity.¹¹⁰

6. The concept of government can be understood in a functional manner as well

When economic activities can be defined in a functional way, it seems logical that this goes for government activities too, in view of their complementary nature. The economic-theoretical perspective ties in with this implication because it essentially offers an explanation for the mere existence of governments. In this perspective, governments emerge from the need to create goods where the market is unable to do so.¹¹¹ This logic is general; like economic activities, government activities can thus be defined functionally.¹¹² The concept of "government" can cover a broad range of collectivities such as national and lower governments, supra-national bodies, but also trade associations, and organizations of the social partners insofar these create social goods for the benefit of the members. Such variety of collectivities can indeed be found in the case law.¹¹³

However, in a competition-law context, it would be unwise to use a purely functional interpretation of the concept of government because what we call a public good in a technical sense (non-excludability and

¹⁰⁹This confusion can also be observed in *Saudacor* (case C-174/14, EU:C:2015:733, para 66) where the Court apparently finds it relevant for the determination of the nature of the activity to know whether the order for carrying out the activity is given by means of a tender process.

¹¹⁰Kersting has a different view: he agrees that when state control does not effectively preclude competition between the possible providers of a (social) insurance scheme, such room for competition deserves protection under competition law, but he opines that such protection can only be granted if the entities concerned are, in a general sense, considered to be undertakings; C Kersting 'Social Security and Competition Law – ECJ focuses on Art. 106(2) TFEU' (2011) *Journal of European Law & Practice* (2) 473.

¹¹¹One nice example of this logic are the regional water authorities in the Netherlands that originate from the need to bring about one specific public good, which is protection against floods.

¹¹²This is shown masterfully in A. de Swaan *In Care of the State, Health Care, Education and Welfare in Europe and the USA in the Modern Era* (Polity Press, 1988).

¹¹³In *Bodson* (case C-30/87 EU:C:1988:225), the activities were initiated by municipalities, and in *Eurocontrol* (case C-364/92 EU:C:1994:7) by states collaborating by treaty. In *Albany*, the activity was initiated by the social partners with the intention, however, that it would be declared binding by the government (case C-67/96 EU:C:1999:430, para 71). See also *Pavlov* (case C-180-184/98 EU:C:2000:428, para 98).

non-rivalry) is not by definition also a public good in an economic sense. This is only so if the creation of the good is welfare enhancing, which means that the benefits of it must exceed the costs. This calculus will normally be made through the democratic process. Also the question who should bear the costs of the good is of a political nature. For these reasons, a decision to establish a social good without involvement of government in a formal sense lacks legitimacy, especially when the costs thereof are borne by individuals who are not represented in that decision. For example, professional rules that have been collectively agreed upon within an industry may be a public good for the members of the profession, but need not be so for society at large. The consideration of the interests of “insiders” versus “outsiders” could consequently take on a political character, and thus calls for democratic justification.¹¹⁴

7. Imperium: special power or special responsibility?

In the above, we observed that in the case law the exercise of governmental prerogatives is one of two main categories of non-economic activities.¹¹⁵ A relevant question is, what role special powers and means of coercion should play in this categorization of cases. The social-good perspective can clarify that. First, for some social goods, the service that is offered to society *coincides* with the exercise of special powers or means of coercion. Examples of this category are air traffic control, environmental inspections or the management of prisons.¹¹⁶ In this case, the social good inevitably assumes the obligation on citizens or undertakings to subject themselves to a certain regulatory or supervisory regime. In other situations, special powers are more a derivative of the exercise of the public task, as is the case with the power to impose charges (mandatory or otherwise) or the enforcement of a statutory obligation to provide information.¹¹⁷ Often, other choices would have been possible, particularly with regard to the financing of the activity (see point 8 below). Special powers are thus not always needed to provide a social good. Examples that illustrate this may include the cleaning and redevelopment of contaminated industrial sites or the management of a special wildlife

¹¹⁴C Janssen and E Kloosterhuis (n 81) argue that, for this reason, also the Wouters exception can only apply in case of explicit government involvement.

¹¹⁵*Supra* Section III.A.

¹¹⁶See, respectively, case C-364/92 *Eurocontrol* EU:C:1994:7, case C-343/95 *Diego Cali* EU:C:1997:160 and Commission Decision N 140/2006 *Allotment of subsidies to the State Enterprises at the Correction Houses*, JOCE C/244/2006.

¹¹⁷See case C-364/92 *Eurocontrol* EU:C:1994:7, case C-343/95 *Diego Cali* EU:C:1997:160 and case C-138/11 *Compass-Datenbank* EU:C:2012:449.

area.¹¹⁸ From a social-good perspective, also these are non-economic activities because they are for the benefit of all members of society.

It would thus not be correct to base the determination of non-economic activities solely on the presence of special powers or means of coercion.¹¹⁹ That would assume too narrow an interpretation of the government's role in today's society. It would bring to mind Hobbes' night-watchman state where government's role more or less coincides with the exercise of a state monopoly on violence.¹²⁰ In today's society, the government covers a much broader range of domains. In this contemporary view, the presence of special powers is not always critical, but rather whether or not the collectivity assumes a special *responsibility*. The concept of social goods can help in the definition of this responsibility, as it encapsulates coordination problems which lead to the market not creating certain goods which are considered important for the general welfare.

8. Method of financing

Social goods can be financed in different ways. Public goods and common resources are often paid out of the general budget, not requiring any specific financing. However, when specific financing is chosen, then it is likely that special powers and/or means of coercion will be employed. As the benefits of the good are freely accessible, payment cannot take place through regular market transactions. Special taxes or retributions or, in the case of social insurance schemes, mandatory premium payments can be introduced instead. The relationship between the benefits of a social good and the payment for them can vary. For example, *Diego Cali*, concerned a charge the purpose of which was to cover the costs of the social good, with no individual relationship between that charge and the benefits of the good. In *Eurocontrol*, such a relationship was only partially present. The same applies to social insurance schemes with a high degree of solidarity. If participation is mandatory, the premium is basically, for part of the population, a veiled tax. It can thus be concluded that social goods utilize methods of financing that are fundamentally different from that of private goods.

¹¹⁸Commission Decision SA.36346 – Germany – GRW land development scheme for industrial and commercial use C/141/2014, para 34.

¹¹⁹That impression is created, for example, in the *Notice State aid* (para 18), in which emphasis is laid on the exercise of public powers, without making clear what powers the Commission refers to.

¹²⁰In his *Leviathan*, Thomas Hobbes famously depicts the image of mankind in its "natural state", without a government, where "life is solitary, poor, nasty, brutish, and short." In this world, the law arises from the power of the sovereign. See C Panza and A Potthast, *Ethics for Dummies* (BBNC 2016) 170.

This variety in financing modes shows that it should not be concluded too soon that a good is of an economic nature just because it is provided for remuneration.¹²¹ If a social good is financed by individual payments from citizens or businesses, the nature thereof must be carefully examined. In such an examination, the presence of special obligations or powers of coercion can be relevant but is not always necessary (think of passport fees). There is however, in my opinion, no indication that the Court has made incorrect assessments with regard to this point. In general, the Court has always placed the nature of the activities at the centre of its reasoning, and has always assessed the method of financing in connection with other factors. As a result, free services, for example, were considered as economic activities in *Höfner*, but not in *Selex*.

V. Non-economic activities and market failure: does it fit?

Section IV revealed that the concept of social goods can help in formulating the right criteria for the definition of economic activities in accordance with the functional approach. This can also be expected from an economic point of view. Social goods epitomize the very reason why the government take over the market's role. It is logical that, under such circumstances, competition law does not apply.¹²² The divide between social goods and private goods can already be spotted easily in several early rulings. The activities in cases like *Eurocontrol* and *Diego Cali* pointed clearly in the direction of public goods, and in cases such as *Höfner* and *Custom Agents* of private goods. The cases in the social-security domain, however, are less easy to interpret in that respect. Having explored both the case law and the concept of market failure in the previous parts of this article, and having pointed to several pitfalls in this exploration, it is now time to arrive at a synthesis.

A. Social security

Social security is often seen as a separate thread in the case law, to which different definition criteria apply. However, the Court seems to use the same basic criterion for both types of cases, which is whether the activity can be provided by private undertakings on a market.¹²³ Nevertheless, it

¹²¹See *supra* Section II.C.

¹²²As was noted, in connection with air traffic control, by AG Tesouro in case C-364/92 *Eurocontrol* EU: C:1993:878, para 13.

¹²³Case C-244/94 *FFSA* EU:C:1995:392, paras 17–19, case C-67/96 *Albany* EU:C:1999:430, para 84, case C-264/01 *AOK* EU:C:2004:150, para 54. See also AG Tesouro in case C-159/91 *Poucet et Pistre* EU: C:1992:3568, para 8, AG Jacobs in case C-218/00 *INAIL* EU:C:2001:448, para 50 and AG Fenelly in case

appears that this criterion has been applied to social security in a special way. In the field of social insurance, two motives for government intervention can play a role. The government takes over the market's role if (a) socially desired insurance schemes cannot be provided in the market as a result of a genuine market failure or (b) the government wants to bring about a more equitable income distribution. In the case law, these two motives are not systematically distinguished. In some cases, the Court considers it relevant that insurance premiums are not proportional to risks.¹²⁴ But in the end, the Court seems to give all kinds of solidarity an equal weight. Already since *Poucet et Pistre* the Court expressly based its assessment on the importance of income solidarity, among other aspects.¹²⁵ In general, it seems that the more solidarity (whatever its nature) is put forward, the sooner the Court arrives at the conclusion that the activity is of a non-economic nature.

Only a broad interpretation of the concept of market failure thus appears to offer sufficient guidance to explain the definition of non-economic activities with respect to social security. Most economists do not see inequality as a market failure in a strict sense. They do acknowledge that it is a valid concern of the government, though of a non-economic nature. From a legal point of view, the question may arise whether or not it is consistent to qualify an activity as non-economic when that activity would be viable on the market but is withdrawn from it for reasons of equity.¹²⁶ However, from a practical point of view that question has little relevance because unravelling the aspects of risk solidarity and income solidarity would only make the definition problem more complex without offering a clear benefit in return.¹²⁷

In this (broader) market failure perspective, solidarity would indeed be the principal criterion for defining non-economic activities, just as it is in the case law. In addition, also mandatory participation and the obligation for insurers to accept all applicants are key factors. Such clauses prevent adverse selection, and are thus instrumental in the realization of the

C-70/95 *Sodemare* EU:C:1997:55, para 29. It is striking that, in the later rulings in *Kattner* and *AG2R Prévoyance*, no reference is made to this basic distinction any longer.

¹²⁴Case C-218/00 *INAIL* EU:C:2002:36, para 39, case C-350/07 *Kattner* EU:C:2009:127, para 44, case C-437/09 *AG2R Prévoyance* EU:C:2011:112, para 47.

¹²⁵Case C-159/91 *Poucet et Pistre* EU:C:1993:63, paras 10–11. The following statement by AG Fenelly may serve as substantiation of the Court's line of reasoning: "Social solidarity envisages the inherently uncommercial act of involuntary subsidisation of one social group by another" (case C-70/95 *Sodemare* EU:C:1997:55, para 29).

¹²⁶SGEI may be motivated by reasons of solidarity too. Nevertheless, they are economic activities under European law.

¹²⁷As will be explained briefly in *infra* Section V.3.

solidarity objective. However, no separate importance should be attached to the mere presence of such obligations, irrespective of a solidarity motive.¹²⁸ These findings correspond with the main lines of the case law as it has evolved thus far.

B. Beyond social security

Experience has shown that cases beyond social security require analyses that vary in depth. Sometimes a brief assessment will suffice. For example, it can be easily concluded that the liberal professions are economic activities on the basis of factual indications that a market indeed exists.¹²⁹ This also applies to fairly common activities such as the trade in tobacco products. On the other hand, there are activities that can easily be designated as typical governmental activities, such as granting permits by municipalities.¹³⁰ In less obvious cases contextual factors have to be taken into consideration. In those situations in particular, it is critical to start the definition process from the central question of whether or not the activity is suitable to be carried out by undertakings in a market. The above reveals that the principle of non-excludability can be useful in answering that question. The question that needs to be asked in this context is a very simple one: does the activity offer (to a considerable degree) benefits to the collectivity, without the possibility to make access to those benefits subject to a voluntary exchange act.

In essence, the activities that the Court identifies as non-economic all fall within this description. They all offer benefits to the collectivity, without the possibility of exclusion. *Selex* could serve as an example to illustrate this fact. On the face of it, this case involved a considerable number of various activities of Eurocontrol: technical normalization, assistance to national administrations, procurement of prototypes and the management of intellectual property rights. According to the Court, however, these activities could be grouped into a single main task: establishing a uniform European air traffic management system.¹³¹ Since this task was considered a non-economic activity, it was also true for all activities that were necessary to its execution. For the Court, it was obvious that any partitioning of this main task into activities within some of which

¹²⁸In this context, AG Jacobs points to the potential risk of insurance of an economic nature being shielded from competition law (case C-67/96, *Albany*, EU:C:1999:28, para 347).

¹²⁹For example: medical specialists (*Pavlov*), lawyers (*Wouters*), accountants (*OTOC*), geologists (*CNG*).

¹³⁰Respectively, case C-118/85 *Tobacco Products* EU:C:1987:283, case C-82/01 *Aéroports de Paris* EU:C:2002:617 and case C-30/87 *Bodson* EU:C:1988:225.

¹³¹Case C-113/07 *Selex* EU:C:2009:191, para 73.

competition would be allowed, would be counterproductive. This main task is clearly a public good for the benefit of the entire community. A similar situation to that in *Selex* can be seen in cases involving environmental protection or management of a public registry of business information.¹³² Such cases clearly concern activities that are in the general interest, without the possibility to exclude anyone from the activity's benefits.

The insight that non-excludability can be *the* compelling reason for a public provision of certain services corresponds well to the non-social security part of the case law. The fact that, as previously mentioned, a hard divide between public and private goods is not always easy to make in practice, did not prevent the Court from developing a consistent legal framework, which, in my opinion, offers sufficient guidance for most situations. Yet, there are still activities the assessment of which may pose thorny dilemmas. The next section discusses an example about education, which illustrates this point.

C. Should solutions be based on principle or on pragmatism?

In the present article, it was shown that in the assessment of concrete cases emphasis is sometimes placed on indications of the real existence of a market, and in other cases on the context in which activities are carried out. At times, these approaches complement each other. The article also showed that both approaches have their pitfalls. It is therefore critical that the underlying principle of the functional approach is always kept in mind. This being said, from a legal-certainty viewpoint it is also desirable that no complex analysis is needed to determine the jurisdiction of competition law in individual cases. It is submitted that the case law concerning social security fails in this respect.¹³³

Education provides an example of a better approach. Here, the Commission has chosen to use just a single definition criterion: the mode of financing. If an educational activity is financed primarily or solely by public funds, it is assumed that a social, cultural and pedagogic task is being carried out. In that case, it is considered a non-economic activity.¹³⁴ In my opinion, this approach can be endorsed. As in the field of social

¹³²Respectively, case C-343/95 *Diego Cali* EU:C:1997:160, case T-347/09 *Germany v. Commission* EU:T:2013:418 and case C-138/11 *Compass-Datenbank* EU:C:2012:449.

¹³³See n 71 and accompanying text.

¹³⁴*Notice State aid*, para 28. The Commission based itself on existing case law in the field of the Free Movement Provisions. This approach has now also been applied in the (state-aid) case C-74/16 *Congregación de Escuelas Pías Provincia Betania* EU:C:2017:496.

security, governments can have multiple reasons for involvement in education. Education plays a role in terms of emancipation and culture transmission, and it increases the job-market opportunities of students. In addition, important external effects are also involved, as society as a whole benefits from a well-educated population. Thus, education has public and private characteristics.¹³⁵ In practice, it is difficult to separate these aspects. That is why it can sometimes be useful to have a relatively simple definition criterion. Since it can be inferred from public funding that society attaches a significant public interest to the education in question, it is, in this specific case, a suitable criterion. Application of the criteria as discussed in the previous parts, would lead to confusing discussions. For example publicly funded institutions may compete with private schools and they may have some latitude that can be called “commercial”. This example shows that pragmatic solutions are sometimes preferable to the application of general and more abstract principles.

VI. Conclusion

From the above, the following conclusions can be drawn. First, it can be argued, albeit with a certain amount of caution, that the Court never abandoned the broader, functional approach from the *Höfner* ruling. As a result, when defining non-economic activities, the question of what the activities’ nature is and whether these can be provided by private undertakings in a market, remained at the heart of the Courts’ assessment. It can thus be concluded that the more practical criteria that the Court has developed in the course of time, should be seen and applied in light of that central question.

An analysis from an economic perspective subsequently shows that, with regard to activities outside of social security, the concept of “non-excludability” can be useful for applying the functional approach correctly. In social security, it turned out that the definition of the concept of economic activity was based on a somewhat different rationale. The guiding principle in the definition seems not exclusively based on market failure but also on national choices regarding income solidarity. As such, this case history reveals a somewhat different development, which is not fully relevant for cases beyond social security.

In my opinion, the approach followed in this article can help in preventing the definition of non-economic economic activities from

¹³⁵Stiglitz and Rosengard (n 92) 401 and beyond.

developing into a box-ticking exercise. However, the efficiency of the functional approach itself has its limitations. From a legal-certainty perspective the approach does not seem to have the same merits in all sectors. The challenge therefore is to strike a balance between concrete observations, general principles and common sense in each individual case. What the right balance is, will depend on the characteristics of the case at hand.

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