Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 19 December 2019[1]

Joined Cases C-262/18 P and C-271/18 P

European Commission
v
Dôvera zdravotná poisťovňa, a.s. (C-262/18 P)
and
Slovak Republic
v
Dôvera zdravotná poisťovňa, a.s.

(C-271/18 P)

(Appeal — State aid — Health insurance bodies — Concept of 'undertaking' — Complex economic assessments — Scope of the judicial review conducted by the General Court — Concept of 'economic activity' — Other entities operating within the social security system seeking to make a profit — Competition as to quality and as to the health insurance services offered)

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1 Original language: French.

1. By these appeals, the European Commission and the Slovak Republic ask to set aside the judgment of the General Court of the European Union of 5 February 2018, *Dôvera zdravotná poisťovňa* v *Commission* (T-216/15, not published, EU:T:2018:64) ('the judgment under appeal'), by which it allowed an action brought by Dôvera zdravotná poisťovňa ('Dôvera') for the annulment of Commission Decision C(2014) 7277 final, concerning a series of measures of financial support implemented by that Member State for Spoločná zdravotná poisťovňa ('SZP') and Všeobecná zdravotná poisťovňa ('VšZP') ('the contested decision'). [2]

2. While there is already a rich body of case-law on the classification of entities operating within a social security system as 'undertakings' for the purposes of the competition rules of the Treaty, this case gives the Court an opportunity to provide some very welcome clarification with regard, in particular, to the impact of the fact that other operators within the system are seeking to make a profit on the classification of the entity in question as an undertaking. In addition, the Court is asked to rule, for the first time, on the scope of the judicial review conducted in relation to assessments made by the Commission in the context of determining whether an entity is to be regarded as an undertaking.

I. Background to the dispute

3. In 1994 the Slovak health insurance system changed from a single system, with just one State-owned health insurance company, to a hybrid model in which public and private organisations coexist. As part of a 2005 reform of the system, the legal form of all insurance providers was changed. They ceased to be *sui generis* legal entities and became incorporated limited liability companies. In 2007, the national legislation imposed an absolute prohibition, with effect from 1 January 2008, on the insurance companies distributing their profits in the form of dividends. In July 2011, following a judgment of the Slovak Constitutional Court declaring that prohibition to be unconstitutional, the legislation was amended so as to allow the insurance companies to distribute their profits subject to certain conditions.

4. Currently, Slovak residents can choose between three health insurance bodies:

– the State-owned insurance companies SZP and VšZP, which merged on 1 January 2010;

– the private insurance company Dôvera; and

– the private insurance company Union zdravotná poisťovňa a.s. ('Union').

5. On 2 July 2013, following a complaint from Dôvera alleging that the Slovak Republic had granted State aid to SZP and VšZP, the Commission initiated the formal investigation procedure.

6. On 15 October 2014, the Commission adopted the contested decision, in which it concluded that the measures at issue did not constitute State aid, on the ground that the activity of compulsory health insurance, as organised and carried out in Slovakia, could not be regarded as an economic activity and that, therefore, SZP and VšZP, as the beneficiaries of those measures, could not be classified as 'undertakings' within the meaning of Article 107(1) TFEU.

2 Commission Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by [the] Slovak Republic for Spoločná zdravotná poisťovňa a.s. (SZP) and Všeobecná zdravotná poisťovňa a.s. (VšZP) (OJ 2015 L 41, p. 25).

II. Procedure before the General Court and the judgment under appeal

7. By application lodged at the Court Registry on 24 April 2015, Dôvera brought an action seeking annulment of the contested decision, in support of which it advanced two pleas. By the first plea, Dôvera essentially argued that the Commission had made an error of law in interpreting the concept of 'undertaking' within the meaning of Article 107(1) TFEU, in two respects. First, it had not considered whether SZP and VšZP could be regarded as being engaged in *any* economic activity, whether within the Slovak compulsory health insurance system or outside it, in which case, Dôvera maintained, they should have been classified as undertakings. Secondly, it had concluded that the classification of the activity carried out by companies operating in the Slovak health insurance system as 'economic' depended on the balancing of the economic and non-economic elements, whereas, Dôvera submitted, the existence of any economic element within a health insurance system is sufficient for that activity to be classified as economic. By its second plea, Dôvera essentially argued that the Commission had made errors of law and of assessment in concluding that the non-economic elements of the Slovak health insurance scheme predominated over the economic elements.

8. Without considering the first plea, the General Court upheld the second plea and annulled the contested decision on that basis.

9. After referring to the case-law on the concept of 'undertaking',[3] and particularly that relating to social security schemes, the General Court examined whether the Commission had erred in law in concluding that the economic elements of the Slovak compulsory health insurance system did not call into question the predominant non-economic elements of that system.[4] For the purposes of that examination, first and foremost, the General Court found that the system under consideration essentially presented the following non-economic features:

– the health insurance companies had a legal obligation to register every Slovak resident who so requested and could not refuse to insure a person on the grounds of his age, state of health or risk of illness;

– the scheme was based on a system of compulsory contributions, which were fixed by law in proportion to the income of the insured persons, but independently of the benefits received or of the risk resulting from, inter alia, the age or state of health of the insured person;

– all insured persons had the right to the same minimum level of benefits;

– there was a risk equalisation scheme, whereby health insurance bodies insuring high-risk individuals received funding from health insurance bodies with a portfolio composed of persons presenting lower risks;

– health insurance bodies were subject to special regulations — in addition to identical status, rights and obligations, each health insurance body was established with the purpose of executing public health insurance and could not carry out activities other than those provided for by law;

– the activities of health insurance bodies were subject to supervision by a regulatory office, which ensured that those companies adhered to the aforementioned legislative framework and intervened when violation occurred.

3 Judgment under appeal, paragraphs 45 to 53.

4 Judgment under appeal, paragraph 54.

10. On that basis the General Court concluded, in paragraph 58 of the judgment under appeal, that 'it is necessary to uphold the Commission's conclusion that, in essence, the Slovak compulsory health insurance scheme had predominant social, solidarity and regulatory features'.

11. The General Court went on to extend its analysis so as to take the economic aspects of the system into account.[5] In particular, it held, first, that the health insurance companies' ability to make, use and distribute part of their profits did call into question the non-economic nature of their activity. In that context, it was irrelevant that their ability to do so was subject to the fulfilment of strict requirements intended to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it since, in any event, the fact that Slovak health insurance companies were freely able to seek and make a profit showed that they were pursuing financial gains and, consequently, that their activities in the sector fell within the economic sphere.

12. Secondly, the General Court found that there was 'a certain amount' of competition as to the quality and scope of services provided by the various health insurance companies. In this regard, it held that even if there was no competition within the Slovak compulsory health insurance system in respect of either the compulsory statutory benefits or the amount of contributions, there was nevertheless 'intense and complex' competition due to the fact that those organisations were free to supplement the compulsory statutory services with related free services, and the fact that insured persons were free to choose their health insurance company and switch company once a year.[6]

13. Consequently, in view of the profit pursued by health insurance companies and the existence of 'intense' competition as to quality and the services offered, the General Court held that the provision of compulsory health insurance in Slovakia was an economic activity.[7]

III. Procedure before the Court and forms of order sought

14. By its appeal in Case C-262/18 P, the Commission, supported by the Republic of Finland, asks the Court:

– to set aside the judgment under appeal;

– to refer the case back to the General Court or, in the alternative, give final judgment on the dispute, and

– to reserve the costs, or order Dôvera and Union to pay the costs.

15. The Slovak Republic contends that the Court should:

– grant the appeal, and

– order Dôvera and Union to pay the costs, or reserve the costs.

16. Dôvera contends that the Court should:

– dismiss the appeal, and

– order the Commission to pay the costs.

5 Judgment under appeal, paragraphs 63 and 64.

6 Judgment under appeal, paragraphs 65 to 67.

7 Judgment under appeal, paragraph 68.

17. By its appeal in Case C-271/18 P, the Slovak Republic, supported by the Republic of Finland, asks the Court:

– to set aside the judgment under appeal;

– to dismiss the action or, in the alternative, refer the case back to the General Court, and

– to order Dôvera and Union to pay the costs, or reserve the costs.

18. The Commission contends that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court or, in the alternative, give final judgment on the dispute, and

– reserve the costs, or order Dôvera and Union to pay the costs.

19. Dôvera and Union contend that the Court should:

– dismiss the appeal, and

– order the Slovak Republic to pay the costs.

20. By its cross-appeals in Cases C-262/18 P and C-271/18 P, Dôvera asks the Court:

– to set aside paragraph 58 of the judgment under appeal, in so far as it states that Dôvera had not contested the assertion that the Slovak health insurance scheme had 'predominant social, solidarity and regulatory features'.

21. Union asks the Court:

– to set aside paragraph 58 of the judgment under appeal, in so far as it states that Dôvera had not contested the assertion that the Slovak health insurance scheme had 'predominant social, solidarity and regulatory features', and

– to order the Commission to pay the costs.

22. The Slovak Republic contends that the Court should:

– dismiss the cross-appeal as inadmissible, and

– order Dôvera to pay the costs.

23. The Commission contends that the Court should:

– dismiss the cross-appeal as inadmissible or, in the alternative, set aside the judgment under appeal;

– refer the case back to the General Court or, in the alternative, give final judgment on the dispute, and

– reserve the costs, or order Dôvera and Union to pay the costs.

24. By decision of the President of the Court of 19 November 2018, Cases C-262/18 P and C-271/18 P were joined for the purposes of the oral procedure and the judgment.

25. The Commission, the Slovak Republic, Dôvera and Union made oral submissions at a hearing on 1 October 2019.

IV. The main appeals

26. In support of their appeals, the Commission and the Slovak Republic, supported by the Republic of Finland, advance three and four grounds, respectively. As the three grounds advanced by the Commission correspond, essentially, to the second, third and fourth grounds advanced by the Slovak Republic, I will deal with them together in this Opinion, after I have addressed the Slovak Republic's first ground.

A. The first ground of appeal advanced by the Slovak Republic in Case C-271/18 P, contending that the General Court exceeded its power of judicial review

1. Arguments of the parties

27. The Slovak Republic submits that, in the judgment under appeal, the General Court exceeded the power of judicial review it enjoys in respect of Commission decisions on State aid, in that it conducted a full review of whether the compulsory health insurance activity in question was an economic activity. The Slovak Republic contends that that issue incontestably involves complex economic assessments, as to which, under settled case-law of the Court, the Commission has a wide margin of discretion. It argues that in the judgment under appeal, the General Court did not pay proper regard to that discretion, but substituted its own economic assessment for that of the Commission.

28. Dôvera and Union submit that that ground of appeal is unfounded. In support of their position, they argue that the determination of whether the activity of compulsory health insurance in Slovakia is an economic activity does not require complex economic assessments, but a simple examination of the facts. Such assessments would only be necessary, they argue, if the question was whether an aid measure was compatible with the internal market within the meaning of Article 107(3) TFEU. In any event, they submit, the assessment made by the General Court in the judgment under appeal amounts to a finding of a manifest error of assessment, given that that the General Court held that the evidence relied on in the contested decision did not support the conclusions reached in that decision.

2. Assessment

29. As a preliminary matter, I think it is necessary, with a view to determining whether the General Court did in fact exceed its power of judicial review, to make some observations as to the principles governing the depth of such reviews in the field of State aid.

30. In that field, two kinds of review of the legality of Commission decisions are generally conducted by the EU judicature, namely a full review, in which the Court substitutes its assessment for that of the Commission, and a limited review of a more restricted scope.[8] In carrying out a limited review, the Court confines itself to 'verifying whether the Commission complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers'.[9]

31. According to the traditional approach reflected in the case-law, what determines whether the EU judicature conducts a limited or a full review is whether the assessments made by the Commission, in the decision in question, are economically or technically complex.[10] It is the need to allow the Commission a margin of discretion arising from such complexity, which dictates that the judicial review must be more limited in scope.

32. Consequently, in determining the scope of the review to be carried out by the EU judicature, the first step in the analysis is to establish whether the assessments under consideration are to be regarded as complex economic assessments.

33. In that respect, in the absence of a general definition of the concept of 'complex economic assessment', the case-law calls first and foremost for consideration of whether the Commission assessments to be reviewed relate to the concept of State aid or compatibility with the internal market.

34. In the case of compatibility with the internal market, it will not be necessary to take the analysis any further because — as the Court has consistently held — an examination of compatibility under Article 107(3) TFEU *necessarily* involves complex economic assessments.[11]

35. By contrast, the determination required by Article 107(1) TFEU does not, in principle, leave any room for such assessments, given that according to well-settled case-law, State aid is a legal concept which must be interpreted on the basis of objective factors.[12] Nonetheless, the Court has acknowledged that this concept can involve complex economic assessments in certain circumstances.

36. The question which the Court will need to consider, in order to reach a decision as to the first ground of appeal advanced by the Slovak Republic, is precisely whether the assessments made by the Commission, in relation to the classification as an undertaking in the context of the concept of State aid, fall within one of those circumstances.

8 See, to that effect, judgments of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraph 11); of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission* (C-328/99 and C-399/00, EU:C:2003:252, paragraph 39); of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 143); and of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 114).

9 See, in particular, judgment of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraph 11).

10 See judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481, paragraph 97).

11 Judgment of 17 September 1980, *Philip Morris Holland* v *Commission* (730/79, EU:C:1980:209, paragraph 24), in which the Court held, for the first time, that when assessing compatibility, 'the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context'.

12 This formulation, which first appeared in the judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission* (C-83/98 P, EU:C:2000:248, paragraph 25), has been repeated by the Court on many subsequent occasions.

37. In its appeal, the Slovak Republic merely states that, in determining whether companies operating within the Slovak compulsory health insurance scheme fell within the concept of 'undertaking', the Commission undoubtedly carried out complex economic assessments. In support of its argument, the Slovak Republic cites several decisions in which the Court has held assessments made by the Commission to have been of that kind. Given that the Court has recognised the economically complex nature of those assessments, the Slovak Republic submits, there is no reason why the assessments at issue in the present cases should not be regarded as such.

38. In order to reach a conclusion on the merits of that argument, I think it is necessary to identify the subject matter of the assessments at issue in the decisions cited:[13]

– in *DSG* v *Commission*,[14] the Commission assessment at issue related to whether a private investor would have increased or extended a line of credit granted to a private company on the same terms as the German government, having regard to the financial position of that company and its prospects of future profitability;

– in *Spain* v *Lenzing*,[15] the assessment at issue related to whether a private creditor had behaved in the same way as the two Spanish public bodies concerned in entering into a debt rescheduling agreement with a private company, and not seeking to enforce those debts following breach of that agreement on the part of the company, having regard to a series of factors and circumstances, including guarantees attached to the sums owed to it, and the debtor company's prospects of future viability and profitability;

– in *Chronopost and La Poste* v *UFEX and Others*,[16] the assessment at issue related to whether the remuneration for logistical and commercial assistance provided by the French public undertaking responsible for the ordinary mail sector to the company managing express mail, which it indirectly controlled, over a period of 10 years, corresponded to the way in which a private investor would have conducted itself in the same circumstances;

– in *Commission* v *Scott*,[17] the assessment at issue related to whether the price paid by a company for land sold by the French public authorities reflected the sale price that would have been accepted by a private seller;

– in *Land Burgenland and Others* v *Commission*,[18] the assessment at issue related to whether the Austrian public authorities had acted in the same way as a private seller would have done in selling a regional bank, not to the highest bidder, but to another party, at a significantly lower price, in the light of a variety of factors including the degree of certainty that the transaction would proceed and the associated financial risks.

39. It is quite clear in my view that simply referring to that series of decisions of the Court cannot, in itself, justify regarding the assessments concerning whether SZP and VšZP were undertakings as complex economic assessments, given that *none* of the assessments which were held to meet that description, in the decisions referred to, related to whether an entity receiving support from public funds fell within the concept of 'undertaking'.

13 I will exclude one of the decisions referred to by the Slovak Republic, namely the judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87), from my analysis, because it relates to an antitrust case and not a State aid case. In my view, this can only mean that that judgment is not relevant to the determination of whether the assessments made by the Commission, with regard to the issue of whether SZP and VšZP were 'undertakings' within the meaning of Article 107(1) TFEU, were complex economic assessments, as the objective nature of the concept of State aid has a significant impact on that determination.

14 Order of 25 April 2002 (C-323/00 P, EU:C:2002:260).

15 Judgment of 22 November 2007 (C-525/04 P, EU:C:2007:698).

16 Judgment of 1 July 2008 (C-341/06 P and C-342/06 P, EU:C:2008:375).

17 Judgment of 2 September 2010 (C-290/07 P, EU:C:2010:480).

18 Judgment of 24 October 2013 (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682).

40. On the contrary, all of the complex economic assessments at issue in the decisions cited by the Slovak Republic related to whether an advantage had been conferred, as determined applying the market economy operator test in its various forms, namely the private investor test, the private creditor test and the private vendor test ('the private operator test'). [19] I do not find this surprising given that, in carrying out its function of review and determining whether the conditions for a finding of State aid are fulfilled, the Court, as far as I am aware, has only recognised assessments relating to the application of that test as complex economic assessments, [20] going so far as to hold that its application always involves such assessments. [21]

41. If and in so far as the Slovak Republic is implicitly arguing, in its appeal, that the conclusion reached as regards the private operator test should be applied *by analogy* to the present case, it must be asked whether the considerations which led the Court to recognise that the application of the private operator test is economically complex are transposable to the assessments made by the Commission in determining whether SZP and VšZP fell within the concept of 'undertaking', as the Slovak Republic maintains.

42. Those considerations should be identified. First, as to the assessments concerned being economic in nature, there is no doubt that, since a private operator acts with regard to the foreseeability of obtaining a return, leaving aside all other considerations, [22] a test based on acting in the same way as such an operator necessarily involves an analysis based on economic data. Secondly, as to those assessments being complex in nature, this is to be explained in my view by the fact that the economic data required for the private operator test is not actual recorded data, but is hypothetical, inasmuch as the analysis carried out is an *ex ante* analysis of the prospects of obtaining a return from given market conduct. [23] The fact that the assessments required by the private operator test are complex economic assessments stems, as I see it, from this *prospective* element or element of *economic forecasting*. This view seems to me to be supported by a passage from the judgment in *Commission* v *Scott* in which the Court concluded, having regard in particular to the fact that the land at issue had been sold to the private company concerned without either an unconditional bidding procedure or a valuation by an independent expert, that the Commission's task was 'correspondingly complex and could not lead to anything but a *rough estimate* of the market value of the land at issue'. [24]

43. In summary, the fact that the assessments made by the Commission in applying the private operator test are complex economic assessments is due, it would appear, to the fact that the uncertainty inherent in any economic forecast requires interpretative work which the EU judicature is not equipped to carry out; this justifies a discretion being allowed to the Commission. [25]

44. It goes without saying that those considerations cannot be applied by analogy to Commission assessments, such as those made in determining whether an entity receiving support from public funds is to be regarded as an undertaking within the meaning of Article 107(1) TFEU, which do not involve any element of economic forecasting.

19 These tests are defined in the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1, paragraph 74).

20 In addition to the decisions cited by the Slovak Republic, see judgments of 29 February 1996, *Belgium* v *Commission* (C-56/93, EU:C:1996:64, paragraphs 10 and 11), and of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission* (C-328/99 and C-399/00, EU:C:2003:252, paragraphs 38 and 39).

21 See judgments of 22 November 2007, *Spain* v *Lenzing* (C-525/04 P, EU:C:2007:698, paragraph 59); of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 68); of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraph 74); and of 30 November 2016, *Commission* v *France and Orange* (C-486/15 P, EU:C:2016:912, paragraph 90).

22 In this regard, see judgment of 10 July 1986, *Belgium* v *Commission* (234/84, EU:C:1986:302, paragraph 14).

23 See, in particular, judgment of 5 June 2012, *Commission* v *EDF* (C-124/10 P, EU:C:2012:318, paragraphs 82 to 85 and 105).

24 Judgment of 2 September 2010 (C-290/07 P, EU:C:2010:480, paragraph 70). My italics.

25 See Ritleng, D., *Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires* [Determination of legality by the Community judicature and the discretionary power of Community institutions], AJDA, 1999, No 9, p. 645.

45. It must then be asked whether such assessments, and more specifically assessments relating to the classification of an entity operating within a social security system as an undertaking, can nevertheless be regarded as complex economic assessments on the basis of considerations *other than* those underlying the recognition of the application of the private operator test as such.

46. In my opinion, this must be answered in the negative.

47. For the reasons set out below, I take the view that such Commission assessments cannot in any event be regarded as complex economic assessments.

48. I note first of all that, as will be apparent from the examination of the grounds based on an error of law as to the interpretation of the concept of 'undertaking',[26] the issue of whether the activity carried out by an entity operating within a social security system is an economic activity, so that the entity can be regarded as an undertaking, involves establishing whether the national legal framework governing the activity of providing the social security service concerned presents certain features — for example, whether membership of the social security scheme is mandatory or optional, whether or not the entity is free to determine the amount of contributions, and whether or not the services provided depend on the amount of contributions.

49. However, there does not seem to me to be any doubt, first of all, that the assessments required to determine whether those features are present, which relate to the content of national legislation, are eminently legal rather than economic in nature.

50. As to whether those assessments are complex, even if, in 'hybrid' schemes, they involve balancing economic and non-economic elements, I do not consider that the exercise is so complex that it justifies a discretion being allowed to the Commission, as is demonstrated by the fact that the Court carried out such assessments itself in the references for preliminary rulings giving rise to the judgments referred to in points 115 and 120 of this Opinion.

51. In view of the foregoing, I do not think it is necessary to consider the argument developed by the Slovak Republic under this ground, by which it contends that the General Court ought to have held that the Commission had made a manifest error of assessment. This argument is developed on the basis that the concept of 'undertaking' requires the Commission to make complex economic assessments — a proposition which, I suggest, should be rejected in this case.

52. Accordingly, I do not consider that when, in the judgment under appeal, the General Court substituted its own assessment for that made by the Commission as to whether SZP and VšZP were to be regarded as undertakings, it went beyond the limits of its power of judicial review, as identified in the relevant case-law.

3. Conclusion on the first ground advanced by the Slovak Republic in Case C-271/18 P

53. In the light of the foregoing, I suggest that the Court should reject the first ground of appeal in Case C-271/18 P as unfounded.

26 See section C of this Opinion.

B. The first ground advanced by the Commission in Case C-262/18 P and the fourth ground advanced by the Slovak Republic in Case C-271/18 P, contending that the General Court failed to give adequate reasons

1. Arguments of the parties

54. The Commission and the Slovak Republic, supported by the Republic of Finland, argue that the reasoning of the judgment under appeal is both contradictory and inadequate. In particular, they submit that it is not possible to understand, from that reasoning, what legal test was applied in the judgment under appeal. While, they contend, the General Court indicated that it was annulling the contested decision on the basis of the second plea raised in the action, relating to the balance of economic and non-economic elements, it is apparent from paragraphs 58 and 63 to 69 of the judgment under appeal that, in reality, the legal test it applied was that put forward in relation to the first plea, according to which the presence of any economic element whatsoever, in a system of health insurance, is a sufficient basis for regarding the activity carried out by bodies operating within that system as an economic activity.

55. The Slovak Republic adds that it is not possible to understand, from the reasoning in the judgment under appeal, the reasons why the General Court departed from the case-law of the Court, or the importance it attached to the fact that health insurance bodies were able to use and distribute part of their profits, or the fact that there was a limited amount of competition. As regards profits, it is argued that the General Court failed to take account of the fact that one of the measures to which the contested decision related applied at a time when insurance bodies were prohibited from distributing profits. As regards the extent of competition, the judgment under appeal is said to be contradictory in that the General Court held that there was 'a certain amount of competition' between such companies, while also holding that competition between them was 'intense and complex'.

56. Dôvera and Union reply that the reasoning of the judgment under appeal is sufficiently clear and precise. In particular, they argue, it is apparent from paragraph 54 of the judgment that the General Court did not apply the legal test which Dôvera had proposed under its first plea, but carried out a balancing exercise in relation to the various elements present in the Slovak compulsory health insurance scheme. In that context, they submit, paragraph 69 of the judgment under appeal is *obiter dictum*, and it is clear from paragraphs 63 to 68 of the judgment that the classification of the activity carried out by companies operating within the compulsory health insurance system as an economic activity was based on the presence of two cumulative factors, namely the existence of competition between those companies and the fact that organisations other than SZP and VšZP were seeking to make a profit. As for the use and distribution of the profits made by those health insurance companies, it is argued that the legal restrictions in place are usual in relation to insurance activities, and do not indicate that the activities at issue are not economic in nature. Furthermore, it is submitted, the General Court's observations as to the degree of competition are perfectly consistent.

2. Assessment

57. The complaints on which the present ground is based relate to the allegedly inadequate and contradictory nature of the reasoning in the judgment under appeal. They should be examined one by one.

58. First of all, as regards the complaint that it is apparent from the reasoning of the General Court in the judgment under appeal, and from the conclusion it reached, that while it may have annulled the contested decision on the basis of the second plea, it actually applied the legal test proposed by the applicant under the first plea, I note that that complaint is based on a reading of paragraphs 58 and 63 to 69 of the judgment under appeal, which is summarised below.

59. In considering the second plea, the General Court, in paragraph 58 of the judgment under appeal, upheld the Commission's conclusion that the Slovak scheme was essentially based on solidarity, and, in paragraph 64 of the judgment, it accepted the further explanation advanced by the Commission, to the effect that the economic features of the Slovak compulsory health insurance scheme had been introduced to ensure the attainment of its social and solidarity objectives. On that basis, it is argued, the General Court ought to have rejected the plea, since the legal test which had been applied by the Commission in its decision, and accepted by the applicant at first instance in the context of its second plea, was whether the scheme at issue was essentially based on solidarity, or whether it was essentially economic in nature, and the observations made by the General Court, in the paragraphs just referred to, clearly indicate that it is the first of those possibilities which is correct. However, in paragraph 68 of the judgment under appeal, the General Court accepted the second plea and annulled the contested decision on the basis that the presence of other for-profit operators and the existence of competition within the Slovak compulsory health insurance system demonstrated that the activity carried out within that system was economic in nature. Thus, those two economic elements, taken by themselves, transformed the provision of compulsory health insurance in Slovakia into an economic activity notwithstanding the predominant social, solidarity and regulatory features.

60. That complaint seems to me to be based on the General Court having held, in paragraph 58 of the judgment under appeal, that the Slovak compulsory health insurance scheme had 'predominant' social, solidarity and regulatory features.

61. In this respect, I note that in the version of the judgment under appeal which is in the language of the proceedings, namely the English version, the General Court first stated, in paragraph 54, that the Commission had concluded that the social, solidarity and regulatory features of the scheme were 'predominant'. In paragraph 55 of the judgment, it then observed, it seems to me, that what the description of those features in the contested decision actually indicated was that they were 'significant'. Finally, in paragraphs 56 and 57 of the judgment under appeal, the General Court confirmed, identifying those features, that that was so, and accordingly reached a positive conclusion in paragraph 58 of that judgment.

62. Although paragraph 58 of the judgment under appeal characterises the social, solidarity and regulatory features as 'predominant', there is little doubt in my view that that paragraph, intended as it is to support the observation in paragraph 55 of the judgment, must be understood as characterising them as 'significant'. This, moreover, is supported by the French version of the judgment under appeal. Paragraph 58 of the French version uses the word '*important*' ('significant'); unfortunately this was translated as 'predominant' in the English version of the judgment.

63. Moreover, and above all, it would be wholly incompatible with the last sentence of paragraph 58 of the judgment under appeal itself ('that finding is not challenged by the applicant') to characterise those features as 'predominant', as it is common ground that Dôvera had expressly rejected that characterisation of the Slovak compulsory health insurance regime on numerous occasions during the proceedings at first instance.

64. It is true that paragraph 58 of the judgment under appeal appears to be affirming conclusions reached in the contested decision ('in the light of those various factors, *it is necessary to uphold the Commission's conclusion* that, in essence, the Slovak compulsory health insurance scheme had predominant social, solidarity and regulatory features'),[27] a decision in which the Commission had stated and restated that the non-economic elements in question were predominant. However, the addition of the expression 'in essence' in the wording of that paragraph indicates, in my view, that the

27 My italics.

General Court was upholding that conclusion in so far as it related to the *presence* of those features, and not to the impact this had on the degree of solidarity exhibited by the Slovak compulsory health insurance scheme, for the purposes of characterising the activity carried out within that scheme as an economic activity.

65. Accordingly, if we accept that the General Court went no further, in paragraph 58 of the judgment under appeal, than to find that the non-economic features of the scheme were 'significant', I do not see how its reasoning could be regarded as contradictory.

66. Since the Court did not uphold the Commission's conclusion that the Slovak compulsory health insurance scheme was essentially based on solidarity, but simply acknowledged, in the context of applying a legal test requiring a balancing exercise to be carried out in relation to the economic and non-economic features of the scheme, that that scheme had 'significant' non-economic features, its conclusion that, in view of the economic features considered in paragraphs 63 to 67 of the judgment under appeal, the activity of providing compulsory health insurance in Slovakia was an economic activity is, in my opinion, fully consistent with its premiss.

67. In those circumstances, I consider that that complaint must be rejected.

68. Secondly, with regard to the complaint, which seems to me to be distinct from the one just considered, that paragraph 69 of the judgment under appeal, in so far as it states that the presence of for-profit health insurance bodies transforms SZP and VšZP into undertakings 'by contagion', must be taken to mean that *that factor alone* is a sufficient basis for concluding that the provision of compulsory health insurance in Slovakia is an economic activity, I do not find this persuasive.

69. Before considering that complaint in more detail, I think it would be helpful to set out paragraph 69 in its entirety. The General Court stated as follows: 'That conclusion [namely, that the activity in question was an economic activity] cannot be undermined, even if it were to be argued that SZP and VšZP were not seeking to make a profit. Admittedly, where the bodies whose activity is examined do not have such a goal, but have a degree of freedom to compete to a certain extent in order to attract persons seeking insurance, that competition does not automatically call into question the non-economic nature of their activity, particularly where that element of competition was introduced in order to encourage the sickness funds to operate in accordance with principles of sound management (judgment of 16 March 2004, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 56). However, it is apparent from the case-law cited in paragraph 48 above that the fact that the offer of goods or services is made without seeking to make a profit does not prevent the entity which carries out those operations on the market from being regarded as an undertaking, provided that the offer exists in competition with that of other operators that are seeking to make a profit. It follows that it is not the mere fact of being in a position of competition on a given market which determines the economic nature of an activity, but rather the presence on that market of operators seeking to make a profit. That is the situation in the present case, since it is common ground between the parties that the other operators on the market in question are seeking to make a profit, so that SZP and VšZP, 'by contagion', would have to be considered to be undertakings'.

70. If we were to confine ourselves to examining matters of form, we might accept the interpretation put forward by the Commission and the Slovak Republic. I note that the General Court made the observations appearing in paragraph 69 of the judgment under appeal after holding, in paragraph 68 of that judgment, that what made the activity in question an economic one was the existence of competition as to quality and the services offered and the presence of other operators who were seeking to make a profit, which could be taken to indicate that its intention was to give more detail as to the conclusion it had reached, by making clear that it was only the presence of other operators who were seeking to make a profit that was necessary for the conclusion that the activity was economic in nature, and not both features together. Furthermore, on several occasions the General Court used

wording which implies that there was a hierarchical relationship between the two features in question ('… but *rather* the presence on that market of operators seeking to make a profit')[28] or that the fact that there was competition as to quality and the services offered was stated for completeness and was not strictly necessary ('*since* it is common ground between the parties that the other operators on the market in question are seeking to make a profit … SZP and VšZP, '*by contagion*', would have to be considered to be undertakings').[29]

71. However, when we turn to consider the substantive content of paragraph 69 of the judgment under appeal, it is clear that it is not intended to alter the conclusion, set out in paragraph 68 of the judgment, that the economic nature of the activity of providing compulsory health insurance in Slovakia is based on the concurrent presence, within that social security system, of a competitive situation and of other operators who are seeking to make a profit. Indeed, contrary to what has been argued by the Commission and the Slovak Republic, it seems to me that the reason for the inclusion of that paragraph is simply that the General Court wished to clarify the legal basis for taking account of the presence of other operators who were seeking to make a profit, in the context of determining whether an activity such as that at issue was to be regarded as an economic activity for the purposes of Article 107(1) TFEU.

72. This seems to me to be apparent when paragraph 68 is paraphrased.

73. The reasoning of the General Court begins — and this may give the false impression that it is *obiter dictum*[30] — from a supposition that SZP and VšZP do not seek to make a profit. On that basis, the Court goes on, the fact that companies operating within the social security system concerned had a degree of freedom to compete would not in itself call into question the non-economic nature of their activity. On the other hand, that activity would necessarily be economic in nature, the General Court implies, by reference to case-law of the Court of Justice, if the operators whose offers were in competition with those of SZP and VšZP were seeking to make a profit. Consequently — and here the General Court moves, without expressly saying so, from consideration of the case at hand to a more general statement of principle — the presence of operators seeking to make a profit is, together with the existence of competition, one of the factors determining whether an activity is economic in nature. Accordingly, the General Court held, since it was common ground that the other companies operating within the Slovak compulsory health insurance system were seeking to make a profit, the activity of SZP and VšZP had to be regarded as an economic activity for the purposes of classifying them as undertakings.

74. I therefore consider that that second complaint must also be rejected.

75. Thirdly, as regards the complaint that the General Court did not explain its reasons for departing from the case-law of the Court of Justice, which had always characterised a given social security system by reference to its dominant features, I would note that that complaint is based on an alleged contradiction between the finding that the Slovak compulsory health insurance scheme had 'predominant' social, solidarity and regulatory features (paragraph 58 of the judgment under appeal), and the conclusion that the activity pursued within that system was economic in nature (paragraph 68 of the judgment).

76. On the basis that, as I have stated in points 61 to 64 of this Opinion, paragraph 58 of the judgment under appeal does not characterise those features as 'predominant', but only as 'significant', I do not consider that that complaint can be upheld.

28 My italics.

29 My italics.

30 In the responses they lodged in the present matters, Dôvera and Union argue, essentially, that since that complaint relates to an *obiter dictum*, it should be regarded as inoperative. As will be apparent from the interpretation I have set out in point 71 of this Opinion, I do not think that reading is correct.

77. Fourthly, as regards the complaint that the General Court did not take account of the legal restrictions on the use and distribution of profits imposed by Slovak legislation, it seems to me that, on the contrary, the General Court duly justified its position in paragraph 64 of the judgment under appeal, where it stated that, for the purposes of characterising the activity carried out by the health insurance companies as economic, what was important was not their ability to use and distribute profits, but their freedom to seek to make a profit, since such freedom shows that an entity is pursuing financial gains, and is thus operating within the economic sphere.

78. Accordingly, there being no deficiencies in the matters stated by the General Court in that passage of the judgment under appeal, that complaint must be rejected.

79. Fifthly, as regards the complaint that the General Court failed to have regard to the fact that one of the measures to which the contested decision related was applicable during a period when health insurance bodies were prohibited from distributing a profit, I consider — contrary to the submissions made by Dôvera in its response in Case C-271/18 P — that that complaint has not been raised for the first time on appeal, and is therefore admissible.[31] However, I am persuaded that that complaint cannot succeed on the merits, on the basis that — as Union pointed out in its response — it is settled case-law that the question whether a State measure of support constitutes State aid within the meaning of Article 107(1) TFEU is to be determined on the basis of objective factors which are to be assessed as at the date on which the Commission adopted its decision.[32] In the present case, therefore, the General Court was required to examine whether SZP and VšZP were undertakings on the basis of the circumstances prevailing when the Commission adopted its decision. However, by that time — October 2014 — it had been about three and a half years since the prohibition on the payment of profits had been annulled by the Slovak Constitutional Court, and thus it was no longer in force. Accordingly, since it cannot legitimately be argued that the General Court's reasoning was inadequate on that point, that complaint must in my view be rejected.

80. Finally, as regards the complaint that the reasoning is contradictory in that the General Court held, in paragraph 65 of the judgment under appeal, that there was only 'a certain amount of competition' between bodies operating within the Slovak compulsory health insurance system, while also holding, in paragraph 67 of that judgment, that such competition was 'intense and complex', I would accept the argument of Dôvera and Union that the alleged discrepancy is based on the wording of paragraph 65 of the judgment under appeal being equivalent to 'a limited degree' of competition, or to entities competing 'to a limited extent', whereas, in reality, that wording is neutral and can only be interpreted as meaning that the degree of competition is not unlimited. That difference in the characterisation of the degree of competition is explained by the fact that, whereas the adjective 'certain' is used by the General Court to define, *in abstracto*, one of the factors having a bearing on whether the activity was economic in nature, the adjectives 'intense and complex' are used following an assessment of the *actual* degree of competition between companies operating within the Slovak health insurance system.

81. In those circumstances, I consider that that complaint must also be rejected.

3. Conclusion on the first ground in Case C-262/18 P and the fourth ground in Case C-271/18 P

82. In the light of the foregoing, I suggest that the Court should reject the first ground of appeal in Case C-262/18 P and the fourth ground of appeal in Case C-271/18 P, in their entirety, as unfounded.

31 I would point out that it is well established, in the case-law of the Court of Justice, that to allow a party to raise for the first time, before the Court of Justice, an argument which had not been advanced before the General Court, would amount to allowing that party to put before the Court of Justice, which has limited jurisdiction on appeal, a broader case than had been considered by the General Court. See, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634).

32 See, in particular, judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraph 50).

C. The second ground raised by the Commission in Case C-262/18 P and the third ground raised by the Slovak Republic in Case C-271/18 P, contending that the General Court erred in law in its interpretation of the concept of 'undertaking' within the meaning of Article 107(1) TFEU

1. Arguments of the parties

83. The Commission and the Slovak Republic, supported by the Republic of Finland, submit that the General Court erred in its interpretation of the concept of 'undertaking', within the meaning of Article 107 TFEU, and failed to have proper regard to the case-law of the Court, in particular its judgments in *AOK Bundesverband and Others*,[33] *Poucet and Pistre*,[34] *Cisal*,[35] *Kattner Stahlbau*,[36] and *AG2R Prévoyance*,[37] when it held, in paragraphs 63 to 69 of the judgment under appeal, that the fact that bodies operating within the Slovak health insurance system were seeking to make a profit, together with the existence of a certain amount of competition between those bodies, was a sufficient basis for characterising their activities as economic in nature, despite the presence of predominant non-economic features. The Slovak Republic adds that the General Court's approach is also contrary to the judgments in *Fédération française des sociétés d'assurance and Others*[38] *Albany*,[39] *Brentjens'*,[40] *Drijvende Bokken*,[41] and *Pavlov and Others*.[42]

84. It is argued, moreover, that the General Court failed to have proper regard to the case-law of the Court of Justice in holding, in paragraph 69 of the judgment under appeal, that the mere presence of for-profit operators carrying out the same activity as not-for-profit operators transformed the latter, 'by contagion', into undertakings within the meaning of Article 107(1) TFEU. It is apparent from the judgment in *AOK Bundesverband and Others*,[43] it is submitted, that in addition to the fact that the Slovak health insurance scheme had 'predominant social, solidarity and regulatory features',[44] the fact that its economic features were intended 'to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it'[45] ought to have led the General Court to conclude that the scheme was non-economic in nature. As to profits, it is said that paragraph 64 of the judgment under appeal is based on an artificial distinction between, on the one hand, the freedom to seek and make a profit and, on the other, the ability — subject to strict regulations — to use and distribute such profits.

85. Dôvera and Union reply that the judgment under appeal conforms to the case-law of the Court. They argue that the judgment contains the necessary analysis of the various features in question, and their respective importance and purpose. As regards the judgment in *AOK Bundesverband and Others*,[46] they argue that there are very significant factual differences between the scheme examined in that judgment and the Slovak health insurance scheme.

33 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).
34 Judgment of 17 February 1993 (C-159/91 and C-160/91, EU:C:1993:63).
35 Judgment of 22 January 2002 (C-218/00, EU:C:2002:36).
36 Judgment of 5 March 2009 (C-350/07, EU:C:2009:127).
37 Judgment of 3 March 2011 (C-437/09, EU:C:2011:112).
38 Judgment of 16 November 1995 (C-244/94, EU:C:1995:392).
39 Judgment of 21 September 1999 (C-67/96, EU:C:1999:430).
40 Judgment of 21 September 1999 (C-115/97 to C-117/97, EU:C:1999:434).
41 Judgment of 21 September 1999 (C-219/97, EU:C:1999:437).
42 Judgment of 12 September 2000 (C-180/98 to C-184/98, EU:C:2000:428).
43 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).
44 Paragraph 58 of the judgment under appeal.
45 Paragraph 64 of the judgment under appeal.
46 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).

86. They also submit, as regards the complaint that the General Court's approach diverges fundamentally from the case-law of the Court of Justice, that that complaint is based on a misinterpretation of paragraph 58 of the judgment under appeal, in which, they contend, the General Court did not hold that the economic features of the Slovak compulsory health insurance scheme were 'predominant', but only that they were 'significant'.

87. Moreover, Dôvera and Union argue that, contrary to what the Commission claims, the General Court did not find, in paragraph 64 of the judgment under appeal, that the economic features of that scheme had been introduced to ensure the attainment of social and solidarity objectives. In their view, the restrictions on the use and distribution of profits are usual and do not give rise to any restriction of competition. Furthermore, they argue, 'the ability to use and distribute profits' is not inextricably linked to the freedom 'to seek and make a profit'.

88. Finally, Dôvera and Union submit that the criticism directed against paragraph 69 of the judgment under appeal is inoperative, on the basis that that paragraph is *obiter dictum*.

2. Assessment

(a) Preliminary remarks

89. With a view to establishing whether, as the Commission and the Slovak Republic maintain, the General Court erred in law in interpreting the concept of 'undertaking', as enshrined in Article 107(1) TFEU, it is necessary first of all to point out, once again, that the factors which led the General Court to conclude that, despite the presence of significant social, solidarity and regulatory features, the activity carried out within the Slovak compulsory health insurance system was to be characterised as economic in nature, were, first, the fact that there was competition between the entities operating within that system, and second, the presence of for-profit operators other than the entity under consideration.

90. Consequently, I think the first question to be addressed should be the one which seems to me, prima facie, to be the more controversial: whether the fact that those operators are seeking to make a profit is a *relevant* consideration in determining whether or not a given activity is economic in nature, for the purposes of classifying an entity carrying out that activity as an undertaking within the meaning of Article 107(1) TFEU (section (b) below).

91. Having concluded that it is not a relevant consideration, I will go on to consider, in the light of the case-law of the Court concerning the classification of activities carried out within social security systems as undertakings, whether the competition permitted under the Slovak compulsory health insurance scheme is a valid basis for the conclusion — reached by the General Court in the judgment under appeal — that notwithstanding the social, solidarity and regulatory features of that scheme, the activity of provision of compulsory health insurance has to be regarded as economic in nature. I will answer that question in the negative (section (c) below).

(b) The relevance, for the purposes of classification of the activity as economic, of the fact that other entities operating within the social security system seek to make a profit

92. As I have already stated, it is apparent from paragraphs 68 and 69 of the judgment under appeal that the fact that other operators providing compulsory health insurance in Slovakia were seeking to make a profit was regarded by the General Court as an indication that the activity under consideration was economic in nature.

93. In proceeding on that basis, the General Court was rejecting the approach taken by the Commission, which, regarding it as incorrect to distinguish between the making of a profit and the use or distribution of profits, had considered the freedom of operators on the market in question to use and distribute profits *in the context of examining whether there was competition* between those operators. More specifically, the Commission had taken the view in its decision — as the General Court noted in paragraph 64 of the judgment under appeal — that the ability to use and distribute profits was not such as to call into question the non-economic nature of the activity carried out by SZP and VšZP, given that that ability was more strictly regulated than in the normal commercial sectors, and was subject to the fulfilment of requirements intended to ensure the continuity of the scheme and the attainment of its social and solidarity objectives. In this respect, while acknowledging that that was factually correct, the General Court indicated that it was irrelevant for the purposes of excluding the economic nature of the activity under consideration '*once* the market operators in question seek to make a profit'. [47]

94. I cannot agree with the General Court's interpretation.

95. In this regard, I note that, in the Court's case-law on social security systems, that factor has never been taken into account in assessing the nature of the activity carried on by the entities concerned.

96. It might therefore be expected that the General Court would refer to other case-law providing a legal basis for taking that factor into account. Indeed, in paragraph 69 of the judgment under appeal, the Court refers to 'the case-law cited in paragraph 48 above', namely, the judgments of the Court of Justice in *Cassa di Risparmio di Firenze and Others* [48] and *MOTOE*. [49]

97. In my view, the reference to these two cases requires careful consideration.

98. As regards the judgment in *Cassa di Risparmio di Firenze and Others*, [50] the General Court was referring to the answer provided by the Court of Justice to the question whether Italian banking foundations, acting in the fields of social assistance and public interest, were carrying out an economic or a non-economic activity in conducting commercial, real estate and asset operations which were necessary or opportune in order to achieve the aims prescribed for them. In particular, the General Court cites paragraphs 122 and 123 of that judgment, in which the Court held that the activity of the foundations in question was to be regarded as economic in nature, despite the fact that the offer of goods or services was made on a non-profit-making basis, 'since that offer will be in competition with that of *profit-making operators*'.

99. As regards the *MOTOE* judgment, [51] the General Court refers to paragraph 27, where, in considering the effect of the fact that the relevant entity did not seek to make a profit on whether the activity of organising motorcycling events, and concluding related sponsorship, advertising and insurance contracts, was an economic activity, the Grand Chamber of the Court cited the passage from the judgment in *Cassa di Risparmio di Firenze and Others* [52] referred to above.

47 My italics.

48 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

49 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

50 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

51 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

52 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

100. It follows that the legal basis on which the General Court elevated the presence of for-profit operators within the system in which a given entity is operating to the rank of a decisive factor in determining whether the activity carried out by that entity is economic in nature, together with the existence of competition, is found in paragraph 123 of the judgment in *Cassa di Risparmio di Firenze and Others*,[53] *as affirmed* by the Grand Chamber of the Court in the judgment in *MOTOE*.[54]

101. However, I share the view, expressed by the Slovak Republic in its appeal, that the General Court misunderstood the relationship between those two judgments, given that, in the judgment in *MOTOE*,[55] the intention of the Court of Justice was not to make the formula in paragraph 123 of the judgment in *Cassa di Risparmio di Firenze and Others*[56] generally applicable, but rather to delimit its scope.

102. While it is true that the Court referred to that judgment in paragraph 27 of the judgment in *MOTOE*,[57] in addressing the effect of the fact that the Automobile and Touring Club of Greece ('ELPA') was not a for-profit entity on the classification of certain of its activities as economic activities, it is equally true that, in the following paragraph of the judgment in *MOTOE*,[58] the Court indicated, essentially, that the fact that the Motosykletistiki Omospondia Ellados NPID (MOTOE), which operated in the same sector as ELPA, also did not seek to make a profit, had *no effect* on the classification of the nature of the activity carried out by ELPA, for reasons it explained as follows: 'First, it is not inconceivable that, in Greece, there exist, in addition to the associations whose activities consist in organising and commercially exploiting motorcycling events without seeking to make a profit, associations which are engaged in that activity and do seek to make a profit and which are thus in competition with ELPA. Second, non-profit-making associations which offer goods or services on a given market may find themselves in competition with one another. The success or economic survival of such associations depends ultimately on their being able to impose, on the relevant market, their services to the detriment of those offered by the other operators'.

103. The Court thus held, as I see it, that an activity can be classified as economic even where the presence of competitors seeking to make a profit is purely hypothetical ('it is not inconceivable that … there exist') or where the competitors are not seeking to make a profit at all ('non-profit-making associations … may find themselves in competition with one another').[59]

104. In so holding, far from contemplating an application of the formula used in the judgment in *Cassa di Risparmio di Firenze and Others*[60] beyond the factual background which gave rise to that judgment, the Court, as I see it, was clarifying its case-law by indicating that the fact that competitors of the entity whose activity is under consideration are seeking to make a profit has absolutely no relevance to the assessment of the nature of an activity. On the contrary, the *only* relevant matter is the fact that the entities concerned are in competition with one another.

53 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

54 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

55 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

56 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

57 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

58 Judgment of 1 July 2008 (C-49/07, EU:C:2008:376).

59 It seems to me that the Court was drawing very much on the relevant passage of the Opinion of Advocate General Kokott in that case (C-49/07, EU:C:2008:142, points 41 and 42), which stated that 'the fact that an organisation such as ELPA has the status of a non-profit-making association and operates without seeking to make a profit does not preclude the assumption that it pursues an economic activity and has the associated status of undertaking. Such organisations can also market their services in competition with other economic agents, *irrespective of whether the other economic agents themselves operate without seeking to make a profit or on a commercial basis*. This is particularly clear in the present case, where two Greek non-profit making associations — ELPA and MOTOE — have set themselves the aim of organising and marketing motorcycling events in Greece. *The success of such organisations depends ultimately on their being able, through each of the services which they provide, to hold their own against other providers and to ensure the financing of their activities*' (my italics). The only difference lies in the fact that, unlike the Advocate General, the Court sought to present that conclusion as a clarification of the scope of paragraph 123 of the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8), and it was this, in my view, which led to the error of interpretation made by the General Court in the present case.

60 Judgment of 10 January 2006 (C-222/04, EU:C:2006:8).

105. It should also be noted that, in another field, the Court has accepted that certain activities can be non-economic in nature, *notwithstanding* the existence of for-profit operators who carry out those activities.[61] In its judgment in *Congregación de Escuelas Pías Provincia Betania*, it held that establishments which were integrated into a system of public education and financed by public funds were not carrying out an economic activity when they offered educational services, taking no account of the fact that establishments financed by private funds were providing those same services in exchange for remuneration.[62]

106. That interpretation seems to me to be supported by the traditional approach taken by the case-law on the concept of 'undertaking'. Whether a given entity seeks to make a profit depends, generally speaking, on its legal status, which, under that case-law, has no bearing on whether an entity is to be classified as an undertaking.[63]

107. I therefore consider that the General Court erred as to the interpretation of the concept of 'undertaking', as referred to in Article 107(1) TFEU, in holding, in paragraph 68 of the judgment under appeal, that the fact that private insurance companies were seeking to make a profit was an indication that the activity of providing compulsory health insurance carried out by SZP and VšZP was economic in nature.

(c) Whether there is sufficient competition to justify the activity being classified as an economic activity

108. It may be helpful to begin by setting out, briefly, the principles by which the Court has defined the scope of the concept of 'undertaking' in the field of EU competition law.

109. It has repeatedly been held that that concept is to be understood in a functional sense and encompasses every entity engaged in an economic activity regardless of the legal status of the entity and of the way it is financed.[64] In that regard, the Court defines an economic activity as any activity consisting in offering goods or services on a given market.[65]

110. In other words, whether or not an activity is regarded as economic has a major consequence, in that it is precisely that assessment that determines whether the competition rules laid down by the Treaty are applicable to the factual situation under consideration. Thus, whenever the Court has to make such an assessment, it is inevitably — as Advocate General Maduro explained in his Opinion in *FENIN* v *Commission*[66] — entering 'dangerous territory', since it is being asked to find a balance between protection of undistorted competition on the internal market and respect for the powers of the Member States.

61 As the Commission pointed out in its appeal, the General Court has also accepted this principle. In its judgment of 28 September 2017, *Aanbestedingskalender and Others* v *Commission* (T-138/15, not published, EU:T:2017:675), it upheld a contested decision in which it had been found that the operation of an electronic procurement platform, introduced to enable contracting authorities to fulfil their legal obligations under various EU public procurement directives, was not an economic activity, despite the fact that similar platforms were being operated by for-profit entities. An appeal against that judgment has recently been dismissed by the Court (judgment of 7 November 2019, *Aanbestedingskalender and Others* v *Commission*, C-687/17 P, not published, EU:C:2019:932).

62 Judgment of 27 June 2017 (C-74/16, EU:C:2017:496, paragraph 50). I think it is worth noting that, in paragraph 46 of this judgment, the Court restated the formulation in paragraph 123 of the judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8). However, the conclusion it reached as to the nature of the activity under consideration shows, in my opinion, that the phrase 'since that offer exists in competition with that of other operators which do seek to make a profit' is not understood as requiring both of those factors to be present.

63 This well-established body of case-law dates back to the judgment of 23 April 1991, *Höfner and Elser*, (C-41/90 EU:C:1991:161, paragraph 21).

64 This body of case-law dates back to the judgment of 23 April 1991, *Höfner and Elser*, (C-41/90 EU:C:1991:161, paragraph 21). See, more recently, judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 103).

65 See judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591, paragraph 34 and the case-law cited).

66 Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission* (C-205/03 P, EU:C:2005:666, point 26).

111. For this reason, assessments of this kind are particularly delicate when they relate to whether or not activities which fall within the exclusive competence of the Member States — such as, in this case, the organisation of social security systems — are economic in nature.

112. In this area, the balance referred to above has been achieved in the following way: on the one hand, the case-law has affirmed and reaffirmed that, in principle, the Member States are free to organise their social security systems as they wish.[67] On the other hand, the case-law has suggested that a requirement of consistency is nevertheless imposed upon them, in the sense that they are free to exempt certain activities from the application of the competition rules only on the condition that they *actually* implement the principle of solidarity.[68]

113. What is examined by the Court is, the outcome of the national rules governing the practical operation of the social security system in question. In other words, the Court asks itself the following question: has the national legal framework been designed in such a way that entities operating within the system in question are to be regarded as offering goods or services *on a market* or, to be more precise, in competition with each other? It is only where the answer is in the negative that the activity in question is classified as non-economic, and the competition rules thus become inapplicable.

114. Where the social security system under consideration is hybrid, in the sense of combining non-economic features with features indicating the existence of a market, the classification of the activity carried out within that system depends on an analysis of the various features in question and their respective importance and purpose. The classification of such activities is, in other words, 'a matter of degree'.[69]

115. Notwithstanding the case-by-case approach taken by the Court in this area, it is possible to discern, from the first group of decisions addressed by the parties in their pleadings, which consists of the judgments in *Poucet and Pistre*,[70] *Cisal*,[71] *AOK Bundesverband and Others*,[72] *Kattner Stahlbau*,[73] and *AG2R Prévoyance*,[74] a series of characteristics indicating that an activity is non-economic in nature, these being (i) the social objective of the system, (ii) the fact that it implements the principle of solidarity, and (iii) the supervision by the State.

116. There is little doubt that the compulsory health insurance scheme in Slovakia has all these characteristics, as the General Court acknowledged in paragraphs 55 to 57 of the judgment under appeal. First, it has a social objective, inasmuch as it is intended to ensure that all Slovak nationals have sickness cover, regardless of their financial position or state of health. Secondly, it exhibits many of the features which, in accordance with the case-law, indicate the implementation of the principle of solidarity, in that it involves compulsory membership, compulsory contributions in an amount which is determined in proportion to the income of the persons insured, and does not depend on the risks arising from (amongst other things) their age or state of health, an identical range of compulsory statutory services for all insured persons, a lack of any direct link between the services provided and

67 Judgment of 17 June 1999, *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 37).

68 See, to that effect, Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission* (C-205/03 P, EU:C:2005:666, point 27). See also my remarks concerning the judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150) in points 125 to 127 and 129 of this Opinion.

69 Opinion of Advocate General Jacobs in *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2003:304, point 35).

70 Judgment of 17 February 1993 (C-159/91 and C-160/91, EU:C:1993:63).

71 Judgment of 22 January 2002 (C-218/00, EU:C:2002:36).

72 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).

73 Judgment of 5 March 2009 (C-350/07, EU:C:2009:127).

74 Judgment of 3 March 2011 (C-437/09, EU:C:2011:112).

the amount of contributions paid, and a risk equalisation scheme.[75] Thirdly, it incorporates the features which have been regarded in the case-law as indicating State supervision, namely the fact that every health insurance body is formed with the object of providing such insurance and cannot carry out activities other than those prescribed by law, the fact that such bodies have no influence over the amount of the contributions or the scope of the compulsory statutory services prescribed by law, and the fact that compliance with the legislative framework is monitored by a regulator (the Slovak healthcare surveillance authority or 'HSA') which intervenes in the event of non-compliance.[76]

117. In view of that degree of solidarity, the Court of Justice will need to determine, when it examines these arguments, whether, as the General Court concluded from its analysis in paragraphs 65 to 68 of the judgment under appeal, the scope for competition which has been left to insurance companies by the Slovak legislature is nevertheless sufficient for the activity of providing health insurance in Slovakia to constitute an economic activity. In this regard, it is worth reiterating that the General Court referred to the following features: (i) the existence of competition as to the quality and efficiency of the purchasing process, (ii) the existence of competition as to the quality and scope of services provided, inasmuch as health insurance bodies are free to supplement the compulsory statutory services with related free services, and (iii) the fact that insured persons are free to choose the health insurance company and switch company once a year.

118. However, as regards the existence of competition as to the quality and efficiency of the purchasing processes, which is said to result from the freedom to negotiate and conclude contracts with healthcare providers, I consider it necessary to state that this cannot be taken into account in assessing the nature of the activity of providing compulsory health insurance in Slovakia.

119. Indeed, in its judgment in *FENIN* v *Commission*,[77] the Court held that, since it is the activity consisting in *offering* goods and services on a given market that is the quintessential feature of an 'economic activity', and not the activity of purchasing in itself, there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, which means that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. It follows that the existence of competition as to the purchase of healthcare services, in the present case, cannot be regarded as an indication that the activity of providing compulsory healthcare insurance is economic in nature, as the nature of the former activity depends on that of the latter.[78]

120. As regards the existence of competition as to the quality and scope of services provided and the fact that insured persons are free to choose their health insurance provider, I would observe first of all that, contrary to the submissions advanced by the Slovak Republic in its appeal, the fact that the social security schemes which the Court has thus far held to create an economic environment, such as those considered in the judgments in *Fédération française des sociétés d'assurance and Others*,[79] *Albany*,[80]

75 As regards the features enumerated so far, see judgments of 17 February 1993, *Poucet and Pistre* (C-159/91 and C-160/91, EU:C:1993:63, paragraphs 10, 12, 13 and 18); of 22 January 2002, *Cisal* (C-218/00, EU:C:2002:36, paragraphs 39 to 44); of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 47 to 52); of 5 March 2009, *Kattner Stahlbau* (C-350/07, EU:C:2009:127, paragraphs 44 to 59); and of 3 March 2011, *AG2R Prévoyance* (C-437/09, EU:C:2011:112, paragraphs 47 to 52).

76 Judgments of 17 February 1993, *Poucet and Pistre* (C-159/91 and C-160/91, EU:C:1993:63, paragraphs 14 and 18); of 22 January 2002, *Cisal* (C-218/00, EU:C:2002:36, paragraphs 43 to 44); of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 48 to 52); of 5 March 2009, *Kattner Stahlbau* (C-350/07, EU:C:2009:127, paragraphs 60 to 65); and of 3 March 2011, *AG2R Prévoyance* (C-437/09, EU:C:2011:112, paragraphs 53 to 65).

77 Judgment of 11 July 2006 (C-205/03 P, EU:C:2006:453, paragraph 26).

78 See also paragraph 93 of the contested decision.

79 Judgment of 16 November 1995 (C-244/94, EU:C:1995:392).

80 Judgment of 21 September 1999 (C-67/96, EU:C:1999:430).

Brentjens',[81] *Drijvende Bokken*,[82] and *Pavlov and Others*,[83] had economic features of considerably more significance than those in question in this case (optional or compulsory membership with the possibility of exemption, schemes based on the principle of capitalisation, determination of the amount of contributions and the scope of services left to the entities concerned) does not, in itself, demonstrate that the features in question are not a sufficient basis for concluding that the activity at issue in the present case is economic in nature.

121. On the other hand, it seems to me that a sufficient basis for that conclusion is to be found in the judgment in *AOK Bundesverband and Others*,[84] where the Court was asked to take a stance on the nature of the activity carried out by German sickness funds.

122. Two features of the scheme at issue in that case make it comparable, in my view, with the Slovak compulsory health insurance scheme. First, it involved an equivalent degree of solidarity, in that the membership was, in principle, compulsory for all employees, in that the amount of the contributions depended on the insured persons' incomes,[85] in that the benefits were specified by law and were identical, as regards the categories of obligatory treatment, in that there was no direct link between the contributions paid and the services received, and in that the funds were joined together in a type of community, through a mechanism enabling an equalisation of costs and risks between them.[86] Secondly, it incorporated the same elements of competition as the Slovak scheme, since the sickness funds were free to supplement the compulsory services prescribed by law with optional complementary services, and the insured persons were free to choose their sickness fund.[87]

123. Against that background, the Court essentially held that, having regard to the aspects of the scheme based on solidarity, the elements of competition did not justify classifying the activity of providing health insurance as economic. The Court took no account of the right of insured persons to freely choose their sickness funds in making that assessment and, at the same time, did not regard the fact that the sickness funds would be allowed to provide complementary services as providing a basis for classifying that activity as economic, inasmuch as the obligatory benefits were 'essentially identical'.[88] In view of those common features referred to in the point above, I am persuaded that the conclusion reached by the Court in that judgment is transposable to the cases under consideration,[89]

81 Judgment of 21 September 1999 (C-115/97 to C-117/97, EU:C:1999:434).

82 Judgment of 21 September 1999 (C-219/97, EU:C:1999:437).

83 Judgment of 12 September 2000 (C-180/98 to C-184/98, EU:C:2000:428).

84 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).

85 Judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 6 and 7).

86 Judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 52 and 53).

87 Judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 8 and 9).

88 Judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 52).

89 It should be noted that Dôvera submitted at the hearing that that judgment was not applicable to the present facts because the two cases differed in three respects: the health insurance bodies operating on the Slovak market did not seek to make a profit; they had the legal form of commercial companies, and they were free to negotiate directly with healthcare providers and conclude contracts with them. As to this last matter, I have explained why it cannot be taken into account in points 118 and 119 of this Opinion. As to the issue of the insurance organisations seeking to make a profit, I have set out why this is not a relevant consideration, for the purposes of determining whether an entity is to be classified as an undertaking, in points 92 to 107 of this Opinion. Finally, as to the fact that those organisations have the legal form of commercial companies, I would simply refer, once again, to the traditional approach of the case-law according to which the legal status of an entity, which clearly determines whether it seeks to make a profit, is not relevant for the purposes of that determination. See, in respect of the latter point, judgment of 22 October 2015, *EasyPay and Finance Engineering* (C-185/14, EU:C:2015:716, paragraph 37 and the case-law cited).

particularly as the range of obligatory and identical services offered to all insured persons by health insurance companies in Slovakia is very wide,[90] the related free services being limited to reimbursement of the cost of non-obligatory vaccinations and differences in the opening hours of customer service call centres.

124. In my opinion, the fact that Slovak legislation allows health insurance companies to use and distribute the profits generated by their activity is, equally, not a matter which casts doubt on the proposition that that activity is non-economic in nature.

125. The legal basis for this is to be found, once again, in the judgment in *AOK Bundesverband and Others*.[91]

126. I note that, besides the elements it had in common in the scheme presently under consideration, the German scheme had a further element of competition which would have considerable weight in the analysis of the nature of the activity carried out within a hybrid scheme, such as that at issue in the present case, in that the sickness funds were permitted to compete with regard to the amount of contributions, whose rate they determined independently.[92]

127. However, even the fact that there was some latitude to compete on contributions did not, according to paragraph 56 of that judgment, cast doubt on the proposition that the activity was non-economic in nature, since that element had been introduced 'in order to encourage the sickness funds to operate in accordance with principles of sound management, that is to say in the most effective and least costly manner possible, in the interests of the proper functioning of the German social security system'. In other words, even though the degree of competition was indisputably higher than in the present case, the Court held that the activity of providing health insurance in Germany was not an economic activity, on the basis that, in thus encouraging the insurance bodies to operate as effectively as possible, *the intention of the national legislature had been to ensure the attainment of the social objective of the system*.

128. It seems to me that the same must be true in the cases under consideration. As the General Court acknowledges in paragraph 64 of the judgment under appeal, the ability to use and distribute profits 'is regulated more strictly than in normal commercial sectors', since it is 'subject to the fulfilment of requirements intended to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it'. Those requirements comprise the mandatory formation of a reserve up to the level of 20% of paid-up registered capital (for other companies, the requirement is 10%), and of technical reserves for payment of planned healthcare for insured persons on waiting lists.[93] As I see it, the existence of those requirements is a clear indication that the ability to use and distribute profits serves the objective of ensuring the viability and continuity of the Slovak compulsory health insurance system, thus contributing to the attainment of its social objective.[94]

90 In the judgment under appeal, the General Court did not call into question the finding in paragraph 87 of the contested decision that the range of the obligatory statutory services was very broad, covering almost all healthcare procedures provided in Slovakia. I note in this respect that, in its appeal, the Slovak Republic maintains that 98.9% of all medical services provided are fully reimbursed by health insurance companies under the compulsory health insurance, such that the possibility of those companies competing with each other only relates to the remaining 1.1% of medical services.

91 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).

92 Judgment of 16 March 2004, *AOK Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 7).

93 See footnote 7 to paragraph 15 of the contested decision.

94 See paragraph 95 of the contested decision.

129. More generally, it seems to me that in its judgment in the present case, the Court will have an opportunity to explicate the principle which, in my view, is to be found in the judgment in *AOK Bundesverband and Others*,[95] under which an activity is regarded as non-economic, and is thus exempt from the application of Article 107(1) TFEU, should the national social security scheme in question reveal, that the national legislature has pursued the social objective of the system in a *consistent* manner.[96]

130. In the light of all those matters, I consider that the General Court erred in law in that it overestimated the impact of the degree of competition permitted under the Slovak compulsory health insurance scheme and thus wrongly concluded, in paragraph 70 of the judgment under appeal, that, since their activity was economic in nature, SZP and VšZP fell within the concept of 'undertaking', as enshrined in Article 107(1) TFEU.

3. Conclusion on the second ground of appeal in Case C-262/18 P and the third ground of appeal in Case C-271/18 P

131. In the light of the foregoing, I suggest that the Court should uphold the second ground of appeal in Case C-262/18 P and the third ground of appeal in Case C-271/18 P.

D. The third ground advanced by the Commission in Case C-262/18 P and the second ground advanced by the Slovak Republic in Case C-271/18 P, contending that the General Court distorted certain evidence

1. Arguments of the parties

132. The Commission and the Slovak Republic, supported by the Republic of Finland, argue that the General Court distorted on several occasions the evidence in the file. In particular, they argue that its observation in paragraph 67 of the judgment under appeal, that there was 'intense and complex competition' arising from the possibility of attracting insurance customers and relating to the quality of services, was based on such a distortion. They submit that the elements of competition identified by the General Court in paragraphs 65 and 66 of the judgment under appeal indicate only that there is limited competition as regards the quality of certain peripheral aspects of the provision of health insurance services.

133. The Slovak Republic adds that the General Court distorted the evidence in failing to take account of the fact that one of the measures to which the contested decision related applied at a time when insurance bodies were prohibited from distributing profits. It is also submitted that the finding in paragraph 64 of the judgment under appeal, that insurance bodies are 'freely' able to seek and make a profit, constitutes a distortion.

134. Dôvera and Union contend that these grounds are inadmissible, on the basis that the Commission and the Slovak Republic have not indicated what evidence is said to have been distorted, but have merely asked the Court to reassess the facts. In any event, they submit, the evidence presented to the General Court supports its conclusion as to the existence of intense and complex competition.

95 Judgment of 16 March 2004 (C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150).

96 This is the requirement of consistency that I referred to in point 112 of this Opinion.

135. Furthermore, the argument that the General Court ought to have taken account of the fact that one of the measures to which the contested decision related applied at a time when insurance bodies were prohibited from distributing profits is, they say, inadmissible, having been raised for the first time on appeal, and is inoperative and unfounded in any event. They submit that there is no contradiction between the finding that insurance bodies are 'freely' able to seek and make a profit and the existence of regulations concerning the making of profits.

2. Assessment

136. As a preliminary matter, I think it may be helpful to set out certain fundamental principles deriving from the Court's case-law on distortion of evidence.

137. First of all, I would point out that the question of whether or not the evidence before the General Court is sufficient has long been regarded, in the case-law, as a matter to be appraised by the General Court alone, which is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted. [97]

138. Distortion must be obvious from the documents in the file, without any need to carry out a new assessment of the facts and the evidence. [98] Advancing an interpretation of the evidence which differs from that adopted by the General Court is not sufficient to demonstrate that that evidence has been distorted. [99] In order to do so, the appellant must clearly identify the evidence which is said to have been distorted by the General Court, and demonstrate the errors of analysis which, it is claimed, led to the distortion of that evidence by the General Court. [100]

139. In the present case, with regard, first, to the complaint that the General Court distorted evidence relating to the existence of a temporary prohibition on the distribution of profits by health insurance bodies, I begin by noting that, contrary to what Dôvera argues in its response, the Slovak Republic had drawn attention to that matter in paragraph 53 of the intervention it lodged with the General Court, and accordingly that that argument has not been raised for the first time on appeal. However, I also note that in its appeal, the Slovak Republic merely states that the prohibition on the distribution of profits is apparent from several of the case documents, and does not mention any element said to have been manifestly misrepresented by the General Court in the judgment under appeal. In my view that complaint is directed, in reality, to the fact that the General Court did not take the prohibition into account, regarding it as irrelevant to the assessment it carried out. However, that is a matter of assessment of the evidence and, as such, is not subject to review by the Court of Justice on appeal. I therefore consider that that complaint must be held to be inadmissible.

140. Secondly, as to whether the finding made by the General Court in paragraph 64 of the judgment under appeal, that insurance bodies in Slovakia are 'freely' able to seek and make a profit, constitutes a distortion of evidence, I note that the Slovak Republic does not identify any specific element which is said to have been distorted by the General Court, but simply makes a generic reference to 'documents in the file'. It seems to me, essentially, that under the guise of distortion of evidence, the Slovak Republic is really contending that the General Court made an error of assessment of the facts. The Slovak Republic does not dispute that the restrictions laid down in its national law were correctly

97 Judgment of 11 September 2008, *Germany and Others* v *Kronofrance* (C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 78 and the case-law cited).

98 See judgment of 4 April 2017, *Ombudsman* v *Staelen* (C-337/15 P, EU:C:2017:256, paragraph 83 and the case-law cited).

99 See judgment of 25 July 2018, *QuaMa Quality Management* v *EUIPO* (C-139/17 P, not published, EU:C:2018:608, paragraph 35 and the case-law cited).

100 See judgment of 25 July 2018, *Spain* v *Commission* (C-588/17 P, not published, EU:C:2018:607, paragraph 35 and the case-law cited).

understood by the General Court, but argues that, contrary to its findings, the restrictions in question affected not only the possibility for health insurance bodies to use and distribute profits, but also the possibility for them to make such profits. I therefore consider that that complaint must be declared inadmissible.

141. Thirdly, the Commission and the Slovak Republic contend that the General Court distorted the evidence when it found, in paragraph 67 of the judgment under appeal, that there was 'intense and complex' competition within the Slovak health insurance system. With that in mind, I consider that that complaint amounts in essence to a reiteration of the arguments advanced under the Commission's second ground and the Slovak Republic's third ground, seeking to establish an error of law on the part of the General Court. I have already proposed that those arguments should be rejected, for the reasons given in points 89 to 130 of this Opinion.

142. In so far as the Court considers that the ground thus raised by the Commission, and the complaint thus made by the Slovak Republic, genuinely relate to distortion of the evidence, suffice it to say that at no stage has the Slovak Republic identified the evidence which the General Court is said to have distorted in the judgment under appeal. As for the Commission, while it is true that it refers to one item of evidence, namely a coverage table illustrating the differences between the coverage offered by different health insurance bodies, it is equally true that it does not identify, in any way, the errors of analysis claimed to have led to such a distortion of evidence on the part of the General Court. Accordingly, the ground thus raised by the Commission and the complaint thus made by the Slovak Republic must, it seems to me, be declared inadmissible.

3. Conclusion on the third ground of appeal in Case C-262/18 P and the second ground in Case C-271/18 P

143. In the light of the above considerations, I suggest that the Court should declare the third ground of appeal in Case C-262/18 P and the second ground of appeal in Case C-271/18 P to be inadmissible in their entirety.

V. The cross-appeals

A. Arguments of the parties

144. By its cross-appeals, Dôvera raises a single ground of appeal, contending that the statement, in paragraph 58 of the judgment under appeal, that it had not challenged the finding that the Slovak health insurance system had 'predominant social, solidarity and regulatory features',[101] reflects a procedural error on the part of the General Court, and a failure to give adequate reasons for its decision. In support of that ground, it points to a number of passages in the pleadings it lodged at first instance, in which it expressly rejected that proposition.

145. However, Dôvera regards this as a contingent ground of appeal, submitting that it is only necessary in the unlikely event that, in taking a strict approach to the interpretation of the wording of that paragraph of the judgment under appeal, the Court ignores the translation error in the version of that judgment in the language of the proceedings (English), which describes the social, solidarity and regulatory features of the system as 'predominant', when the French version describes them as '*importants*' ('significant').

101 The term 'predominant', used in the English-language version of the judgment under appeal, does not reflect the French-language version, which uses the term '*importants*' ('significant').

146. Union supports Dôvera's submissions.

147. The Commission replies that the cross-appeals are inadmissible but that, in the event that the Court regards them as admissible, it should hold, on the basis of the English version of the judgment under appeal, that they are well founded. The Slovak Republic submits that there is no translation error in the English version of the judgment and that, in any event, the cross-appeals are inadmissible.

B. Assessment

148. In view of the matters I have set out in points 61 to 64 of this Opinion, I consider that paragraph 58 of the English-language version of the judgment under appeal contains a translation error. As that error can, it seems to me, be corrected simply as a matter of interpretation of the judgment under appeal, I do not think that the Court should examine the cross-appeals.

149. However, if the Court considered it appropriate to do so, it seems to me to be beyond doubt that it would conclude that the cross-appeals are inadmissible, on the basis that Dôvera does not have an interest in bringing proceedings.

150. It is apparent from the case-law of the Court that an interest in bringing proceedings only exists, in relation to a cross-appeal, where that cross-appeal is capable, if successful, of procuring an advantage to the party bringing it.[102]

151. However, at first instance, the General Court allowed Dôvera's action and annulled the contested decision. I therefore fail to see what advantage Dôvera could derive from the Court upholding its cross-appeals and setting aside that part of paragraph 58 of the judgment under appeal in which the General Court stated that Dôvera had not challenged the statement that the Slovak compulsory health insurance scheme had predominant social, solidarity and regulatory features. Even if the Court were to allow the present cross-appeals, that amendment would relate to the *grounds* of the judgment under appeal and would have no impact on the *operative part*; and in any event, no amendment of the operative part, in which the General Court allowed Dôvera's action, could procure it any advantage.

C. Conclusion on the cross-appeals in Cases C-262/18 P and C-271/18 P

152. In the light of those considerations, I suggest that the Court should not examine the cross-appeals brought by Dôvera in Cases C-262/18 P and C-271/18 P.

VI. The action before the General Court

153. Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded and the Court quashes the decision of the General Court, it may give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

154. In the present case, I consider that the Court is in a position to give judgment on the pleas in law advanced by Dôvera before the General Court.

155. Regarding the second plea, I suggest that this should be rejected on the basis of points 89 to 130 of this Opinion.

102 See, in particular, judgment of 21 December 2011, *Iride* v *Commission* (C-329/09 P, not published, EU:C:2011:859, paragraphs 48 to 51 and the case-law cited).

156. In relation to the first plea, as summarised in point 7 of this Opinion, I suggest that it should also be rejected in its entirety. With regard to the first complaint raised under that plea, it follows from the functional approach to the concept of 'undertaking', as described in point 109 of this Opinion, that the classification of an entity as an undertaking always relates to a specific activity. In other words, an entity that carries out both economic and non-economic activities is to be regarded as an undertaking only in respect of the former. That complaint must, therefore, be rejected. As to the second complaint, as is apparent from the settled case-law referred to in points 114 and 115 of this Opinion, whether the activity carried out within a hybrid social security scheme is to be classified as an economic activity depends on a balancing exercise, consisting in an analysis of the various economic and non-economic features of the national scheme, and of their respective importance and purpose. It follows logically that the argument that any economic feature is sufficient for the activity to be so classified is misconceived in law. In my view, the second complaint must also be dismissed.

VII. Costs

157. Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to costs.

158. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission and the Slovak Republic have applied for costs, Dôvera must be ordered to pay the costs relating to the proceedings before the General Court and to this appeal.

159. In accordance with Article 140(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Republic of Finland, as an intervener in the proceedings, must therefore bear its own costs of the present appeal.

160. Under Article 140(3) of the Rules of Procedure, the Court may order an intervener other than those mentioned in the preceding paragraphs to bear its own costs. It is appropriate to order Union to bear its own costs relating to the proceedings before the General Court and to the present appeal.

VIII. Conclusion

161. In the light of the foregoing considerations, I suggest that the Court should rule as follows:

(1) The judgment of the General Court of the European Union of 5 February 2018, *Dôvera zdravotná poist'ovňa* v *Commission* (T-216/15, not published, EU:T:2018:64), is set aside.

(2) The action brought by Dôvera zdravotná poist'ovňa a.s. before the General Court of the European Union is dismissed.

(3) The cross-appeals are dismissed.

(4) Dôvera zdravotná poist'ovňa shall bear its own costs and pay those incurred by the European Commission in relation to the proceedings before the General Court and to this appeal. In addition, it is ordered to pay the costs incurred by the Slovak Republic in the present appeal.

(5) Union zdravotná poist'ovňa a.s. shall bear its own costs of the proceedings before the General Court and of this appeal.

(6) The Republic of Finland shall bear its own costs of this appeal.