Chapter 4
Article 106 TFEU is Dead. Long Live Article 106 TFEU!

Tarjei Bekkedal

Abstract This chapter raises the question of the purpose of Article 106 TFEU (ex Article 86 EC). Article 106(2) TFEU is traditionally seen as a derogation to the Treaty provisions and has an awkward role in the Treaty Chapter on competition. *Bekkedal* notes the conventional reading of the provision is that it is an autonomous exception to all of the Treaty provisions and is not confined to specific types of infringement of the TFEU. The conventional view also takes the position that Article 106(2) TFEU can be invoked by the Member States *and* undertakings. *Bekkedal*, in contrast, takes a radical view. He argues that Article 106(2) TFEU can only be invoked by *undertakings*. He makes the point that Article 106(2) TFEU should not be turned into a general clause in EU law because it should be an *exception* primarily targeted at economic objectives. In relation to the fundamental free movement provisions economic objectives are not, in principle, accepted as legitimate justifications to the free movement rules. *Bekkedal* also notes that the European Courts take a softer approach to the application of the principle of proportionality when applying Article 106(2) TFEU, whereas a classical application of the principle should be strict: 'a least restrictive alternative' assessment of the challenged restriction on competition and cross-border trade. If Article 106(2) TFEU is applied as a general clause with these softer standards for review, it could compromise the Internal Market project. *Bekkedal* finds a new role for Article 106 TFEU in that it could be considered as a value statement fulfilling the concept of a 'European Social Model.'

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4.1 Article 106 TFEU Revisited: Introduction and Outline

This contribution revisits a basic question: what is the scope of Article 106 TFEU in relation to the provision of services of general economic interest (SGEIs)? The answer to that question, as presented here, will contest the conventional view.

According to the conventional view, the exception in Article 106.2 TFEU may exempt the organisation and provision of SGEIs from the requirements of the Treaty, if the application of, for example, the fundamental freedom to provide services, the rules on competition, or the rules on State Aid will obstruct the performance of the operator of an indispensable service. Usually, the exception in Article 106.2 TFEU is described as autonomous, in the sense that it has a horizontal reach and is not confined to specific kinds of infringements. Consequently, according to the conventional view, it may be invoked by both undertakings and the Member States.

Article 106.1 TFEU is not expressly directed at SGEIs but at the entrustment of special or exclusive rights. Nevertheless, the entrustment of special or exclusive rights is quite a common technique for the realisation of SGEIs, typically to ensure

that services are universally available. According to the conventional view, Article 106.1 TFEU may in that case make the Member States subject to the competition rules—which in their own capacity would only apply to undertakings. In the following, the application of Article 106.1 TFEU, read in conjunction with Article 102 TFEU, towards Member State regulation on SGEIs is referred to as 'the competition approach'.

The seed which initiates a broad re-elaboration of the conventional view is found in the recent practice of the ECJ. In *MOTOE*, the ECJ established that the exception in Article 106.2 TFEU can only be invoked by bodies which conduct activity *as an undertaking*.[1] In the judgments in *Asemfo* and *UPC*, the ECJ finally confirmed openly that Article 106.1 TFEU has no independent effect, in the sense that it must be read in conjunction with the relevant rules of the Treaty.[2]

This chapter will submit that the exception in Article 106.2 TFEU cannot be invoked to justify barriers to free movement (Sect. 4.2). Furthermore, it will be submitted that the competition approach towards the Member States' organisation of SGEIs on their own territory should, and is about to, be abandoned (Sects. 4.3 and 4.4). Together, these submissions leave no room for the application of Article 106.2 TFEU when cases which concern Member State regulation on SGEIs are handled in front of the Court. The application of Article 106.2 TFEU will be confined to issues which are handled by the Commission in the first instance, like the assessment of State Aid and the execution of the other powers enshrined in Article 106.3 TFEU.[3]

It should be emphasised that the constitutional importance of Article 106 TFEU with regard to SGEIs will not be contested. Section 4.5 of this chapter will try to sketch out how the *values* of Article 106 TFEU may be detached from the provision itself and reintegrated into the mandatory requirements doctrine, which forms an inherent part of the fundamental freedoms. This *new approach* will be described as one of transformation and transposition: The classical patterns of reasoning, which over time have been developed pursuant to Article 106.2 TFEU, are about to be redefined to suit the character of the fundamental freedoms and will thus reappear in a modified version. Article 14 TFEU may be seen as a catalyst in this regard. The provision confirms the constitutional importance of SGEIs and may encourage both a universal, and to some extent, holistic approach towards such services—to realise the vision of a European social model. The suggested approach rests on the citizen's *right* to access SGEIs—considered in tandem with the Charter of Fundamental Rights, Article 36—while free movement, competition or regulation are merely means to that end.

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[1] ECJ, Case C-49/07 *MOTOE* [2008] *ECR* I-4863 para 46.

[2] ECJ, Case C-295/05 *Asemfo* [2007] *ECR* I-2999 para 40; ECJ, Case C-250/06 *UPC* [2007] *ECR* I-11135 para 15.

[3] The application of Article 106 TFEU by the Commission will not be discussed.

4.2 The Functioning and Scope of the Exception in Article 106.2 TFEU

4.2.1 Introduction

Section 4.2 contests the conventional view that the Member States can rely on the exception in Article 106.2 TFEU to justify barriers to free movement.[4] The reasons are twofold: first, the case law on Article 106.2 TFEU establishes a principal acceptance of justifications of an economic character,[5] while such justifications have been doctrinally rejected with regard to the fundamental freedoms.[6] Second, the reconciliation-test of Article 106.2 TFEU does, to some extent, deviate from the classical notion of proportionality which is inherent in the fundamental freedoms and the doctrine of mandatory requirements.[7]

The submission that Member States cannot invoke Article 106.2 TFEU to justify barriers to free movement gains support from the judgment in *MOTOE*, as the enactment of regulation is an act of authority which cannot be equated to the activities of an *undertaking*.[8] However, the *MOTOE* judgment will not be presented as the decisive argument against the conventional view, only as a confirmation of its mistaken propositions, whilst Article 106.2 TFEU is firstly considered as primarily a justification for objectives of an economic nature.

4.2.2 Primarily a Justification for Objectives of an Economic Nature

According to its wording, Article 106.2 TFEU is applicable to SGEIs. If that notion is understood to mark a difference from the more commonly used reference to the 'general interest', and if the exception is interpreted both literally and strictly, it may be argued that its scope is limited to objectives of an economic nature. The provision protects the public's economic interests with regard to the financing of society's *indispensable services*. Thus, it has formerly been argued that in its practical application, Article 106.2 TFEU is intrinsically linked to universal services, in their different market sectors, due to the very specific

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[4] Numerous observers have held that Article 106.2 TFEU may serve as a justification for barriers to free movement. See for example Deringer 1964–1965, p. 138, Buendia Sierra 1999, Hatzopoulos 2000, pp. 75, 80–81, Maillo 2007, pp. 604–606, Neergaard 2007, p. 77, Szyszczak 2007, p. 217. Somewhat more reluctant, Snell 2005, p. 51.

[5] See Sect. 4.2.2 infra.

[6] Established doctrine since ECJ, Case 7/61 *Commission* v. *Italy* [1961] *ECR* 317 (at 329).

[7] See Sect. 4.2.3 infra.

[8] Supra n. 1. The literal reading of the provision is very clear in the opinion of AG Kokott, which the judgment explicitly refers to.

problems connected to the financing of such services (especially the risk of 'cream skimming').[9] Today however, that view is generally perceived as too formal.[10] In his seminal 1999 contribution, Buendia Sierra established that the exception in Article 106.2 TFEU accounts for objectives of both an economic and a non-economic nature. The protection of health was mentioned as an example of a legitimate concern—an example which we will return to, later.[11] Buendia Sierra admitted that the wording of Article 106.2 TFEU appeared to limit the scope of the exception to objectives of an economic character, but claimed that formal distinctions appeared to be 'groundless'—pointing to the fact that economic objectives must, in any case, promote some ultimate non-economic goal to be accepted. Admittedly, that submission is intuitively appealing. However, it may also be criticised.

It is worth recalling that the ECJ has consistently held that the exception in Article 106.2 TFEU is to be narrowly constructed.[12] To include objectives of a non-economic nature, is to take the opposite stance. Buendia Sierra's line of argument lacks appeal because it changes the character of Article 106.2 TFEU from a special exception into a general exception—and as we will return to, the ECJ does not seem to adhere to this idea.[13]

With regard to the mandatory requirements doctrine which forms an inherent part of the fundamental freedoms and protects the *general interest*, the ECJ has consistently held that considerations of an economic nature are generally not accepted.[14] Suffice to say, the distinction between economic and non-economic aims has not been regarded as 'groundless' with regard to the fundamental

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[9] Wachsmann and Berrod 1994, p. 39.

[10] Hirsch et al. 2008, p. 1293.

[11] Buendia Sierra 1999, pp. 337–338. Probably, this has always been the main view, see, for example, Deringer 1968, pp. 246–247.

[12] See, e.g., ECJ, Case 127/73 *SABAM* [1974] *ECR* 313 para 19; ECJ, Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* I-5699, para 37 and ECJ, Case C-242/95 *GT-Link* [1997] *ECR* I-4449, para 50.

[13] See Sect. 4.2.4 infra.

[14] See, e.g., ECJ, Case 95/81 *Commission* v. *Italy* [1982] *ECR* 2187 para 27; ECJ, Case 238/82 *Duphar* [1984] *ECR* 523 para 23; ECJ, Case 288/83 *Commission* v. *Ireland* [1985] *ECR* 176 para 28; ECJ, Case 352/85 *Bond van Adverteerders* v. *Netherlands* [1988] *ECR* 2085 para 34; ECJ, Case C-288/89 *Gouda* v. *Commissariaat voor de Media* [1991] *ECR* I-4007 para 29; ECJ, Case C-324/93 *Evans Medical* [1995] *ECR* I-563 para 36; ECJ, Case C-484/93 *Svensson and Gustavsson* [1995] *ECR* I-3955 para 15; ECJ, Case C-120/95 *Decker* [1998] *ECR* I-1831 para 39; ECJ, Case C-398/95 *SETTG* [1997] *ECR* I-3091 para 23; ECJ, Case C-158/96 *Kohll* [1998] *ECR* I-1931 para 41; ECJ, Case C-264/96 *ICI* v. *Colmer* [1998] *ECR* I-4695 para 28; ECJ, Case C-224/97 *Ciola* [1999] *ECR* I-2517 para 16; ECJ, Case C-35/98 *Verkooijen* [2000] *ECR* I-4071 para 48; ECJ, Case C-254/98 *TK-Heimdienst* [2000] *ECR* I-151 para 33; ECJ, Case C-367/98 *Commission* v. *Portugal* [2002] *ECR* I-4731, para 52; ECJ, Case C-164/99 *Portugaia Construções* [2002] *ECR* I-787 para 26; ECJ, Case C-168/01 *Bosal* [2003] *ECR* I-9409 para 42; ECJ, Case C-388/01 *Commission* v. *Italy* [2003] *ECR* I-721 paras 19, 23 and ECJ, Case C-76/05 *Schwarz* [2007] *ECR* I-6849 para 77.

freedoms.[15] From an utterly material or pragmatic point of view that could, and probably would have to, be criticised. The State is not a business. It does not aim at a surplus, neither does it provide bonuses to its King or Queen or politicians. All incomes are spent for the betterment of its citizens. Hence for a State, *no objectives* are economic *in the end*. But that is not the point. The ECJ's rejection of economic objectives is better understood as a doctrinal proportionality test. The *least restrictive* way of handling budgetary concerns is generally through the tax system, not through specific regulation on the different economic sectors. This general economic logic may however be difficult to apply to some universal services, typically due to the risk of cream skimming. The very specific *economic logic* of such services may therefore make specifically constructed regulation *necessary*. In this particular regard, Article 106.2 TFEU has had an important role to play: to shelter SGEIs from detrimental competition from cherry pickers.

The only line of jurisprudence on the application of Article 106.2 TFEU that really deserves the description 'well established' is exactly the Court's approach to universal services in their different kinds. The objective of ensuring that providers of SGEIs enjoy economically acceptable conditions may justify limitations on competition—to secure the general availability of an alleged indispensable service.[16] The test is not strict as it does not require that the viability of the entrusted company is actually threatened.[17]

As we will return to later, it may seem that the Court *in fact* has accepted justifications with an economic objective on some occasions relating to the four freedoms and the mandatory requirements doctrine as well.[18] A distinct feature of Article 106.2 TFEU is that such objectives have been *openly* accepted *in principle*. This imposes on Article 106.2 TFEU, the character of being primarily a justification for economic objectives—relating to the provision of SGEIs.[19] Without elaborating the comparison further, it is worth noting that this is the main function of the exception in the field of State aid as well.

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[15] A telling example is found in ECJ, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509 paras 71–72 where the ECJ, contrary to Buendia Sierra's submission, emphasised the economic aims of the national regulation on access to medical and hospital services, even if intrinsically linked to the ultimate goal of health protection.

[16] See, e.g., ECJ, Case C-320/91 *Corbeau* [1993] *ECR* I-2533 paras 16–21; Case C-393/92 *Almelo* [1994] *ECR* I-1477 para 49; Joined Cases C-147 and 148/97 *Deutsche Post* and *Citicorp* [2000] *ECR* I-825 paras 49–52; Case C-340/99 *TNT-Traco* [2001] *ECR* I-4109 paras 53–55; Case C-475/99 *Ambulanz Glöckner* [2001] *ECR* I-8089 para 57; ECJ, Case C-162/06 *International Mail* [2007] *ECR* I-9911 paras 32–36.

[17] To this, see also Case C-67/96 *Albany* [1999] *ECR* I-5751 para 107 and Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* I-5699 para 52.

[18] See Sect. 4.2.4 infra.

[19] See also Hatzopoulos 2002, pp. 726–727.

4.2.3 Article 106.2 and the Fundamental Freedoms

The case law cited above concerns the competition approach where it is well-established that Member States may invoke the exception in Article 106.2 TFEU to justify prima facie violations of Article 106.1 TFEU, read in conjunction with Article 102 TFEU. Let us now turn to the more intriguing and important question. Can Member States invoke the exception in Article 106.2 TFEU to justify prima facie violations of the Treaty rules on free movement?

In the matter now discussed, the consistent interpretative guideline of the ECJ—that the exception is to be interpreted narrowly—becomes of vital importance. Surely, Article 106.2 TFEU is placed under the chapter 'Rules on Competition' Surely, the wording of the exception is first and foremost directed at the competition rules, and thus refers to 'undertakings' Applying Article 106.2 TFEU as an exception to the Treaty rules on the four freedoms does not appear to be a narrow construction, but the complete opposite. A wide interpretation would seem sensible if it was necessary to fill a gap, but the fundamental freedoms are well equipped with tailored exceptions—both the mandatory requirements doctrine and the written justifications. Article 106.2 TFEU does not fit in. Whether one agrees or disagrees that *only* objectives of an economic nature are relevant pursuant to the exception in Article 106.2 TFEU, it is at least well established that the exception will cover such objectives.[20] The consistent practice of the ECJ, that the Member States cannot (in principle) invoke arguments of an economic character to justify barriers to free movement would seem to be irrelevant, if the exception in Article 106.2 TFEU could serve to complement the mandatory requirements doctrine.

Buendia Sierra seems to couple a broad construction of the scope of the exception with a traditional and strict proportionality test, which will at the end of the day ensure a narrow application. According to Buendia Sierra, the proportionality test is fulfilled when the following three elements are proven: (1) that there is a causal relationship between the measure and the objective of general interest, (2) that the restrictions caused by the measure are justified by the benefits for the general interest, and (3) that the objective of general interest cannot be achieved through other *less restrictive means*.[21] However attractive this approach may appear on the theoretical level, it does not seem to work that way in practice. If Member States are allowed to invoke the exception in the first place, it may be fairly difficult to conduct a strict assessment of 'proportionality'.[22] A telling example is the judgment in *Commission* v. *Netherlands*. First, the Court repeated its well-established statement that Article 106.2 TFEU is to be interpreted narrowly. Thus, the Commission had contended that the Member State in question had to establish that there existed no other less restrictive means. The Court

[20] See Sect. 4.2.2 supra.

[21] Buendia Sierra 1999, p. 301.

[22] In a 2007 contribution Buendia Sierra too seems to point at this problem. Buendia Sierra 2007, p. 543.

however, expressed a different view, ruling that the burden of proof is not so extensive as to require the Member State to prove positively that no other conceivable measure can enable the entrusted tasks to be performed under the same conditions.[23]

As Baquero Cruz has shown in a very convincing contribution, the judgment in *Commission* v. *Netherlands* is no single example, but part of a broader and seemingly consistent picture.[24] Baquero Cruz concludes that the reconciliation-test applied by the Court 'does not impose on the decision-maker, the obligation to choose the option least restrictive of competition.'[25] That observation serves to confirm Baquero Cruz' submission that the reconciliation of interests induced by Article 106.2 TFEU, has autonomous features which make the label 'proportionality-test' quite unsuitable, if that notion is understood in its traditional sense. Let us investigate the constitutional backdrop of the observations Baquero Cruz presents, to provide a possible explanation for the reserved approach of the ECJ.

The content and functioning of Article 106.2 TFEU have primarily been clarified in cases which rest on the competition approach. From a constitutional point of view there is a remarkable difference between the rules on the four freedoms on the one hand and the competition rules on the other. The fundamental freedoms have the same constitutional character as traditional individual *liberties*—although their purpose may perhaps be of a more instrumental character: to establish a single market. Liberties protect some areas of private autonomy, but not private autonomy nor liberty as such. Liberties guarantee freedom from some restraints, but always in a defined sense (though not always clear), such as freedom of speech or freedom of movement across borders. Hence, one could say that the existence in the legal system of specific liberties is both a prerequisite for, and a confirmation of, the lawmakers' otherwise sovereign competence to issue restraints on liberty in the broad and undefined sense.

The competition rules do not have any similarities to liberties in the traditional sense—obviously because their main purpose is to prevent abuses from private companies in markets where competition is already presumed to exist. Basically, the competition rules establish *obligations not to*. If the obligation 'not to' is redefined and redirected towards the State, the competition rules may, however, establish some kind of right of *free competition*. If that latter notion is understood

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[23] ECJ, Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* I-5699 para 58.

[24] Baquero Cruz 2005, pp. 187–197, making (in this regard) reference to ECJ, Case 155/73 *Sacchi* [1974] *ECR* 409; ECJ, Case 66/86 *Ahmed Saeed* [1989] *ECR* 803; ECJ, Case C-41/90 *Höfner* [1991] *ECR* I-1979; ECJ, Case C-320/91 *Corbeau* [1993] *ECR* I-2533; ECJ, Case C-393/92 *Almelo* [1994] *ECR* I-1477 and ECJ, Case C-67/96 *Albany* [1999] *ECR* I-5751.

[25] Baquero Cruz 2005, p. 196, confirming his foregoing thesis at 187: 'that the Court has never followed such an approach but a milder approach that entails a softer test'. The same conclusion is reached by Sauter 2008, pp. 186–188 and Stergiou 2008, p. 183. In the same direction, pointing at the different and softer assessment under Article 106.2 TFEU in comparison to the classical notion of proportionality, see Soriano 2003, p. 112. Flynn 1999, p. 193, makes a similar observation, noting that the ECJ has displayed a more reserved application of the competition rules since 1993. Contra, Davies 2009, p. 573.

as an ideal—a 'natural position' of no restraints—it equates to a protection of liberty in its broadest meaning. The constitutional problem is that courts never protect individual *liberty* in that broad material sense. Courts protect *liberty* in a formal way, through the principle of legality (viz. the formal notion of the Rule of Law)—as the law itself is the guardian of liberty. In addition, courts protect *liberties* in many different fields depending on which liberties the legal system contains. What constitutional courts do not do, is to consider—in a broader sense—how much freedom (e.g., freedom of competition) is enough freedom.

The traditional notion of proportionality, inherent in the four freedoms, should be strict, because there is a prima facie violation of true and explicit individual rights regarded by the legal system, which must be taken seriously. The notion of 'free competition' is much more blurred. If that notion is taken *too* seriously, i.e., if the classical proportionality-test is employed in the assessment pursuant to Article 106 TFEU, read in conjunction with the competition rules, that may entail a broad revision of the Member States' policy in the economic field.[26] In theory, adhering to neo-liberal arguments, there will always exist less restrictive means.[27] Such a broad revision may however seem unconstitutional and hence undemocratic. That can explain why the Court's approach has been more reserved in this regard, focusing first and foremost on whether the means actually chosen by the Member State seem to work. A central criterion is whether the public service provider is 'manifestly unable to satisfy demand'.[28] Indeed, that test does not reflect a classical notion of proportionality. Instead, it gives clear associations to the 'manifest error' test which the Court will resort to in situations where its control with other institutions is characterised by true deference—due to the political nature of their decisions. The answer to the question 'how much competition?' is to quite an extent, dependent on policy. If the purpose of the national regulatory framework is to make some SGEI available to the public, but the provider is still unable to satisfy demand, it would seem that the framework must suffer from some kind of manifest error. However, if that is the essence of the court-made test, pursuant to Article 106.2 TFEU, the assessment is not very strict.

We can extract two important conclusions from the foregoing elaboration. The first is that the traditional notion of proportionality cannot, and does not, count for the functioning of the exception in Article 106.2 TFEU. The second is that the Court's reserved application of that exception has probably had more to do with the less clearly-defined character of the competition rules than a true deference towards SGEIs. To put it differently: if Member State regulation which is intended to ensure the provision of SGEIs, encroach upon the *rules on the four freedoms*, it will not be unconstitutional to employ the traditional notion of proportionality. It does not

[26] Reminding us of the Marenco/Pescatore polemic. See especially Marenco 1987, p. 420.

[27] The basic neo-liberal norm is very simple and reads like this: 'The optimal allocation of recourses should be decided by the law of supply and demand.' However, that can hardly be transposed into a legal norm.

[28] *Ambulanz Glöckner*, supra n. 16 para 62. Cf. Sect. 4.2.2 supra.

follow from the constitutional recognition of SGEIs that the seemingly softer test entailed by Article 106.2 TFEU must prevail in such situations. Quite to the contrary the traditional proportionality-test and its 'least restrictive requirement' have to be considered as an inherent feature of the protected rights, i.e., the fundamental freedoms.[29] That is not to say that market-interests must be given priority in such situations—as we know proportionality is a flexible tool. However, the mode of reconciliation is more fixed—having regard to the nature of the freedoms.

The conclusion of the arguments put forward so far is that Article 106.2 TFEU should not be allowed to serve as a justification for barriers to free movement. Thus, a restrictive interpretation of the exception should coincide with a restrictive scope of application. If the exception *is* brought forward, a restrictive interpretation on the level of assessment may, as we have seen, be difficult—running the risk of compromising the fundamental freedoms. If, in a specific case, the doctrine of mandatory requirements is not sufficient to save the day from the Member State's point of view, it would seem to be a very unhappy constitutional paradox if the exception in Article 106.2 TFEU provided a final bailout solution.[30] It is of course possible to deal with that problem by resorting to the traditional proportionality test under such circumstances, but then it is difficult to see why Article 106.2 TFEU should be applied in the first place. To pursue a kind of harmonisation will only do harm, neglecting the fact that Article 106.2 TFEU has a core area with a distinct character, and it may lead to confusion as to when these distinctive features prevail, and when the application of the exception is just copying other settled doctrines which already exist in their own capacity. Therefore, the exception in Article 106.2 TFEU should only be applied when its specific characteristics are essential to the assessment. In general, that will not be the case with regard to distortions to the fundamental freedoms. Hence the classical assessment of mandatory requirements coupled with the traditional proportionality-test should serve as the basis of reconciliation in such situations—not Article 106.2 TFEU.

4.2.4 The Case Law of the ECJ

4.2.4.1 Introduction: The 'Campus Oil' Judgment

Let us first make one thing clear: the case law where Member State regulation has been challenged pursuant to the competition approach, and where the Member

[29] On a general level, see Alexy 2002, pp. 66–69. More specifically see, for example, ECJ, Case C-169/91 *Council of Stoke-on Trent* v. *B & Q* [1992] *ECR* I-6635 para 15.

[30] In this regard it is proper to insist that the doctrine of mandatory requirements forms an inherent part of the freedoms. Hence, that doctrine must always be applied first, before turning to Article 106.2 TFEU which is a true exception. Then it becomes clear that the invocation of Article 106.2 TFEU will always, as also noted by van der Woude, lead to the problem of 'double justification'. Van der Woude 1991, p. 76. See also Davies 2009, pp. 563, 572.

States have been allowed to invoke Article 106.2 TFEU, has no bearing on the question of whether the Member States may invoke the exception in other regards, e.g., to justify prima facie violations of the fundamental freedoms. The exception is to be interpreted narrowly. A necessary implication is that the application of the exception must take due regard of the nature and purposes of the legal principles from which it may serve as an exception. Consequently, the exception is not as autonomous as it may appear. It seems impossible both to construe the exception narrowly *and* to let it form its own rule. The question of the applicability of Article 106.2 TFEU in *four freedom* cases must therefore be handled on its own premises.

Admittedly, in the case law of the ECJ, there are a few judgments which have involved the Treaty rules on the four freedoms, and where the exception in Article 106.2 TFEU has been applied. However, those cases share a common feature: Article 106.1 TFEU serves as the starting point, and the Member State is held responsible for violating *both* the competition rules and the Treaty rules on the four freedoms.[31] A separate section will be devoted to this special line of jurisprudence (Sect. 4.4 below). There are, however, no examples in the case law of the ECJ where Member State regulation has been assessed solely under the Treaty rules on the four freedoms, and where the exception in Article 106(2) TFEU has been applied. Quite to the contrary: in *Campus Oil* the ECJ emphasised that the exception could not exempt a Member State from the obligations arising from Article 34 TFEU, however, without stating any grounds for that finding.[32] That case is old, but as we shall see, the finding is that, it is still good law.

4.2.4.2 The Notion of 'Undertaking': The 'MOTOE' Judgment

The more recent judgment in *MOTOE* provides considerations of significant principal importance.[33] The private entity ELPA organised motorcycle-events, an activity which was found to be economic. Thus, in this capacity ELPA was considered to be an 'undertaking' pursuant to the competition rules. At the same time ELPA was vested with an exclusive right to authorise other undertakings to conduct similar activities. The two different functions were found to be incompatible as they created a conflict of interests contrary to Article 106.1 TFEU, read in conjunction with Article 102 TFEU. With regard to the application of the exception in Article 106.2 TFEU, Advocate General Kokott considered it to be of imperative importance to distinguish between ELPA's activities as an undertaking and its functions as a regulatory authority. With regard to the latter, which represented the problem, Article 106.2 TFEU was not applicable 'since the

[31] See, e.g., ECJ, Case C-179/90 *Merci* [1991] *ECR* I-5889; ECJ, Case C-266/96 *Corsica Ferries* [1998] *ECR* I-3949 and ECJ, Joined Cases C-147/97 and C-148/97 *Deutsche Post* [2000] *ECR* I-825.

[32] ECJ, Case 72/83 *Campus Oil* [1984] *ECR* 2727 para 19.

[33] Supra n. 1.

precondition for the application of that provision is the existence of a service, that is to say an economic activity *as an undertaking*.'[34] The ECJ came to the same finding and expressly referred to the Advocate General's elaboration.[35] The conclusion seems to reflect that the subjects referred to in Article 106.2 TFEU are 'undertakings', not public authorities.

Suffice to say, public authorities in the true sense never conduct economic activity, they just regulate it. Therefore, on the principal level, the *MOTOE* judgment provides a strong argument that lawmakers or regulators cannot invoke Article 106.2 TFEU when they operate as such. That observation is not at odds with the fact that the Member States have occasionally been allowed to invoke the exception in Article 106.2 TFEU in other regards, typically where the national regulatory framework on some SGEI has been challenged pursuant to Article 106.1 TFEU read in conjunction with Article 102 TFEU. In the majority of such cases there is a fundamental requirement that the behaviour of some private undertaking amounts to an abuse, and that the abuse may be *imputed* or traced back to the regulatory act of the State.[36] If that requirement is fulfilled, then the State is held responsible for *the act of the undertaking*—as the national regulatory framework left the latter with no choice on how to behave *commercially*. Naturally, if the State is held responsible for the commercial behaviour of an undertaking, pursuant to the competition rules, it must also be allowed to invoke exceptions which apply to undertakings, as Article 106.2 TFEU. However, if national regulations encroach upon the right to free movement, then there is no question of whether an act of an undertaking may be imputed to the State. If legal provisions establish a barrier to free movement, the public authorities of the State are *directly* responsible as such. To deny the invocation of Article 106.2 TFEU in that situation is nothing but taking the wording of Article 106.2 TFEU seriously—as it is an exception.[37]

4.2.4.3 The Case Law Concerning Monopolies in Goods

In his contribution Sierra argues that Article 106.2 TFEU may be invoked by the Member States, making reference to the judgments concerning the Dutch,

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[34] Opinion of AG Kokott in *MOTOE*, supra n. 1, para 110 [emphasis added].

[35] *MOTOE*, supra n. 1 para 46.

[36] ECJ, Case C-323/93 *La Crespelle* [1994] *ECR* I-5077 para 18; ECJ, Case C-387/93 *Banchero* [1995] *ECR* I-4663, para 51; *Ambulanz Glöckner*, supra n. 16 para 39. See also Sect. 4.3.2 infra.

[37] Admittedly, as mentioned in supra n. 4, the mainstream view is that Member States can invoke the exception in all regards. That view traces long back, see, e.g., Page 1982, p. 27, who emphasises that both undertakings and Member States may benefit from the exception. However, it should be noted that the traditional view was also that Article 106.2 TFEU was an exception to Article 106.1 TFEU, and that the latter could never be used to strike down *general acts* (Page at 23). Thus, in practice, the functioning of Article 106.2 TFEU would be to justify what would otherwise connote to abuses.

Italian and French monopolies in the energy sector, dating back to 1997.[38] The jurisprudence of the ECJ concerning State monopolies of a commercial character, pursuant to Article 31 EC, does however seem to be of a very specific character. As we all know, the ECJ has always made it very clear that Article 31 refers to monopolies of *goods* only. Regarding *such monopolies*, the ECJ has accepted that Article 106.2 TFEU can be invoked as a justification for their very existence.[39] One possible explanation is the politically sensitive character of monopolies in goods, acknowledged explicitly by the fact of there being a *lex specialis* provision concerning such monopolies in the Treaty. The soft approach of Article 106.2 TFEU seem appropriate to that situation. In fact, in some of the early drafts on the Treaty, what we today know as Articles 37 TEU and 106 TFEU respectively, formed one single Article.

One should be extremely careful to draw general conclusions from the case law concerning monopolies in goods. If one conclusion is to be drawn, it might actually be that Article 106.2 TFEU is not relevant in other fields. It should be recalled that the ECJ has constructed the scope of Article 37 TFEU quite narrowly. In *Franzén* the ECJ drew a dividing line, stating that 'the effect on intra-Community trade of the other provisions of the domestic legislation which are separable from the operation of the monopoly although they have a bearing upon it' had to be examined with reference to Article 34 TFEU of the Treaty.[40] In the latter regard Article 106.2 TFEU was not applied. The same strict approach was followed in *Rosengren*. Swedish rules on imports of alcoholic beverages had the 'effect of channelling consumers who wish to acquire such beverages towards the monopoly.'[41] It is tempting to ask if that is not the entire purpose of the *existence* and *operation* of a monopoly, but the ECJ saw it differently, finding Article 37 TFEU to be irrelevant in this regard, resorting instead to Article 34 TFEU.[42]

The narrow interpretation of Article 37 TFEU makes the scope of the exception in Article 106.2 TFEU similarly narrow. It is submitted that this is intentional; otherwise there would seem to be no convincing explanation for the very careful elaboration made by the Court. Taken literally, the practice of the Court only prove the obvious, expressed by the ECJ in the *Hanner* judgment:

> … it is clear from the case law of the Court that Article [106.2 TFEU] may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights *which are contrary to Article* [37.1 *TFEU*]…[43]

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[38] Buendia Sierra 2007, p. 543, making reference to ECJ, Case C-157/94 *Commission* v. *Netherlands* [1997] *ECR* I-5699; ECJ, Case C-158/94 *Commission* v. *Italy* [1997] *ECR* I-5789 and ECJ, Case C-159/94 *Commissions* v. *France* [1997] *ECR* I-5815. In the same direction, see Stergiou 2008, p. 179.

[39] For another example see ECJ, Case C-438/02 *Hanner* [2005] *ECR* I-4551.

[40] ECJ, Case C-189/95 *Franzén* [1997] *ECR* I-5909 para 36.

[41] Case ECJ, C-170/04 *Rosengren* [2007] *ECR* I-4071 para 23.

[42] Op. cit. paras 24–27.

[43] *Hanner*, supra n. 39, para 47 [emphasis added].

The dividing line between regulation which secures the mere *existence* and *operation* of the monopoly, and other regulation with a possible negative impact on intra-EU trade is difficult to draw outside the field of goods. The application of Article 37 TFEU seems to correspond to the distinctions made in *Keck*, i.e., between selling arrangements and other regulation.[44] The reasoning in *Keck* has never been transposed to the other freedoms and it may seem that its distinctions are unsuitable outside the field of goods.[45] If that is correct, one may add that Article 106.2 TFEU seem to be unsuitable outside the very special and narrow category of 'monopolies in goods'.

4.2.4.4 Case Law Concerning the Health Sector: The Revealing Example

One of the most striking lines in the recent jurisprudence of the ECJ, that reveals a stark unwillingness to formally adhere to the exception in Article 106.2 TFEU in 'four freedom cases', starts with the *Decker* judgment.[46] The case concerned a prior authorisation requirement for the reimbursement of medical expenses incurred in another Member State—constituting a barrier to the free movement of goods pursuant to Article 34 TFEU. The ECJ repeated its consistent jurisprudence, confirming that aims of a purely economic nature cannot justify a restriction to the fundamental freedoms.[47] But it also made it clear that:

> However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.[48]

The statements in *Decker* seem to somewhat contradict themselves. As Snell puts it, the Court accepted an economic aim while claiming it was not doing so.[49] Admittedly, there is an obvious need to make sure that health services and other SGEIs can be provided under sound economic conditions. In fact, that is as we have seen accepted *in principal* in an established line of jurisprudence pursuant to Article 106.2 TFEU.[50] Therefore, it is not at all surprising that the Court has repeated its reasoning in *Decker* on later occasions, notably in the important and to some extent groundbreaking judgments in *Smits & Peerbooms*, *Müller-Fauré* and

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[44] ECJ, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] *ECR* I-6097. The point made becomes clearer if one compare with the judgments in *La Crespelle* and *Banchero*, supra n. 36.

[45] For some convincing arguments, see Hatzopoulos 2000, pp. 67–68.

[46] Supra n. 14. See also *Kohll*, supra n. 14, para 41.

[47] Formally, the *Decker* case does not alter the doctrinal rejection of economic aims, instead it has been taken as a confirmation, see, i.e., the reference made in *TK-Heimdienst*, supra n. 14, para 33.

[48] *Decker*, supra n. 14, para 39.

[49] Snell 2005, p. 43.

[50] See Sect. 4.2.2 supra.

Watts, all concerning the health sector.[51] The question is why the Court has not turned to the exception in Article 106.2 TFEU instead of constructing some kind of fiction under the mandatory requirements doctrine.

The Court's approach can be explained by two reasons. First, one must recall that, primarily, to define a service as an SGEI is considered to be a Member State competence.[52] That being so, and considering that economic aims are undoubtedly accepted under the exception in Article 106.2 TFEU, a broad interpretation of that exception would run a risk of *completely* undermining the consistent line of jurisprudence which makes it clear that economic aims cannot justify distortions to free movement. The fiction constructed by the Court will conserve the doctrinal rejection of economic aims, while *exceptionally* allowing them when they are of imperative importance—securing some ultimate non-economic aim.[53] Still it is clear that this represents something quite extraordinary.[54] The handling of the Court-made fiction is clearly the responsibility of the Court itself. Therefore, in a very complex field, which SGEIs rightly are considered to represent, the fiction under the mandatory requirements doctrine establishes some room for maneuver for the Court, which all in all can establish coherence without the risk of treading on Member State competences. This is a somewhat creative solution to the old debate of whether 'SGEIs' is an EU concept. The proponents of such a view had pointed to the danger of leaving the definition to the discretion of the Member States,[55] which is true enough. On the other hand, if the Court is to control more than a *manifest error* of definition, it will run the risk of engaging directly in the political discussions of the Member States. None of these rigid alternatives seem very attractive and the ECJ seems to have paved its own third way, steering clear of the pitfalls on both sides.

A second reason which might explain the subtlety is that the Court wants to stick to the traditional framework for reconciliation of interests in four freedom cases. As we have seen, the assessment pursuant to the exception in Article 106.2 TFEU does not seem to entail a 'least restrictive alternative test'.[56] Hence, the Court has made it quite clear that it is not necessary to prove that the survival of

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[51] ECJ, Case C-157/99 *Smits & Peerbooms* [2001] *ECR* I-5473, para 72; ECJ, Case C-385/99 *Müller-Fauré* [2003] *ECR* I-4509, para 73; ECJ, Case C-372/04 *Watts* [2006] *ECR* I-4325, para 103. See also ECJ, Case C-444/05 *Stamatelaki* [2007] *ECR* I-3185, para 30.

[52] Communication from the Commission, *Services of general interest in Europe* (2001/C 17/04), para 22.

[53] To the latter requirement, see ECJ, Case C-324/93 *Evans Medical* [1995] *ECR* I-563 paras 36–37.

[54] Thus, the Court had no difficulty in rejecting that the cost of managing cultural assets (museums) could be considered a legitimate aim in ECJ, Case C-388/01 *Commission* v. *Italy* [2003] *ECR* I-721 para 22. Identically, regulation intended to preserve industrial peace in the Greek tourist industry, preventing adverse effects on that industry and ultimately on the economy as a whole was turned down in ECJ, Case C-398/95 *SETTG* [1997] *ECR* I-3091 para 23.

[55] See Buendia Sierra 1999, p. 279 et seq. for further references.

[56] See Sect. 4.2.3 supra.

the operator is in any way threatened to benefit from that exception. Conversely, the Court-made fiction in *Decker* and the following cases, seems to hold on to the traditional notion of strict necessity—requiring as we have seen that there is a risk of *seriously undermining* the financial balance of the system in question.[57] The practical implications of the latter requirement are important. A good example of the Courts nuanced approach is evident in *Müller-Fauré*. The Court found that the risk of seriously undermining the financial balance of the social security system could justify an authorisation requirement for *hospital treatment* abroad. However, such an arrangement was not accepted for *non-hospital treatment* abroad, where its removal was considered by the Court to have only limited budgetary impact.[58] It is submitted that such a distinction would have been very hard to draw had the Court instead resorted to the softer test pursuant to Article 106.2 TFEU.

It could be argued that the ECJ *is* treading on Member States' competences through its somewhat covert reasoning, keeping Article 106.2 TFEU in the dark, while employing (some of) its values only when it suits the Court. However, it does not follow from the wording of Article 106.2 TFEU that it can be brought forward by the Member States in four freedom cases at all. Therefore, the Court's technique does not take anything from the Member States—it gives. While evaluating the Court's reasoning, one must also bear in mind that its main duty is to ensure that law is observed. As emphasised in Sect. 4.2.3, the interpretation of Article 106.2 TFEU has more or less been ironed out in cases where Member State regulation has been challenged pursuant to the competition approach. Even though competition is regarded as a constitutional value, the competition rules do not establish any individual liberties in the true sense. The four freedoms should on the other hand be treated as individual rights and taken seriously. Hence, a stricter assessment is not only legitimate, it is also demanded.

4.2.5 Conclusions

The exception in Article 106.2 TFEU is directed at undertakings. Strictly interpreted, the exception may not be invoked by the Member States. Admittedly, it is settled case law that the exception will apply if Member State regulation is challenged pursuant to the competition approach: Article 106.1 TFEU read in conjunction with Article 102 TFEU. In that situation however, the behaviour of an undertaking is imputed to the State. A wide application of the competition rules corresponds with a wide application of the exception. If Member States are held responsible for the behaviour of undertakings, it seems necessary and logical to allow the invocation of any justification which is available to undertakings.

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[57] If that requirement is not fulfilled, the Court will resort to the doctrinal rejection of economic aims. See, e.g., ECJ, Case C-109/04 *Kranemann* [2005] *ECR* I-2421 paras 31–35.

[58] *Müller-Fauré*, supra n. 15 paras 95–98.

Conversely, if Member State regulation violates the fundamental freedoms, the State is responsible as such, in their *public capacity*. Article 106.2 TFEU does not address that situation.

The case law of the ECJ seems to confirm the observations above. The ECJ has never treated Article 106.2 TFEU as a relevant exception in cases which solely concern the fundamental freedoms. That reluctance seems well-founded. The analysis of the case law on Article 106.2 TFEU revealed that the exception allows economic objectives as justifications for prima facie violations of the Treaty. To shelter public service providers from full competition to ensure their commercial viability is one thing, allowing the State, in its public capacity, to limit free movement due to budgetary constraints is quite another.

Furthermore, the reconciliation test inherent in Article 106.2 TFEU appears to be softer than the traditional proportionality test—which can be explained by the fact that competition is of a far more blurry and somewhat political nature in comparison to free movement. In cases which concern the fundamental freedoms, the Court should—and does also seem to—resort to the mandatory requirement doctrine and the traditional proportionality test. Article 106.2 TFEU is not applicable, but we have seen that the values of Article 106.2 TFEU are sometimes transposed and employed at the general level when they, according to the facts of the case, are of imperative importance. On some occasions, the Court has accepted economic justifications for barriers to free movement, without admitting it openly. To include some of the values of Article 106.2 TFEU in the doctrine of mandatory requirements does however seem to be fully legitimised by Article 14 TFEU as long as the balancing of interest and the mode of reconciliation take due regard of the nature of the fundamental freedoms. Of course, a covert reasoning may be more difficult to grasp in a concrete case than a more doctrinal approach, but it is easy to agree with Snell that this 'subtlety is desirable'.[59] On a general level, the Court's reasoning promotes constitutional coherence by establishing some flexible framework for reconciliation 'on the balance' which mirrors the nature of the fundamental freedoms and also takes due regard of the ultimate non-economic values.

4.3 Article 106 TFEU Read in Conjunction with the Competition Rules

4.3.1 Introduction

The hypothesis which will be tested is that the competition-approach does not add much as EU Law on the internal market stands today. If Member State regulation distorts competition, contrary to Article 106.1 TFEU, read in conjunction with

[59] Snell 2005, p. 55.

Article 102 TFEU, it will also in most imaginable situations amount to a restriction on free movement. If that is correct, the only thing the competition-approach really adds is the possibility for the Member States to invoke the exception in Article 106.2 TFEU. It will be submitted that the best way of respecting the interpretative guideline of the ECJ—that the exception in Article 106.2 TFEU is to be construed narrowly—is not to invoke the competition-approach either.[60]

This section will undertake a systematic analysis of Article 106.1 TFEU, to provide a constitutional explanation for its apparently diminishing importance in the case law of the ECJ. Then we will return to a more detailed analysis of the three main doctrines developed on the basis of Article 106.1 TFEU read in conjunction with Article 102 TFEU; the extension of the dominant position doctrine, the conflict of interests doctrine and the demand limitation doctrine.

4.3.2 The Diminishing Role of Article 106.1 TFEU in the Case Law of the ECJ

In *Asemfo* the ECJ concluded that:

> [i]t follows from the clear terms of Article 86(1) EC that it has no independent effect in the sense that it must be read in conjunction with the relevant rules of the Treaty.[61]

That finding has later been repeated in *UPC*.[62] The statement confirms that Article 106.1 TFEU is a mere reference provision. That conclusion is not revolutionary. Pappalardo made a similar submission as early as 1991.[63] However, Pappalardo's position was not at all uncontroversial. Through its clarification, the Court dismisses a more dynamic approach and brings a long debate on the proper interpretation of Article 106.1 TFEU to its end.

Article 106.1 TFEU has always been, and should probably still be, considered to express a special duty of loyalty addressed to the Member States. The long-standing question has been how far that obligation reaches. According to the grand-father judgment in *GB-INNO*, the Member States must not enact regulation that will deprive the competition rules of their *effectiveness*.[64] That statement is still good law, but its indefiniteness has always provoked more questions than answers. One possible interpretation has been that Member States must not enact regulation whose effects will encroach upon the objectives and purposes of the

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[60] It should be noted that this seemingly unorthodox position was presented as the preferred approach by Van der Woude 1991, p. 76 as early as in 1991.

[61] *Asemfo*, supra n. 2, para 40. The Court's finding seems to deviate from the opinion presented by AG Geelhoed, paras 114, 121.

[62] *UPC*, supra n. 2 para 15. See also Opinion of Advocate General Jacobs in *Ambulanz Glöckner*, supra n. 16 para 88.

[63] Pappalardo 1991, p. 34.

[64] ECJ, Case 13/77 *GB-INNO* [1977] *ECR* 2115, paras 30–32.

competition rules (the *effet utile-approach*). Another and a more modest interpretation would be that Member States must not enact regulation which will lead to actual abuses from specific companies (the *behaviour-approach*).[65]

At first it seemed that the ECJ preferred a dynamic interpretation of Article 106.1 TFEU—the *effet utile-approach*. The judgment in *Corbeau* represents the most expansive and famous interpretation of the provision.[66] The judgment suffers from a lack of reasoning, but seemingly the ECJ considered the establishment of a dominant position as being contrary to the objectives of the competition rules per se—even if there was no actual abuse. Hence, the substantive part of the assessment would be that of justification, pursuant to Article 106.2 TFEU.

A first step-back, indicating a preference for the more modest *behaviour-approach*, appeared immediately afterwards and is well-known.[67] In the *La Crespelle* judgment, the Court ruled that the mere creation of a dominant position by the granting of an exclusive right within the meaning of Article 106.1 TFEU is not as such incompatible with Article 102 TFEU. A Member State contravenes the prohibitions contained in those two provisions only if, in merely exercising the exclusive right granted to it, the undertaking in question cannot avoid abusing its dominant position.[68]

The judgments in *Asemfo* and *UPC* are a second step-back. Probably, the concrete results in the two judgments were not dependent on the Court's reluctant interpretation of Article 106.1 TFEU. That part of the rulings has much more bearing in principle terms. The Court was not forced to take a clear stance, but it seems as if the ECJ wanted to lock a door—an action it seldom performs. Clearly, the Court prefers a literal reading, at the expense of a more dynamic interpretation of Article 106.1 TFEU. After the two judgments it will, on a principal level, be even more difficult than before to argue in favour of the *effet utile-approach*. On their own terms, the competition rules only prohibit abusive behaviour.

4.3.3 A Constitutional Explanation to the Court's Literal Interpretation of Article 106.1 TFEU

The choice between the modest behaviour approach and the more dynamic *effet utile-approach* is not exclusive to Article 106.1 TFEU. It should be recalled that, there the Court had used two different ways in which the Member States can be held responsible pursuant to the competition rules. The first is the combined

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[65] For a more thorough description of the two alternative approaches, see Buendia Sierra 1999, p. 151 et seq., or Maillo 2007, p. 599 et seq.

[66] *Corbeau,* supra n. 16.

[67] On this see, Buendia Sierra 1999, p. 173 et seq., Maillo 2007, p. 603.

[68] *La Crespelle*, supra n. 36, para 18. See also *Banchero*, supra n. 36, para 51 and *Ambulanz Glöckner*, supra n. 16 para 39.

reading of the general duty of loyalty in what was Article 10 EC, and the competition rules—normally Article 81 EC (now Article 101 TFEU). This is referred to as the State Action doctrine.[69] The second way is Article 106.1 TFEU read in conjunction with the competition rules—normally Article 102 TFEU.

The alternative approaches were lively debated with regard to the State Action doctrine. In this regard the *behaviour-approach* must now be considered as settled case law.[70] Hence, as noted by Baquero Cruz, the State Action doctrine has been 'reduced to a rather marginal construction, dealing with very exceptional cases.'[71] It will typically apply where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU, or reinforces their effects. It has been submitted, however, that the Court's withdrawn application of the State Action doctrine has no bearing on the other path—the application of Article 106.1 TFEU read in conjunction with Article 102 TFEU.[72] I will not bring up the entire discussion here, but present a few remarks to explain why I disagree with that position.

The choice between the *effet utile-approach* and the *behaviour-approach* is better seen as an overarching constitutional dilemma rather than a mere doctrinal question—the latter allowing for different solutions with regard to different provisions of the Treaty, the former insisting on coherence. Whether Member States can be held responsible pursuant to the competition rules for enacting regulation that does not actually lead to abusive conduct from a specific company, but which may possibly create the same effects, is in all cases a question of competences.[73] It is hard to agree that the wording of Article 106 TFEU can make any difference because it is 'mainly about competition'.[74] The wording is notoriously unclear. In earlier days, Article 106.1 TFEU was understood by some observers to presuppose and thus legitimise special or exclusive rights by explicitly referring to them.[75] Considering the wording only, that is a perfectly viable interpretation. We can put it even simpler: considering the wording only, it makes perfect sense to submit that the purpose of Article 106 TFEU is to protect SGEIs from competition. Or, due to the unclear wording, one can resort to the neutral position as Marenco did. Some 25 years ago he analysed whether public undertakings where subject to the competition rules. His answer was in the affirmative, pointing to the fact that the

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[69] See Szyszczak 2007, Chapter 2.

[70] This settlement was reached in ECJ, Cases C-2/91 *Meng* [1993] *ECR* I-5751; C-185/91*Reiff* [1993] *ECR* I-5801 and C-245/91 *Ohra* [1993] *ECR* I-5851 and is still valid law, see Joined Cases C-94/04 and C-204/04 *Cipolla* and *Macrino and Capodarte* [2006] *ECR* I-11421. For a precise elaboration of the judgments, see Reich 1994, p. 459. The most thorough analysis of the State Action doctrine is presented by Neergaard 1998.

[71] Baquero Cruz 2007, p. 556.

[72] Ibid. See also Baquero Cruz 2002, p. 130 and Buendia Sierra 1999, pp. 141–143 and 266-267.

[73] Neergaard 1998, pp. 321–322 rightly points to competence issues to explain the Courts reserved application of the State Action doctrine.

[74] Baquero Cruz 2002, p. 130. See also Baquero Cruz 2007, pp. 555–556.

[75] Van der Woude 1991, p. 69.

competition rules themselves do not qualify the notion of 'undertaking'. Hence, in their own terms and in their own capacity, the competition rules would apply to both public and private undertakings.[76] Marenco did not attach any significance to Article 106.1 TFEU in this matter, as the provision did 'not seem to help either way'.[77]

The point I would like to make is this: one cannot read anything out of the wording of Article 106 TFEU without interpreting it—and the interpretation should take constitutional considerations into account.[78] In this regard, one must recall the considerable constitutional difference between the rules on the four freedoms on the one hand and the competition rules on the other. As pointed out in Sect. 4.3.4: outside the field of liberties in the true sense, Constitutional Courts do not normally consider more broadly—how much freedom (i.e., freedom of competition) is enough freedom. So, if Article 106.1 TFEU is interpreted in a constitutional context it does not make sense to disregard the very reserved application of its twin brother—the State Action doctrine.[79]

On a principal level, the Court's literal reading of Article 106.1 TFEU in *Asemfo* and *UPC* coincides with the literal reading of Article 10 EC (repealed by the Treaty of Lisbon 2009 but replaced in substance by Article 4.3 TEU) and Article 101 TFEU—contrasting the dynamic interpretation, the Treaty's *liberties*—the four freedoms. It is submitted that *both* these lines of interpretation should be regarded as highly constitutional.[80] A dynamic interpretation of liberties is constitutional in the sense that it protects clearly established rights of individuals (freedom of movement) while also promoting the single market. A reluctant and literal reading of the competition rules (that is, with regard to Member State regulation) reflects that it is normally not for the courts to define the amount of individual freedom in a broad and undefined sense.

4.3.4 But What About Integration?

Dynamic interpretation has always been rooted in the integration-goal. If the interpretative approach towards Article 106.1 TFEU is literal—will that have an adverse effect on integration? The answer will be dependent on one's conception

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[76] Marenco 1983, p. 497.

[77] Ibid., at 499.

[78] That approach gains support from ECJ, Case 283/81 *CILFIT* [1982] *ECR* 3415 para 20.

[79] On the connection between the two, see also Opinion of Advocate General Jacobs in *Albany*, supra n. 17, para 371.

[80] See in this regard opinion of Advocate General Teasauro in *Meng*, supra n. 70 para 29, pointing at some underlying 'normative aspect' to support a literal and thus not dynamic reading with regard to the State Action doctrine. Conversely, Baquero Cruz 2007, p. 585, equating dynamic interpretation and constitutional reasoning. But even if constitutional reasoning is often dynamic, it is not necessarily so. Constitutional considerations may also identify limits.

of 'integration'. Furthermore, it depends on whether the fundamental freedoms are a better tool to realise that present conception than the competition approach.

The Court-made doctrines on the competition approach stem from the early 1990s.[81] From a constitutional perspective it should be remembered that in 1992 the Maastricht Treaty introduced an adjustment to the basic principles of the EC Treaty, specifying that the activities of the Member States and the Community should include 'the adoption of an economic policy which is … conducted in accordance with the principle of an open market economy with free competition.' The main focus of that period was to complete the internal market.[82] Integration was realised through the constitution of the marketplace. Thus, one possible conception of the EC Treaty could be that of an *economic constitution*. The competition rules were a handy tool to further the vision of a common marketplace at a time when the Treaty rules on the fundamental freedoms were not as mature and far-reaching as today.

Article 14 TFEU was introduced by the Amsterdam Treaty in 1997, after which the different courts made doctrines on the competition approach, have not been developed further. In 2009, the Lisbon Treaty established the new notion of a social market economy coupled with the moving of the reference to 'an open market economy with free competition' to a darker and less prosperous place in the TFEU.[83] The constitutional surroundings have been perfected. The tremendous success of the EC-project increases its impact on people's lives. It is no longer a union based on coal and steel. Therefore, the European citizen must be the target of the European project, and benefit from its achievements. With regard to SGEIs, that conception of integration is highlighted by the Charter of Fundamental Rights, Article 36, which reads:

> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

These observations themselves do not invalidate the competition approach towards SGEIs, but pave the way for other approaches if they fit better with the re-shaped conception of integration. The detrimental weakness of the competition approach is the impossibility of establishing a constitutional concept of sufficient competition which is workable when the vision of the legal system is somewhat more sophisticated than to establish as much competition as possible.

If we accept Prosser's observation, that '[m]arkets are never free, being constructed through, and dependent on, different kinds of legal (and social) structures',[84] it is also easy to agree with Odudu, that: 'the competition rules are simply

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[81] As noted by Van der Woude 1991, a new era was introduced by the groundbreaking judgment in ECJ, Case C-202/88 *France* v. *Commission* [1991] *ECR* I-1223.

[82] A good description is provided by Flynn 1999.

[83] *OJ* 2007/C 306/49. The text of Article 4 EC shall become Article 119 TFEU.

[84] Prosser 2005, p. 1.

an inappropriate lens through which to view regulation.'[85] Taking the Member States' perspective it is certainly strange that the enactment of regulation, due to the limited reach of the notion of 'special or exclusive rights' in Article 106.1 TFEU, is not exposed to the competition rules in general, but mainly in situations where it composes the legal framework for SGEIs. With regard to such services concerns about competition might be said to have the least bearing, as they normally contain elements of solidarity.

These observations serve to emphasise that the competition approach presents the Court with great difficulties—not only in the concrete assessment but also on the normative level.[86] The question of how much competition has always been considered utterly political—especially when it comes to the (re)distribution of welfare.[87] And noteworthy, the more or less political question of how far the competition rules reach, is coupled with the exception in Article 106.2 TFEU which also has a political character.[88] The paragraph forms a part of the Commission competence enshrined in Article 106.3 TFEU. Thus, the Commission is the better or preferred institution to deal with Article 106 TFEU. Consequently the Court's control will normally be limited *if* the Commission has acted in the first instance.[89]

These arguments are not an attempt to shield the regulation of SGEIs from tight legal scrutiny. It is significantly important to control the use of special or exclusive rights to avoid a fragmentation of the market, as they amount to the most interventionist technique of realising national social policy. But consequently, it would also seem clear that the fundamental freedom to provide services, as it stands today, is both applicable and sufficient to secure the interests of the EU, by promoting equal opportunity and consequently a level playing field.[90] In fact, it is hard to see that competition rules really broaden the obligations of the Member States.[91] It is more difficult to ascertain an abuse rather than a restriction, and there is a risk that the competition approach is less efficient.

It is submitted that it would further the integration project, if the competition approach were to be abandoned, at least in the situation whereby Member State regulation also restricts free movement. The Court has not been unaware of the normative deficiencies of the competition approach—therefore it compensates through a quite generous application of the exception in Article 106.2 TFEU.

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[85] Odudu 2006, p. 31.

[86] For further elaboration upon these difficulties, see Davies 2009, pp. 576–581.

[87] See on this issue Scharpf 2002, p. 645.

[88] Baquero Cruz 2005, p. 171.

[89] ECJ, Case T-106/95 *FSSA and others* v. *Commission* [1997] *ECR* II-299 paras 99, 100; ECJ, Case C-163/99 *Portugal* v. *Commission* [2001] *ECR* I-2613 paras 19, 20.

[90] As noted by Roth 2002, p. 14; 'The discrimination criterion corresponds to the *principle of undistorted competition* which is fundamental to the single market.'

[91] See also Davies 2009, pp. 556, 562.

Conversely, the four freedoms approach will entail a classical test of proportionality. The latter is a better guardian of integration.

Consequently, the application of Article 106.1 TFEU, read in conjunction with Article 102 TFEU must be extremely conscious of systematic and institutional considerations. Instead of developing different doctrines which define prima facie violations pursuant to the competition approach, and then turn to the exception in Article 106.2 TFEU, the whole assessment should be turned around. Considering the very specific characteristics of the exception in Article 106.2 TFEU, one must start by asking: what cases *should* be brought under the exception, *if any*? The answer to that question will define the proper area of Article 106.1 TFEU read in conjunction with Article 102 TFEU.[92] The following sections will explain the recent practice of the ECJ from that angle, to prove that the competition approach—just like the State Action doctrine—has been 'reduced to a rather marginal construction, dealing with very exceptional cases'.[93]

4.4 The Doctrines on Article 106.1 TFEU Read in Conjunction with Article 102 TFEU

4.4.1 The Extension of the Dominant Position Doctrine

The extension of the dominant position doctrine applies where a Member State vests a company which already holds a dominant position in one market, with special or exclusive rights on a neighbouring but separate market.[94] Even though the doctrine seems to be well-established and accepted in legal theory,[95] it has been applied by the ECJ in only a few cases.[96]

On a theoretical level the doctrine is interesting because it certainly has a potential for complementing the Treaty rules on the fundamental freedoms. According to the judgments in *Coname* and *Parking Brixen*, the award of special or exclusive rights (such as service concessions) will, in the absence of any transparency in the award process, be considered to be in breach of Articles 49 and

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[92] This analytical approach is maybe unorthodox, but not new. The interpretation of Article 87.1 EC in ECJ, Case C-280/00 *Altmark* [2003] *ECR* I-7747 was to a great extent influenced by systematic considerations about the proper scope of the exception in Article 106.2 TFEU.

[93] Paraphrase of Baquero Cruz 2007.

[94] The landmark judgment is ECJ, Case C-18/88 *RTT* v. *GB-Inno BM* [1991] *ECR* I-5941.

[95] See Buendia Sierra 1999, p. 169 et seq.; Whish 2003, pp. 228–229, Maillo 2007, p. 602.

[96] A clear example is the *Ambulanz Glöckner* judgment, supra n. 16 para 43. Perhaps ECJ, Case C-203/96 *Dusseldorph* [1998] *ECR* I-4075 paras 61–63 should also be understood to employ the doctrine.

56 TFEU.[97] Normally therefore, the Member States are required to conduct a procedure of competitive tendering. However, even if the requirements which flow from the fundamental freedoms are fulfilled, it is of course imaginable that the winning company already holds a dominant position in another neighbouring market. Possibly then, a process which sits perfectly well with the Treaty rules on the four freedoms may nevertheless violate Article 106.1 TFEU, read in conjunction with Article 102 TFEU, *But*—it is also possible to consider the extension of the dominant position doctrine as a pragmatic and prescribed doctrine which the ECJ resorted to, *before* the application of the four freedoms was developed in such a sophisticated manner as today.

The extension of the dominant position doctrine has had a major impact on the telecommunications sector.[98] With the sector today being fully liberalised, it may seem that the ECJ is putting the extension of the dominant position doctrine to rest, on the same sector that once gave it birth. The *Connect Austria* case concerned the allocation of frequencies for mobile telephony.[99] The former Austrian telecommunications incumbent, Mobilkom, already held frequencies in the GSM 900 band, and was considered to have a dominant position in the national market for GSM telephony. Then, in addition, the company was awarded frequencies in the GSM 1800 band. It was disputed whether Mobilkom had paid a frequency fee in line with what its competitors had to bear. Clearly, if that was not the case, the award should be considered to be in breach of both the rules on the four freedoms and the state aid rules. Interestingly, however, the questions from the national court concerned the application of Article 106.1 TFEU, read in conjunction with Article 102 TFEU, supposedly due to the tradition of applying these provisions to the telecommunications sector. If the extension of the dominant position doctrine was still alive, it should in principle not be of decisive importance whether Mobilkom had paid the same fee as its competitors. The allocation of more frequencies could in all cases be said to extend or strengthen the company's dominant position. The ECJ, however, seemed to treat the extension of the dominant position doctrine as extinct. It ruled that the award of additional frequencies would be in breach of Article 106.1 TFEU read in conjunction with Article 102 TFEU if Mobilkom did not have to pay the same fee as other operators. Conversely, if the fee was fixed at a rate ensuring *equal opportunities*, the measure at hand would *not* be caught.[100] That finding seems like a mere reference to the Treaty rules on the four freedoms. The ECJ must of course ensure that the principle of equal treatment is observed, even in situations where national courts take no regard to the rules on the four freedoms, and base their questions solely on the competition approach.

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[97] ECJ, Case C-231/03 *Coname* [2005] *ECR* I-7287; ECJ, Case C-458/03 *Parking Brixen* [2005] *ECR* I-8585.

[98] The Court has accepted the Commission's application of the doctrine in this regard, see ECJ, Joined Cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy* v. *Commission* [1992] *ECR* I-5833 paras 36–38.

[99] ECJ, Case C-462/99 *Connect Austria* [2003] *ECR* I-5197.

[100] Ibid., paras 80–95.

The important tenet of the case is, however, that there does not seem to be anything more to the extension of the dominant position doctrine than would already follow from the rules on the four freedoms.

Preferably then, the award of new rights in their different kinds should be assessed solely on the basis of Articles 49 and 56 TFEU. In that case, as the Commission has also contended, the exception in Article 106.2 TFEU seems to be of no relevance.[101] During the award-process there will normally be no commercial behaviour on behalf of the undertaking which can be imputed to the State. As noted in Sect. 4.2.4.2, that link may seem to be a prerequisite if the State wants to invoke the exception in Article 106.2 TFEU as it, according to its wording, is directed at undertakings. The award process is of a purely regulative character, and as Barnard has pointed out, the requirements which have been derived from the fundamental freedoms may be seen as principles of good government.[102] Thus it would in any case seem difficult to construe how a formal requirement, like that of transparency, may have a negative impact on the performance of the preferred company.

4.4.2 *The Conflict of Interests Doctrine: A Doctrine of Legal Capacity*

The *ERT* judgment is often referred to as the leading precedent for the conflict of interests doctrine.[103] Greek law entrusted the national broadcasting company, *ERT*, with a monopoly to broadcast, *and* an exclusive right of transmission of other broadcasts, including broadcasts from other Member States. The ECJ ruled that such a situation would be in breach of Article 106.1 TFEU, where the rights were liable to create a situation in which *ERT* was *led to infringe* Article 102 TFEU by virtue of a discriminatory broadcasting policy favouring its own programs—*unless* the application of Article 102 TFEU would obstruct the performance of the particular tasks entrusted to the company.

Noteworthy, as Whish puts it, it was not necessary for *ERT* to have actually abused its dominant position, as long as the measures made this sufficiently likely.[104] To some, this may seem similar to an *effet utile-approach* towards the competition rules.[105] On further inspection, however, without denying the existence or importance of the conflicts of interests doctrine, it will be submitted that it

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[101] SEC(2006) 516 Commission Staff Working Document, Annexes to the Communication from the Commission on social services of general interest in the European Union COM (2006) 177 final, 15.

[102] Barnard 2008, p. 355.

[103] ECJ, Case C-260/89 *ERT* [1991] *ECR* I-2925. See also ECJ, Case C-179/90 *Port of Genoa* [1991] *ECR* I-5889; ECJ, Case C-163/96 *Silvano Raso* [1998] *ECR* I-533, cf. Buendia Sierra 1999, p. 165 et seq., Maillo 2007, p. 599 et seq.

[104] Whish 2003, p. 228.

[105] Gyselen 2003, p. 77, Szyszczak 2007, p. 125.

should not at all be labelled a 'competition doctrine'. Therefore, it is also submitted that the exception in Article 106.2 TFEU is of no relevance either.

What the ECJ really feared in the *ERT* judgment was a potentially *discriminatory* broadcasting policy, encroaching on the basic principle of *equal opportunity* which arises from Article 56 TFEU.[106] That observation explains why no actual abuse was necessary. This led van der Woude to pose the well founded rhetorical question of why 'the Court still bothered to analyse these rights under Articles [102] and [106].'[107]

With regard to the fundamental freedoms it is clear that the Member States must establish a regulatory structure which both respects them, and also prevents obvious risks of violations. That point was spelled out much more elegantly in the later *Hanner* judgment.[108] The case concerned the Swedish monopoly on the retail sale of medicinal preparations ('Apoteket'). Even though a monopoly as such was justified it could not, in law or in fact, place goods from other Member States at a disadvantage, in comparison to trade in domestic goods. In this regard the Swedish regulation lacked structural safeguards—i.e., well-established, transparent procurement procedures to avoid discrimination. Thus, the ECJ found Article 37.1 TFEU to be infringed.[109] Interestingly, the Court noted '[a]ccordingly, it is unnecessary to deal with the second aspect, namely the question whether Apoteket does *in practice* place medicinal preparations from other Member States at a disadvantage.'[110] The latter finding makes it very clear that with regard to free movement, a lack of structural safeguards on behalf of the State, which creates a potential risk of discrimination, may in itself constitute an infringement.

The conflict of interests doctrine does not share much in common with 'competition law' in its true and original sense. The doctrine is not really about efficiency or freedom to compete. From an analytical point of view, it makes much more sense to treat the doctrine as a principle of good governance—more specifically as a doctrine of regulatory and legal capacity. The objectives of the doctrine have more in common with what one traditionally labels as rules on impartiality, rather than the objectives of the competition rules. The ECJ gave a fairly good description in the recent judgment in *MOTOE*, where the company's commercial exploitation of motorcycle events made it 'tantamount de facto' to also confer upon it, the regulatory power to authorise such events.[111]

While being increasingly common in sector-specific secondary regulation, the Treaty on the Functioning of the European Union itself suffers from an obvious lack of regulation on the important issue of legal and regulatory capacity. Since the

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[106] *ERT*, supra n. 103 paras 19–26. As Hancher points to, the monopoly was not considered to be a problem as such. Hancher 1999, p. 722.

[107] Van der Woude 1991, p. 74.

[108] *Hanner*, supra n. 39.

[109] Ibid., para 44.

[110] Ibid., para 45 [emphasis added].

[111] *MOTOE*, supra n. 1 para 51.

market entails competition, it is from a pragmatic point of view, easy to understand why the ECJ sometimes resort to the competition rules to fill the gap and establish some basic principles of good governance. Thus the case law on the conflict of interests doctrine is better analysed in this broader context. Then, other decisions invoking quite different provisions of the Treaty other than Article 106.1 TFEU read in conjunction with Article 102 TFEU, can still be seen as part of the same doctrine. An interesting parallel is the Court's approach to Articles 10 and 81 EC which, not very surprisingly, fits the puzzle very well. As a supplement to the *behaviour-approach*, the Court has always made clear that the State Action doctrine will apply where a Member State 'divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.'[112] The above-mentioned *Hanner* decision can serve as another example. But the doctrine reaches further—and in my opinion even the judgments in *Viking* and *Laval* may be added to the picture.[113] As Azoulai points out, the Court was reluctant to entrust private organisations (trade unions) with the task of determining the nature of the public social order. He continues; 'Paradoxically—the state seems to be the only reference for the Court.'[114] However, viewed as a question of *legal authority*, it is, maybe not so paradoxical that only the State can function as the guarantor of the public interest.

The description of the conflicts of interests' doctrine, as a doctrine of legal capacity, indicates that the ECJ was wrong in the *ERT* judgment when it ruled that Article 106.2 TFEU could, in principle, justify the regulatory arrangement, if the application of Article 102 TFEU would obstruct the performance of the particular tasks entrusted to the company. If what we saw in its first appearance was not in fact a competition law doctrine, how can Article 106.2 TFEU serve as a justification? Or, to put it clearer: If what we saw was a principle of good governance, how can one possibly construe that this principle obstructs the performance of the company? In *Hanner*, the ECJ laconically ruled that there was no room for the exception: 'However, a sales regime of the kind at issue in the main proceedings … cannot be justified under Article [106.2 TFEU] in the absence of a selection system that excludes any discrimination against medicinal preparations from other Member States.'[115] That finding seems to be of relevance in all cases where the real problem is that the national regulatory regime is establishing some sort of conflict of interests, no matter whether the problem is tackled by the pragmatic use of Article 106.1 TFEU, read in conjunction with Article 102 TFEU, or some other Treaty provision.

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[112] See, e.g., *Cipolla* and *Macrino and Capodarte*, supra n. 70 para 47.

[113] ECJ, Case C-341/05 *Laval* [2007] *ECR* I-11767 and ECJ, Case C-438/05 *Viking Line* [2007] *ECR* I-10779.

[114] Azoulai 2008, p. 1351.

[115] *Hanner*, supra n. 39 para 48. See also *MOTOE*, supra n. 1 paras 45–46 where Article 106.2 TFEU was found to be irrelevant to the case, as long as the performance of regulatory functions is not 'economic'.

4.4.3 The Demand Limitation Doctrine

The judgment in *Höfner* is the leading precedent for the *demand limitation doctrine*.[116] The German Federal Office for Employment was vested with exclusive rights of employment procurement. Hence, it was prohibited for everyone else to engage in employment activities. The ECJ ruled that the arrangement would be in breach of Article 106.1 TFEU if it created a situation where the agency could not avoid infringing Article 102 TFEU. Whether that was actually the situation was conditional on several requirements, most importantly that the agency had to be 'manifestly incapable of satisfying demand prevailing on the market for such activities.'[117]

With regard to the jurisprudence of the ECJ on Article 106.1 TFEU read in conjunction with Article 102 TFEU, the *demand limitation doctrine* is probably the most important. Nevertheless, as EU Law now stands, it is submitted that the fundamental freedoms should substitute the competition-approach even in cases where the demand limitation doctrine is, in principle, applicable.

One immediately striking feature is that the demand limitation criterion spelled out by the Court seems unnecessarily complex in comparison to the fundamental freedoms approach. Normally, an exclusive right for one privileged company will go hand in hand with a *prohibition* for other companies. A prohibition is a straightforward restriction to free movement. Of course in specific cases, as in *Höfner*, the assessment under the competition rules can be pretty straightforward as well, but that is not always the case.[118] Consider, as an example, the judgment in *Dusseldorp* where the ECJ ruled that:

> Article [106] of the … Treaty, in conjunction with Article [102], precludes rules such as the Long-term Plan whereby a Member State requires undertakings to deliver their waste for recovery, such as oil filters, to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position.[119]

That finding entails an unduly complex evaluation for the national court. Astonishing then is the fact that, even if carried out correctly, it will still not achieve the goals of the single market. It seems clear that the regulation in *Dusseldorp* restricted free movement. Of course, that may in principle be justified with reference to the doctrine of mandatory requirements. However, even if it was proved that the market was being *efficient*, in spite of the fact that national

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116 *Höfner*, supra n. 24.

117 Ibid., para 34.

118 See ECJ, Case C-208/05 *ITC Innovative Technology* [2007] *ECR* I-181 para 52.

119 ECJ, Case C-203/96 *Dusseldorph* [1998] *ECR* I-4075, operative part, para 2.

companies were favoured, that would simply be an irrelevant defense.[120] An important tenent of the rules on the four freedoms is that they do not presuppose any detailed analysis of the conditions in the market concerned.[121]

Compared to the rules on the four freedoms, the competition rules suffer from a lack of nuances, and simply do not reach far enough. As another example, consider the situation where there is sufficient justification (pursuant to the rules on the four freedoms) to vest some special or exclusive right to a privileged company. Clearly, the company itself cannot be accused of abusing its dominant position in the process of selecting the title holding company. Therefore, the award process must be assessed with the fundamental freedoms as its basis.[122]

On the other hand, it may be argued that Article 106.1 TFEU, read in conjunction with Article 102 TFEU can fill a loophole where there is no cross-border element—i.e., where national regulation restricts competition, but not free movement. This was actually the case in the *Höfner* judgment which, while often being analysed in principal terms, may also be viewed as an example of utter pragmatism. With regard to Article 56 TFEU, the Court remarked that the dispute concerned German regulation, and was between German parties only. Hence, the ECJ ruled that '[s]uch a situation displays no link with any of the situations envisaged by Community law.'[123] If that is true, it is highly questionable whether the competition rules legitimately can fill the 'gap'. Rather, the problem seems to be that the reach of Community law is not infinite—it stops somewhere—but somewhere the ECJ have yet to reach.

To some extent, the possible criticism presented above may be of historical interest only. The Court's assessment of the cross-border requirement in the *Höfner* judgment no longer seems to be good law—if, in fact, it ever was. If national regulation nationalises the market, it is quite foreseeable that disputes may be nationalised as well. That feature of national regulation should not at all prevent the application of the fundamental freedoms—quite to the contrary it represents the core problem. Therefore, there are strong reasons to embrace the development in more recent practice of the ECJ, where the Court focuses on the *hypothetical* intra-state element.[124] If such a hypothetical intra-state element exists, national actors too should be allowed to invoke the fundamental freedoms against their own State. That will increase the efficiency of EU Law—the most central rationale behind the doctrine of direct effect. Suffice to say, there existed a *hypothetical* intra-state element in *Höfner*. If there ever was a loophole, the Treaty rules on the four freedoms have filled it themselves.

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[120] See, e.g., ECJ, Case C-255/04 *Commission* v. *France* [2006] *ECR* I-5251 paras 28–29 and ECJ, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] *ECR* I-1891 para 51.

[121] See Davies 2003, p. 93 et seq.

[122] See supra Sect. 4.2.3.

[123] *Höfner*, supra n. 24 para 39.

[124] See, e.g., ECJ, Case C-36/02 *Omega Spielhallen* [2004] *ECR* I-9609 and *Parking Brixen*, supra n. 97. On the latter see Hatzopoulos 2000, p. 93.

If the submissions presented so far are correct, the demand limitation doctrine, while having a clear existence on the theoretical level, does not have the potential to supplement the fundamental freedoms in any important ways. Instead, what it seems to add is a possibility for the Member States to invoke the exception in Article 106.2 TFEU. However, as argued in Sect. 4.2, the exception should be considered irrelevant in cases which also affect free movement. If that submission is correct, it is our duty to consider seriously when—and even if—the demand limitation doctrine should be invoked towards the Member States at all. A broad use of that legal basis will correspond to a broader application of the exception in Article 106.2 TFEU—contrary to the requirement of the ECJ that the exception is to be construed narrowly.

Some observers may find this way of seeing things illogical and even provocative. Admittedly, the regular assessment is to first apply the main rules, and then eventually the relevant exception. However, SGEIs raise unduly difficult problems and a linear approach is not sufficiently sophisticated to handle them. That is not to say that this contribution can present a full solution, but there are hints in the jurisprudence of the ECJ that can serve as a basis for a coherent approach.

Recently, the Court seems to have developed a certain reluctance when it comes to answering interpretative questions from national courts regarding the application of Article 106.1 TFEU read in conjunction with Article 102 TFEU. In a number of cases the ECJ has declared the questions inadmissible, pointing to the complexity of evaluation and a lack of sufficiently detailed market information.[125] True enough, the assessment is complex, but taken at face value, the line of argument put forward by the Court is not really convincing. When replying to interpretative questions, the ECJ assists national courts by describing how Community Law is to be understood. The application of the law, for example the concrete assessment of whether a company holds a dominant position, is the duty of the national court. The complexity of the final assessment did not seem to bother the ECJ in earlier days, i.e. in the mentioned *Dusseldorp* judgment. Therefore, the reluctance of the Court may imply a fiction. The Court seems to be maneuvering so as not to engage Article 106.1 TFEU read in conjunction with Article 102 TFEU, where it is more proper to solve the case on the basis of the four freedoms alone. That in turn will lead to a more diminishing use of the exception in Article 106.2 TFEU. That is not to say that the Court will never or should never apply the demand limitation doctrine. However, it is submitted that the Court should do this only where the case's characteristics suits the exception in Article 106.2 TFEU. As stated in Sect. 4.2.2 above, that requirement will typically be fulfilled when the case at hand concerns a universal service, and where the Member State's justification is directly aimed at securing the economy

[125] See, for example, ECJ, Case C-134/03 *Viacom* [2005] *ECR* I-1167, para 29; ECJ, Case C-451/03 *Ausiliari Dottori* [2006] *ECR* I-2941 para 26, and *Asemfo* supra n. 2 para 45.

of the privileged company. In other situations, the Court should resort to the new tendency of declaring the interpretative questions inadmissible.

The jurisprudence of the ECJ seems to be in line with the submission above. The last time the Court answered a question from a national court concerning the application of the demand limitation doctrine was the *Ambulanz Glöckner* judgment in 2001.[126] It is hard to see that the ECJ was provided with any more market information in this case, than in other cases where it has abstained from providing an answer. It is submitted that the true difference was that the *Ambulanz Glöckner* case concerned a classic universal service. The objective of the Member State regulation was to ensure that the service provider could run its business on economically acceptable conditions. Hence, the exception in Article 106.2 TFEU was suitable to the case—therefore it was proper for the ECJ to provide an answer to the interpretative question posed by the national court.

4.5 Article 106 TFEU and the European Social Model

4.5.1 Introduction

This section will sketch out a possible new approach towards SGEIs, which rests solely on the fundamental freedoms. Without denying the direct effect of Article 106 TFEU, it will be argued that the true importance of the provision appears when it is *not* given immediate application by the Court, but is instead considered as a value statement fulfilling the concept of a *European Social Model*. Importantly, that notion will not be understood in a material sense, i.e. as a conception of the 'European Welfare State'. Due to the limited scope of the EC Treaty, the limited competences enshrined in it, and the great differences between the national welfare systems of the Member States, a European social model can only be partial, not autonomous. Perhaps, it can be described more precisely as a system of 'bits and pieces', based on the existing social systems in the Member States, integrated by the principles of free movement and equal treatment and legitimised by the conception of a European citizen—with true rights of access to services, which the different Member States themselves have regarded as indispensable.

Schiek has described the European Social Model as polygamic, which means that social objectives must be considered as some kind of constitutional value, being part of—or having to be regarded when applying—the hard law of the Treaties.[127] The constitutional importance of SGEIs is confirmed by Article 14 TFEU. Buendia Sierra has submitted that Article 14 TFEU 'does not modify [Article 106.2 TFEU], but rather reaffirms the logic behind the provision.'[128]

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[126] *Ambulanz Glöckner*, supra n. 16.

[127] Schiek 2008, p. 25.

[128] Buendia Sierra 1999, p. 313.

That may be so, but as noted by Szyszczak—even though Article 14 TFEU lacks direct effect, it has teleological value.[129] In other words, Article 14 TFEU has the potential of reaffirming the logic of Article 106.2 TFEU on the general level. Hence, the values of Article 106.2 TFEU may be seen as obligatory parts of a universal constitutional model of reasoning, in the reconciliation between Community principles and the social policies of the Member States.

The realisation of a European social model requires a specific sort of interaction, where the constituted model is regarded as integral to the different provisions by which it is constituted. Thus, the suggested approach may be described as holistic. It confirms the importance of SGEIs without letting Article 106.2 TFEU form its own autonomous rule. In cases which concern the fundamental freedoms, the values of Article 106.2 TFEU have to be taken into consideration, also regarding the citizens' right of access to SGEI, pursuant to the Charter of Fundamental Rights in the European Union, Article 36. However, the mode of reconciliation should be defined by the fundamental freedoms themselves, the mandatory requirements doctrine and the principle of proportionality, not the exception in Article 106.2 TFEU.

The approach which will be sketched out below, does not claim to present a complete description of the European Social Model. Its only ambition is to address one of its 'bits and pieces'—Article 106 TFEU. Speaking in practical terms, there are at least two important consequences of the suggested approach. Firstly, The constitutional force of Article 106.2 TFEU, read in conjunction with Article 14 TFEU, may influence the application of the mandatory requirements doctrine: Economic objectives may occasionally be accepted as justifications for barriers to free movement when they promote the provision of SGEIs—but not necessarily to such an extent that the application of the mandatory requirements doctrine is reduced to the mirror image of Article 106.2 TFEU. Secondly, with regard to the application of Article 106.1 TFEU read in conjunction with Article 102 TFEU, the most important doctrine has probably been that of *demand limitation*.[130] In short, the traditional conception of the competition approach reads like this: If a Member State reserves an economic activity for a privileged undertaking or a monopolist, it may amount to a violation of the competition rules if market-demand is not satisfied. Consequently that may establish a right for competitors to access the market.

Under a new approach, which is solely based on the fundamental freedoms, the old competition-doctrine of *demand limitation* will be transposed to a citizens' right to access SGEIs. That right, it will be submitted, is fundamental in the Dworkinian sense: if Member States restrict free movement to secure the provision of some SGEI, but are still unable to satisfy citizens' demand for the alleged indispensable service, mandatory requirements in the general interest will not be accepted as justifications.

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[129] Szyszczak 2007, p. 220.

[130] *Höfner*, supra n. 24—cf. Sect. 4.4.3 supra.

4.5.2 The Transformation and Transposition of the Demand Limitation Doctrine

4.5.2.1 Introduction: A Right for Citizens

Let us recap a bit. In Sect. 4.2 it was submitted that the exception in Article 106.2 TFEU cannot justify distortions to free movement. On the other hand, it is clear from the case law of the ECJ that the Member States can invoke the exception with regard to the competition-approach and the doctrine of demand limitation.

With regard to the *demand limitation doctrine*, it was argued in Sect. 4.4.3 that all possible infringements would also be captured by the Treaty rules on the four freedoms. Hence, even if the features of a case make the competition-approach feasible, such cases may instead be assessed under the fundamental freedoms alone—to prevent the invocation of the exception in Article 106.2 TFEU.

Maybe it is not entirely precise to submit that the traditional demand limitation doctrine can in no way supplement the fundamental freedoms. Let us, as an example, consider the situation where a Member State establishes some kind of monopoly, or at least some kind of authorisation system in the field of gambling. Furthermore, let us presuppose that the system restricts free movement, but can be justified by some mandatory requirement.[131] Still, it would, in principle be possible to claim that such a system entails some sort of demand limitation in breach of Article 106.1 TFEU read in conjunction with Article 102 TFEU—in some situations that is the purpose of the system. Under such circumstances, it seems difficult for the Member States to invoke the exception in Article 106.2 TFEU. Clearly, gambling companies do not secure the common good, even though the regulation of gambling does. Gambling is not a SGEI.

However, it would seem quite paradoxical if the competition approach should lead to a result other than that which would follow from the rules on free movement in our example. Taken at face value, it would mean that the Member State regulation did not serve the common good after all, *or* imply that companies have a *right to compete* which overrides the common good. None of these alternatives seem sensible, and neither Article 106 TFEU nor the competition rules have been invoked in the numerous gambling cases before the Court.[132] Presumably, that is because the demand limitation doctrine does not at all entail some sort of right for companies—explained by the fact that the competition rules are not *liberties* in the true sense.[133] Instead it is submitted that the demand limitation doctrine entails a *right for citizens*—thus the doctrine protects *their interest*. That submission represents a restatement of the old doctrine whose correctness and

[131] See, e.g., ECJ, Case C-275/92 *Schindler* [1994] *ECR* I-1039 and ECJ, Case C-124/97 *Läärä* [1999] *ECR* I-6067.

[132] See, i.e., ECJ, Case C-243/01 *Gambelli* [2003] *ECR* I-13031, which according to paras 8 and 34 concerned special or exclusive rights. Still, Article 106 TFEU was not applied.

[133] Cf. Sect. 4.2.3 supra.

consequences we shall elaborate further. It will be argued that the doctrine of demand limitation may serve to nuance the proportionality test in all fields, establishing a citizen's right of access to SGEIs, thus preserving the European social model. Understood in that sense, the demand limitation doctrine has a universal character, independent of Article 106 TFEU.

4.5.2.2 The Transformation

Let us first scrutinise how the demand limitation doctrine was assessed by the ECJ in the *Ambulanz Glöckner* judgment—where it was introduced in the traditional way, by reference to Article 106.1 TFEU read in conjunction with Article 102 TFEU.[134] However, as we shall see, the approach of the ECJ was somewhat untraditional.

The case concerned exclusive rights for ambulance transport in the German region of Rheinland-Pfalz. The ECJ concluded that these rights would be contrary to Article 106.1 TFEU read in conjunction with Article 102 TFEU, if the entrusted company had a dominant position, and interestingly, if there was 'a sufficient degree of probability that national regulation actually prevented undertakings established in Member States other than the Member State in question from carrying out ambulance transport services there, or even from establishing themselves there.'[135] But the Court also found the objective of assuring the service provider's economical viability to be a relevant justification pursuant to the exception in Article 106.2 TFEU. The invocation of that justification was however made conditional, and would not be accepted if the medical aid organisations entrusted with the operation of the public emergency ambulance service were 'manifestly unable to satisfy demand in the area of emergency ambulance and patient transport services.'[136]

The ordering of the Court's findings in the *Ambulanz Glöckner* case deserves attention. First, the application of Article 106.1 TFEU read in conjunction with Article 102 TFEU was made dependent on the possibility of other companies to provide the same services, or establishing themselves in the same area. Therefore, as to the question of whether national regulation constituted a prima facie violation of the Treaty, the Court's reasoning relied to a very great extent, on a parallel to the fundamental freedoms, *not* a traditional demand limitation analysis.

Furthermore, the Court accepted justifications of an economic nature. Not until both the character of the infringement and the possible justification were established, was the question of demand limitation taken into consideration. The functioning of that test however was not to provide some additional arguments in a broad reconciliation assessment. Quite to the contrary, the rationale behind the

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[134] *Ambulanz Glöckner*, supra n. 16.

[135] Ibid., para 66.

[136] Ibid.

Court's requirement seems to be coarse-cut: It is hard to see how a Member State can justify distortions to the fundamental principles of the Treaty by reference to the importance of securing universal access to an indispensable service, if in fact not all citizens have access to it.

The observations presented above indicate that the demand limitation test introduces an additional factual requirement which may lead to a rejection of justifications which would otherwise, in the abstract, be legitimate. That will increase the impact of the Treaty principles, which may get a more absolute character. If it is proven that the regulatory efforts of the Member State fail to achieve their purpose, the likely result is that, the principles of free movement will prevail, and citizens' demand must then be served through the functioning of the market. That gives the refined doctrine of demand limitation, the character of being a right of access to SGEIs, protecting the interests of citizens. This understanding gains support from Article 36 in the Charter of Fundamental Rights in the European Union.

4.5.2.3 The Transposition

The *Ambulanz Glöckner* case concerned the classical situation of universal service. As the questions from the national court concerned Article 106.1 TFEU read in conjunction with Article 102 TFEU, it was quite easy for the ECJ to stick to the exception in Article 106.2 TFEU—which fitted the case.[137] But what if cases with similar characteristics are treated under the Treaty rules on the four freedoms?

As mentioned in Sect. 4.2, Article 106.2 TFEU should not be allowed to serve as an exception to the Treaty rules on the four freedoms. However, that does not exclude a more general application of a refined demand limitation doctrine, such as the one that appeared in *Ambulanz Glöckner*. If that doctrine is not in fact an application of the competition rules, but instead connotes a citizen's right of access to SGEIs, it should be of relevance in the assessment pursuant to the mandatory requirements doctrine as well. A universal approach is definitely supported by Article 14 TFEU. Seemingly, it is also confirmed in the practice of the ECJ.

In Sect. 4.2.4 above, we saw that in quite a few cases concerning national welfare systems, more specifically the right of cross-border hospital treatment, the Court did *in fact* recognise objectives of an economic nature as mandatory requirements, even though no references to Article 106.2 TFEU were made. Notably, that approach has been coupled with a demand limitation doctrine—still without any reference to Article 106 TFEU. While the Court, in *Smits & Peerbooms*, accepted that financial concerns could justify a requirement of prior authorisation for hospital treatment abroad, it also emphasised that the refusal of an application was dependent on the competent Member State being able to provide the *same or equally effective treatment without undue delay* from an

[137] Cf. Sect. 4.4.3 supra.

establishment with which the insured person's sickness insurance fund had contractual arrangements.[138] In other words, the barrier to free movement would not be justified unless patients demand was satisfied. That approach has later been repeated in various forms—the judgment in *Müller-Fauré* is especially illuminating. The Court repeated that the need to ensure the financial balance of the social security system, and the need of planning and rationalisation to avoid overcapacity, could justify a waiting list system and a requirement of prior authorisation for hospital treatment abroad.[139] However, the Court also clarified that if an authorisation was refused solely by referring to there being a waiting list, and without taking account of the medical situation of the patient, such considerations would seem to be *purely* economic, and hence unjustified.[140] This is a perfect example of how the fiction employed by the Court, while sometimes approving objectives of an economic character, also conserves the possibility of always retreating to the main rule—their illegitimacy.[141] In practical terms the implication seem to be that the assessment of necessity may be very strict. In support for such a strict approach, which may lead to a rejection of the justifications put forward by the Member State, the Court remarked that a waiting time which is 'too long or abnormal would be more likely *to restrict access* to balanced, high-quality hospital care.'[142] Therefore—if patients' access to a SGEI is not satisfied, the Court seems unwilling to accept that barriers to free movement can be justified, at least if the justification is economic in character.

The overriding character of the citizen's right to access was confirmed in *Watts*. Again the Court took as a starting point that, the need to ensure the financial balance of the social security system could constitute a legitimate consideration.[143] However, the strict necessity test entailed by the doctrinal disapproval of economic objectives, coupled with the demand limitation doctrine—understood as a citizens' right to access SGEIs—are the most interesting features of the case. Regarding the latter the Court stated that:

> … where the delay arising from such waiting lists appears to exceed in the individual case concerned, an acceptable period having regard to an objective medical assessment of all the circumstances of the situation and the clinical needs of the person concerned, the competent institution may not refuse the authorisation sought on the grounds of the existence of those waiting lists, an alleged distortion of the normal order of priorities linked to the relative urgency of the cases to be treated, the fact that the hospital treatment provided under the national system in question is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member

[138] *Smits & Peerbooms*, supra n. 51 para 103.

[139] *Müller-Fauré*, supra n. 51, para 91.

[140] Ibid., para 92.

[141] Cf. Sect. 4.2.4.4 supra.

[142] *Müller-Fauré*, supra n. 51 para 92 [emphasis added].

[143] *Watts*, supra n. 51 paras 102–105.

> State and/or a comparison between the cost of that treatment and that of equivalent treatment in the competent Member State.[144]

This finding implies that '[t]he fact that the cost of the hospital treatment envisaged in another Member State may be higher than it would have been had it been provided in a hospital covered by the national system in question, cannot in such a case be a legitimate ground for refusing authorisation.'[145] Equally where ancillary costs, such as travel and accommodation are covered where the treatment is provided in a national hospital, such costs must also be reimbursed if the patient travels abroad.[146] Thus, when there is an objective medical need, the citizens' right to free movement comes close to a trump.[147] If demand is not met, the Court seems unwilling to accept budgetary constraints, and will instead retreat to the traditional doctrine of the illegitimacy of economic objectives.

In this regard, the Court's approach seem to mirror the pattern of reasoning, developed pursuant to Article 106.2 TFEU—albeit transposed to the general level without mentioning the provision itself. Importantly though, behind all the subtlety, European citizens benefit from true welfare rights, stemming from the domestic sphere, being strengthened by EU Law, and gaining efficiency from the dynamics of the market.

4.6 Conclusions

Article 106 TFEU, read in conjunction with Article 14 TFEU, expresses a constitutional approval of the social importance of SGEIs. However, the application of the exception in Article 106.2 TFEU must also take sufficient regard to the fundamental principles of the market.

Section 4.2 concluded that the exception in Article 106.2 TFEU cannot be invoked by the Member States to justify barriers to free movement. That conclusion deviates from the nearly unanimous conventional view, but the latter is not supported by the practice of the ECJ, which, quite to the contrary, seems to confirm a narrow application of the exception.[148] There are two decisive arguments against turning Article 106.2 TFEU into a general clause:

(1) Article 106.2 TFEU should primarily be regarded as an exception directed at economic objectives, which the provision accepts as relevant *in principle*. With regard to the fundamental freedoms on the other hand, economic

[144] Ibid., para 120, cf. also paras 129–131.

[145] Ibid., para 73, cf. also paras 74, 64 and 148.

[146] Ibid., paras 139–140.

[147] In the same direction, however critical, Newdick 2006, p. 1657.

[148] See Sect. 4.2.4 supra.

objectives are *in principle* not accepted as justifications for barriers to free movement.

(2) The reconciliation of interests pursuant to Article 106.2 TFEU deviates from the classical notion of proportionality which is inherent in the fundamental freedoms. While the classical proportionality test entails a 'least restrictive alternative' assessment, the reconciliation of interests pursuant to Article 106.2 TFEU is softer and more ad hoc based. Therefore, if Article 106.2 is turned into a general clause, and applied strictly on its own premises, it may compromise the fundamental freedoms.

Section 4.3 presented the main arguments against the competition-approach towards Member State regulation on SGEIs, based on the combined reading of Articles 106.1 TFEU and 102 TFEU. In most cases, the Treaty rules on the four freedoms appear to be the most efficient guarantor of the integration goal. From a practical point of view, it should also be emphasised that if a sector is so heavily regulated that Article 106.1 TFEU, read in conjunction with Article 102 TFEU may in principle be applicable, it is normally because concerns about solidarity or citizens' accessibility have been very prominent in the legislative process. Regarding the new notion of a 'social market economy' in the Lisbon Treaty, it would seem quite paradoxical if the functioning of Article 106.1 TFEU is to expose Member State regulation to the competition rules exactly in the quite limited number of situations where concerns about 'free competition' may seem to have the least bearing. Therefore, the fundamental freedoms should be considered to be the preferred legal basis to assess such cases, as they have the Member States as their natural subject. That in turn will also entail a more narrow use of the exception in Article 106.2 TFEU.

On the whole, the approach towards SGEIs that has been advocated in this contribution, reduces the immediate practical importance of Article 106 TFEU, but not its constitutional importance. From a constitutional perspective the essentials of the provision are its values, whose overarching character is confirmed by Article 14 TFEU, and also the Charter of Fundamental Rights in the European Union, Article 36. With regard to values, *generality* is a prerequisite to realising a European social model, an understanding which seems to influence the patterns of reasoning employed by the ECJ even in cases where Article 106.2 TFEU is not given immediate application. In Sect. 4.2.4, it was proven how the ECJ occasionally accepts economic justifications even with regard to the fundamental freedoms, if there is otherwise a *serious risk of undermining the financial balance* of a SGEI. In this regard, the approach of the ECJ mirrors the application of Article 106.2 TFEU, albeit somewhat modified. With regard to the nature of the fundamental principles involved, economic considerations are only accepted *in fact*, not in principle, which raise the bar and give the Court a strong grip over the assessment. In addition, 'the least restrictive' requirement is maintained, whereas the application of Article 106.2 TFEU on the other hand is not conditional on the viability of the entrusted company being actually threatened.

Section 4.5 proved how the ECJ, on a general level, seem to couple the acceptance of economic objectives with a demand limitation test. Whether Article 106.2 TFEU is applied or not, the invocation of economic aims as a justification for regulation on SGEIs will require that citizens' demand for an alleged indispensable service is met. In this respect, the approach of the Court seems to turn the traditional competition doctrine of *demand limitation* into a citizens' right of access to SGEIs. The transformation of the doctrine, and its transposition to the general level, is in line with the Commission's conception of the European Social Model:

> Europe is built on a set of values shared by all its societies, and combines the characteristics of democracy—human rights and institutions based on the rule of law—with those of an open economy underpinned by market forces, internal solidarity, and cohesion. These values include the access for all members of society to universal services or to services of general benefit, thus contributing to solidarity and equal treatment.[149]

It is noteworthy how the Commission in this statement links access to universal services with fundamental European values, mentioning them in the same breath as human rights. From an academic perspective one should always be a bit skeptical towards such formulations. Fine words may in the end be just that—words. In this case, however, the conception of the Commission seems to be confirmed by the ECJ, and is also supported by the Charter of Fundamental Rights, Article 36. If the Member States, in spite of regulation, are not able to satisfy demand for some allegedly important service, mandatory policy requirements cannot normally justify infringements to the fundamental freedoms. Either the Member State has to re-design its system, in order to make it function properly, or it must resort to the other mode of satisfying the general interest—that is, through the market. Conceived in this way, it can truly justify its association above with fundamental rights. According to Dworkin, a fundamental right in its true sense cannot be encroached upon by reference to public policy.[150] This is how the citizens' right to access universal service would seem to work in practice; if citizens' demand is not satisfied, the principles of the market will prevail.

Of course, the Court's approach may have consequences for national public policies. However, it does not interfere directly with those policies, but instead takes the priorities of the Member States as the starting point for the legal assessment, and is thus very principled. The idea of the European social model—emphasising that citizens must have access to universal services—legitimises that the citizen's right is intensively protected, on some occasions prevailing over the public concern of funding; hence giving the principles of free movement a character of being truly fundamental rights which benefit each and every individual European citizen.

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[149] Commission Opinion. *Reinforcing Political Union and Preparing for Enlargement*, COM(96) 90, 28.08.1996 Section 8.

[150] Dworkin 1977, Chapter 7, esp. p. 192.

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